

Vadivel Vs. Packialakshmi

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SooperKanoon Citation : sooperkanoon.com/790959

Court : Chennai

Decided On : Jul-14-1995

Reported in : 1996CriLJ300

Judge : N. Arumugham, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 405, 406, 415, 416 and 420;
[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 200

Appeal No. : C.R.C. No. 297 of 1991

Appellant : Vadivel

Respondent : Packialakshmi

Advocate for Def. : P. Kulandai Vadivelu, Adv.

Advocate for Pet/Ap. : Miss Latha, Adv. for ;Miss A. Angayarkanni

Judgement :

ORDER

1. The first accused before the learned Judicial Magistrate, Nanguneri in C.C. No. 31 of 198, tried upon a private complaint for the offences under Sections 420 and 406 of the Indian Penal Code along with two others, who was convicted for the offence under Section 420 of the Indian Penal Code, felt aggrieved by the judgement dated 30-8-89 canvasses the same for want of legality, propriety and

validity in this criminal revision.

2. On 20-1-1982 at Moonumothemmozhi in Nagarcoil District the revision petitioner being the first accused, along with his wife second accused, by name Bakiathai, approached P.W.1 Bagialakshmi to get a gold chain weighing about five sovereigns and another chain weighing about 2 1/2 sovereigns to attend a marriage of their near relative in some other village by giving an assurance to the respondent to return the jewels after attending the marriage and on such representation they made the said Bagialakshmi to part with the jewels and thereafter, they never returned the same as promised. But, later they pledged the said jewellery in the bank as if they belonged to them. Even after, repeated demand and requests they deliberately failed to redeem and return the same. A complaint lodged by the said Bagialakshmi to the concerned police was since of no yield, was private complaint against the revision petitioner first accused, his wife and his father for abetment a lodged before the learned Magistrate, under Section 200 of the Criminal Procedure Code for the offences under Section 420 and 406 of the Indian Penal Code.

3. By taking such complaint to file and after recording the evidence of five prosecution witnesses in accordance with precedual law and giving further opportunity to cross examine them in the context of the plea of defence taken by and on behalf of the accused and on consideration of the copy of the complaint, along with the receipt produced for redeeming the jewellery of the complainant, itself and the letter correspondence that took place between the parties, marked as Exs. P. 1 to P.12, learned trial Magistrate found the first accused alone as guilty for an offence under Section 420 of the Indian Penal Code as the complainant had established the guilt of the accused beyond the realm of doubt and that while doing so, he acquitted the second and third accused of both the offences.

Consequently, learned Magistrate convicted the first accused and sentenced him to undergo rigorous imprisonment for a period of six months and also imposed a fine of Rs. 3,000/- in default to undergo rigorous imprisonment for 3 months for the offence under Section 420 of the Indian Penal Code.

4. On appeal filed in C.A. No. 252 of 1989 learned Sessions Judge, Tirunelveli by his order dated 27-6-1990, after having reappraised and considered the whole legal evidence and the rival pleas in a very elaborate manner rejected the appeal and all the contentions put forward on behalf of the accused and confirmed the conviction and sentence against the first accused and aggrieved by this, the revision petitioner has filed this criminal revision case.

5. It was the endeavour of Miss. Latha, learned counsel appearing for the petitioner that the learned Magistrate as well as learned Sessions Judge have committed a mistake and serious error in finding the accused guilty for the offence under Section 420 of the Indian Penal Code while acquitting him for the offence under Section 406 of the Indian Penal Code for want of legal evidence and mens rea and that since both the Courts have concurred that the complainant has not established the defence committed by the first accused for the charge under Section 406 of the Indian Penal Code, the conviction and sentence recorded by both the Courts run counter, as the concept of law involved in Sections 420 and 406 of the Indian Penal Code are depending on each other. Perhaps, this is the only legal plea being ventured before me while canvassing this revision.

6. Of course, the above contention was controverted by learned Counsel appearing for the respondent by contending that the elaborate finding of both the Courts below in acquitting all the accused including the revision petitioner for the offence under Section 406 of the Indian Penal Code is purely based on the opinion available in evidence. That finding cannot be taken as a shield or devised one.

