

The Crown Prosecutor Vs. J. Mciver and

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SooperKanoon Citation : sooperkanoon.com/780557

Court : Chennai

Decided On : Aug-12-1935

Reported in : 159Ind.Cas.656; (1935)69MLJ681

Appellant : The Crown Prosecutor

Respondent : J. Mciver and ;k.S. Narasimhachari

Judgement :

Madhavan Nair, J.

1. One Rao Bahadur Soora Lakshmiah Chetty by his agent Gopalaswamy Chetty instituted a complaint in the Court of the Chief Presidency Magistrate, Egmore, Madras against J. McIver the senior partner of Messrs. Huson Tod & Co. a firm of stock-brokers Madras as first accused, and K.S. Narasimhachari, one of the assistants of the said firm as the second accused, charging them with offences punishable : under Sections 406 and 420, Indian Penal Code--'Criminal breach of trust' and 'cheating and dishonestly inducing delivery of property'. The learned Magistrate acquitted the accused; and this appeal has been filed by the Government against the order of acquittal.

2. The complaint alleged that in or about November 1934 Messrs. Huson Tod & Co., purchased for and delivered to the complainant 6 1/2 per cent. 1935 Bombay Development Loan Bonds of the value of Rs. 3,50,000 receiving full payment therefor, that in or about the last week of March 1935 the second accused

represented to him that his firm had entered into a contract with the Imperial Bank of India to sell and deliver to them 6 per cent, 1935 Bombay Development Loan Bonds, that with a view to perform the contract, the accused's firm had purchased from Bombay the requisite quantity of paper but that the Imperial Bank had returned the same on the ground that the endorsement on them was irregular, that the bonds had been sent to Bombay for rectification and that pending the receipt of the bonds from Bombay the complainant might oblige the firm temporarily by giving them his bonds of the said denomination and value to satisfy the Imperial Bank, and that as soon as the bonds purchased by them were received back from Bombay with the endorsements rectified, the complainant's bonds would be returned to him.

3. It was further alleged that on the 27th of March the second accused renewed his request saying that the Bombay bonds had not arrived and as that was the last day for completion of the contract with the Bank the complainant should oblige the firm by giving his bonds temporarily for a few days and assured him that he hoped to receive the Bombay Bonds sent for rectification by the 30th of March, and that the complainant's Bonds would be returned to him on the 1st of April positively.

4. It was then stated in the complaint that the complainant believing the representation made on behalf of the firm by the second accused and on the assurance that his bonds would be returned on the 1st of April, 1935 caused 14, 6 1/2 per cent., 1935 Bombay Development Loan Bonds of the aggregate value of Rs. 3,50,000 to be endorsed and delivered over to the accused's firm by his brother and authorised agent on the 27th of March, 1935, and that the second accused passed a receipt for the same for and on behalf of the accused's firm. It was further alleged that as the Bonds were not returned on the 1st of April as promised, the complainant telephoned about it to the accused's firm and that the first accused sent a letter in the name of the firm in which while confirming the receipt passed by the second accused on behalf of the firm when he obtained the Bonds it was stated that the Bonds from Bombay had not been received and that on receipt of the same the complainant's Bonds would be forwarded to him.

5. However, as the Bonds were not sent as promised, the complainant, it was alleged, again wrote to the accused's firm on the 17th of April asking for the return of the Bonds forthwith and to this the first accused wrote in the name of the firm the next day saying that the Bombay Bonds had not yet arrived and to avoid delay they would repurchase and deliver to the complainant similar Bonds by the end of the month if the originals were not got back before the 23rd of April, 1935.

6. The complaint further alleged that on the 29th of April the first accused went to the complainant and represented to him that his application for loan to the Imperial Bank of India was not sanctioned, that he was not able to purchase similar Bonds as promised or pay the value of the Bonds in full, that the Bombay Bonds had not been received¹, and promised that he would pay Rs. 1,00,000 the next day, 30th of April, another sum of Rs. 1,00,000 in the course of a fortnight or a month, and the entire balance within three months and that he would also get a letter of guarantee from the second accused. It was stated that the complainant then yielded to the request of the first accused for time without any knowledge or suspicion that the accused would have mishandled or otherwise dishonestly dealt with his Bonds or that any fraud had been played.

7. Subsequently, it was alleged that the first accused sent a sum of Rs. 50,000 and the guarantee letter from the second accused and a further sum of Rs. 30,000 and when pressed for the balance of Rs. 20,000 to make up the initial payment of one lakh he falsely denied the responsibility for the transaction throwing the blame on the second accused though he had been repeatedly taking time for payment of the same.

8. The complainant then stated that this conduct of the first accused aroused his suspicion and that he has now learned that the story of the Bonds being sent to Bombay for rectification is a myth and that after obtaining from him, the Bonds on false representation and on promise to return the same in specie they sold the same away to third parties without his knowledge or consent and misappropriated the sale proceeds.

9. On the above allegations the complainant charged the 1st and the 2nd accused with having committed the offences punishable under Sections 406 and 420,

Indian Penal Code, and prayed that they be dealt with according to law.

10. On the 14th of May, 1935, the Chief Presidency Magistrate issued summons against both the accused. It may be stated here that the offence under Section 420, Indian Penal Code, is compoundable with the permission of the Court under Section 345(2) of the Code of Criminal Procedure, while that under Section 406 of the Indian Penal Code is not compoundable.

11. On the 2nd of July 1935, an application signed by the counsel for the complainant as well as by the counsels for the 1st and the 2nd accused was filed before the Magistrate. The application ran as follows:

As the facts alleged, if proved, amount to an offence under Section 420, Indian Penal Code, which is compoundable with the permission of the Court, it is prayed that the Court may be pleased to permit the case to be compounded as against the 1st accused. On such permission being granted the complainant will report the case compounded against the 1st accused and will not press the case against the 2nd accused without prejudice to the complainant's civil rights against both.

12. It will be observed that in this application nothing is mentioned about the offence under Section 406, Indian Penal Code with which also, the two accused had been charged in the complaint; nor is any permission asked to compound the case of cheating with the second accused.

13. On receiving the above application the Magistrate examined Gopalaswami Chetti the agent of the complainant and he deposed as follows:

* * * Under his instructions I wish to compound this case and offer no evidence. I have also filed a petition signed by the counsels of all the parties concerned to the above effect. I request permission of this Court to compound as the offence is one under Section 420, Indian Penal Code.

14. After recording the above statement the learned Magistrate passed an order acquitting the accused in the following terms:

Permission granted, Case reported compounded. Accused are acquitted.

15. It may be mentioned that on the application for permission to compound, filed by the complainant and the two accused the learned Magistrate made the following note:

The complainant himself and his counsel both admit that the facts disclosed only an offence under Section 420, Indian Penal Code, which is compoundable with the permission of the Court. Examined Gopalaswamy Chetty. I am also of opinion that the offence disclosed is only under Section 420, Indian Penal Code.

16. This note does not form part of the acquittal order.

17. On behalf of the Crown, the learned Crown Prosecutor argues that the order of acquittal in so far as it relates to the offence of 'Cheating' with respect to the 1st accused is unsustainable, inasmuch as the learned Chief Presidency Magistrate has not exercised his discretion as required under Section 345(2) of the Code of Criminal Procedure in allowing the case to be compounded as against him, that as against the 2nd accused the offence of 'cheating' has not been compounded at all: and that with respect to the offence of 'criminal breach of trust' under Section 406, Indian Penal Code, the order of acquittal is bad as against both the accused, as the offence is not compoundable and as the case has not been tried at all. For these reasons he urged that the acquittal order in its entirety should be set aside.