7. In the light of the above circumstances, I have to consider the legality of the plea raised on behalf of the revision petitioner as hereunder :

The concept of cheating has been defined under Section 415 of the Indian Penal Code which is as follows :-

'Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and

which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

Explanation :- A dishonest concealment of fact is a deception within the meaning of this section.'

The above section has been elicited with nine illustrations.

8. Section 406 of the Indian Penal Code deals with the criminal breach of trust in the following words :

'Whoever, being in any manne 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'.

The section is illustrated with two explanations.

9. Thus, it is seen that for identifying the concept of criminal cheating, as provided under Section 416 of the Indian Penal Code, the ingredients of fraudulent, dishonest intention has become the basic sine quo non and if it is there or, identified, then it is to be further ascertained that as a result of which the person so represent must be made to deliver any property to the other and that the inducement must be inherent with intention to keep the same or to utilise the said property for the use and utilisation of the person, who made such an inducement with such intention. Whereas, in the concept of the criminal breach of trust, as defined under Section 405 of the Indian Penal Code, voluntary entrustment following dominion over such property by one to the other person has become necessary to be identified and that the property has become necessarily disentitled, misappropriated or converted in such a way as provided by the Section. If the ingredients set out in the above sections of law are identified, upon the materials placed by the prosecution, then, Sections 406 and 420 of the Indian

Penal Code respectively being the punishment sections come into operation.

However, while doing such legal exercises, it has become imperative for the Court to see that the criminal breach of trust and cheating, though, generally involves dishonest intention, but, both are mutually exclusive and different in the basic concept, in the context that criminal breach of trust is voluntary and cheating, is purely on the basis of inducement with dishonest intention. In this regard, I have to say my view that both the concept of law for the respective offences are totally distinct, different in nature and accordingly, mutually exclusive with each. Unless and until these are adequate materials available and made before the Court of law, both the offences can be dealt with together.

10. In the said position and applying the said principle to the facts of the instant case, I am totally unable to persuade myself to countenance the first contention raised by the learned counsel for the revision petitioner and as such, the same cannot be sustained for any moment. However, the concurrent finding recorded in this case is that all the accused were not found guilty for the offence under Section 406 of the Indian Penal Code and the State or the aggrieved party has not come forward with any revision appeal challenging the impugned order :-

11. With regard to the other view expressed by the Bar during the course of argument that the first accused was entrusted with the jewellery by P.W. 1, complainant with full knowledge and that therefore there exists no need to frame a charge under Section 420 of the Indian Penal Code and consequently after trial the first accused ought not to have been found guilty and sentenced accordingly. This contention cannot be accepted for one simple reason that the very entrustment of the jewels in question was made by P.W. 1 only on the representation made by the first accused and his wife attracting inducement along with fraudulent and dishonest intention with a view to get the jewellery under the pretext of attending a marriage of their near relative and thereby made the complainant to part with her jewels and that thereafter, they had pledged the jewels and failed to redeem it and ultimately made the complainant to redeem the same. Therefore, the accused is squarely within the four walls and limbs of Section 415 of the Indian Penal Code and one establishing the guilt of the accused

by producing necessary evidence before the Court, both the Courts have, in my considered view, rightly and justifiably found the accused guilty and sentenced him for the offence under Section 420 of the Indian Penal Code. For this reason I reject the other plea taken on behalf of the revision petitioner.

12. The sentence awarded on consideration of the evidence seems to be not excessive. Keeping in view the fact that the first accused has committed the offence of getting the jewellery on false representation, later pledged the same and failed to redeem it the quantum of sentence has to be decided. Being a family man, I feel that the ends of justice would be met by modifying the sentence of conviction into one of fine to the extent which was imposed already and that the fine amount of Rs. 3,000/- having been already paid, in the context of the present modification, I shall record that the revision petitioner need not suffer rigorous imprisonment as per the judgement rendered by both the Courts below.

13. Order accordingly.