18. The order of the Magistrate is very brief and unsatisfactory. The exact scope of it, whether it covers only one of the offences with which the accused were charged or whether it refers to both the offences has been the subject of considerable arguments before us. We have no doubt that the order as it stands covers both the offences. It is true that the learned Magistrate has not explicitly stated the reasons which persuaded him to accord permission for compounding the offence of cheating. But on that ground alone we cannot accept the argument that he has passed the order without applying his mind to the facts of the case. If, as the learned Crown Prosecutor says, that the Presidency Magistrate must be considered to have definitely made up his mind that there was a prima facie case against the accused under Sections 406 and 420, Indian Penal Code, when he passed the order 'issue summons under Sections 406 and 420, Indian Penal Code, against both the accused,' we may well assume that when he passed the

order 'Permission granted. Case reported compounded,' he must have concluded in his mind that it was a proper case in which sanction for compounding the offence should be granted though we must say that the Magistrate might have done better if he had indicated his reasons. It is argued that with respect to the 2nd accused, what was originally stated in the petition asking for permission to compound the offence of cheating was that the case will not be pressed against him, that such a procedure in warrant cases is unknown to law and that no request for compounding the case as against him was ever made. The argument is not without force; but we cannot allow ourselves to be guided solely by the averments contained in the petition. In the deposition of Gopalaswamy Chetty extracted above, he stated that under the complainant's instructions he wished to compound 'this case' and offer no evidence. In so far as this relates to the offence under Section 420, Indian Penal Code, which is compoundable we must understand the statement to mean that his instructions were to compound the whole case, that is, the case against both the accused and not the case as against the 1st accused alone. For these reasons we are not inclined to set aside the order of acquittal of the accused in so far as the order of acquittal relates to the offence under Section 420, Indian Penal Code.

19. The next question for consideration relates to the order of acquittal with reference to the offence of criminal breach of trust under Section 406, Indian Penal Code, with which also both the accused were charged in the complaint. Section 405 defines the offence as follows:

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses, or disposes of, that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust.

20. The terms of the section are very wide. Omitting the details not necessary for the purposes of this case, a person may be said to commit criminal breach of trust if, when in any manner entrusted with property or with any dominion over it, be

dishonestly misappropriates it or uses it in violation of any legal contract made touching the discharge of the trust. The learned Crown prosecutor argues that assuming that the facts alleged in the complaint have been made out, the two accused have committed criminal breach of trust inasmuch as they have, after being entrusted with dominion over the property belonging to the complainant for the purpose of using it in a definite manner and returning the same after such use, misappropriated it contrary to the arrangement arrived at between the parties. This argument is met with the reply that the complaint discloses only an offence under Section 420, Indian Penal Code, as noted by the Magistrate and that it does not disclose any offence under Section 406, Indian Penal Code. The Magistrate has given no reason for his opinion beyond saying that the complainant himself and his counsel admit that the facts disclose only an offence under Section 420 and that that is also his opinion. Mr. Grant's argument in support of his contention that the complaint does not disclose an offence under Section 406 is twofold. In the first place, he argues that when the accused by deceiving the complainant fraudulently and dishonestly induced him to part with the property in question, the offence of cheating was complete and that there is no room for further holding that the accused have committed criminal breach of trust also by their subsequent misappropriation of the property. This argument cannot be accepted as will appear from two decisions of this Court. In *in re Ramappa* (1911) 22 M.L.J. 112 the accused who was the Superintendent of some Coffee Curing Works was convicted of criminal breach of trust by misappropriating a large sum of money made up of amounts which he had received from the Manager on the false pretence that they were required for paying coolies who garbled coffee. One of the arguments urged against the conviction was that the receipt of the money by false representation amounted to the offence of cheating and that the subsequent appropriation of it by the accused to his own use would not amount to criminal breach of trust as the criminal intent was present at the time of the receipt of the moneys from the Manager. The learned Judges (Benson and Sundara Aiyar, JJ.) observed that the argument is not sound and held as follows:

When the accused received the money he did so as a servant of the company for the express purpose of using it for his master's benefit in a particular way. He was therefore entrusted with the money and his appropriating it to himself clearly

amounts to Criminal breach of trust.

21. In *re Venkatagurunatha Sastri* : AIR1923 Mad597 it was held by Spencer, J., that where a person who had pledged promissory notes with another as security for a loan dishonestly induced the latter to hand over the same to him by pretending that he required the same to collect money from his creditors with the aid of which he would pay cash to the complainant, his act constituted an offence of cheating punishable under Section 420 of the Penal Code. It was also held that, where it appeared further that the pledgor dishonestly disposed of the note in violation of his contract with the pledgee to use the money collected in paying off his debt, there was both entrustment and dishonest misappropriation, and that the conviction for the offence of criminal breach of trust under Section 406, Indian Penal Code was legal. In this connection attention may also be drawn to the words 'In any manner' used in the section which would show that the entrustment of the property with the accused may be brought about in various ways. For the above reasons we overrule the first argument advanced by Mr. Grant.

22. His next argument is that on the facts alleged in the complaint it cannot be said that the accused were 'entrusted' with property or with any dominion over it assuming that there has been subsequent misappropriation. Part of the argument in support of this contention is based upon the allegations in the complaint. It is said in paragraph 6 of the complaint that the complainant 'believing the representations of the 2nd accused caused 14 bonds of the aggregate face-value of Rs. 3,50,000 to be endorsed and delivered over to the accused's firm by his brother and authorised agent on the said date namely, -27th March, 1935....' It is argued that this would show that the delivery of the property did not stop with mere entrustment but that it was handed over absolutely *to the 2nd accused, as otherwise there was no meaning in endorsing and delivering them to the accused's firm. Obviously this suggestion cannot be accepted. Reading the complaint no one will understand that the complainant intended to make a present of these bonds to Messrs. Huson, Tod & Company for, that is what the argument amounts to. The allegations show that the 14 bonds in question were handed over temporarily to the accused's firm for a specific purpose and for a definite period and after accomplishing this purpose the same bonds were to be returned to the

complainant. It is obvious that if the bonds were not endorsed over in favour of Messrs. Huson, Tod & Company, the purpose for which they were delivered, that is, to give them over to the Bank till the bonds purchased for them were received after rectification, would not be satisfactorily achieved.

23. The rest of the argument on the above point is based upon the interpretation put by the House of Lords in *Lake v. Simmons* (1927) A.C. 487 on the word 'entrusted' which appeared in a clause in a certain insurance policy. In the circumstances of that case it was held that the obtaining by a person of articles by larceny by a trick cannot amount to entrustment as there was no real consent by the owner of the articles to the transferee obtaining possession of the same. Read in the light of the facts of the case it will be found that that decision is not helpful in interpreting the word 'entrusted' as used in Section 405 of the Code. As pointed out by Lord Haldane in that very case, 'entrusted' is not necessarily a term of law. It may have different implications in different contexts. In its most general significance all it imports is a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all. On the allegations in the complaint in this case, we have no doubt that the 14 bonds in question were 'entrusted' by the complainant to the accused within the meaning of Section 405 of the Code. This argument must also be rejected.

24. For the above reasons, on this part of the case, that is, with respect to the offence of criminal breach of trust, we must hold that the complaint discloses an offence punishable under Section 406, Indian Penal Code. That offence is not compoundable and the merits of it have not been inquired into by the learned Chief Presidency Magistrate. We have already stated that, in our opinion, the order of acquittal must be understood to cover both the offences alleged against the accused. It therefore follows that the order in so far as it relates to the offence of criminal breach of trust under Section 406, Indian Penal Code, should be set aside and the learned Chief Presidency Magistrate should be asked to restore the complaint on file and deal with it according to law.