

Amar Nath Bhattacharjee Vs. Prasenjit Kumar Bose and anr.

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Court : Kolkata

Decided On : Mar-31-2006

Reported in : (2006)3CALLT449(HC),2006(4)CHN719

Judge : Arun Kumar Bhattacharya, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 156(3), 401 and 482;
;[Indian Penal Code \(IPC\), 1860](#) - Sections 406, 415, 420 and 506

Appeal No. : C.R.R. No. 2334 of 2004

Appellant : Amar Nath Bhattacharjee

Respondent : Prasenjit Kumar Bose and anr.

Advocate for Def. : Sandip Kundu, Adv. for Opposite Party No. 1

Advocate for Pet/Ap. : Sudipta Moitra and ;Pushpal Satpathi, Advs.

Disposition : Application allowed

Judgement :

Arun Kumar Bhattacharya, J.

1. The hearing arises from an application under Section 401 read with Section 482 Cr.PC filed by the petitioner praying for revision of the Judgment and order dated 31.8.2004 passed by the learned Additional Sessions Judge, First Track Court No.

III, Barrackpore in Criminal Appeal No. 30/03 confirming the order of conviction and sentence passed by the learned Judicial Magistrate, 3rd Court. Barrackpore in C. Case No. 799/96 under Section 420 IPC on 29.11.2003.

2. The circumstances leading to the above application are that the present O.P. No. 1 lodged a complaint under Section 156(3) Cr.PC alleging inter alia that the petitioner claiming himself to be the owner of a property at Sastri Road, P.S. Naihati executed a registered sale deed on 02.02.87 in favour of O.P. No. 1 at a consideration of Rs. 10,000/-. Later it was detected that the petitioner was not owner of the said property as his father executed a Will without giving any property to him but to his wife Smt. Shila Bhattacharjee and a Probate Suit is pending. So, the petitioner and his wife Shila Bhattacharjee are liable to be prosecuted under Sections 420/406/506 IPC. The police after investigation submitted FRT. On the basis of the protest petition filed by O.P. No. 1, process was issued against the petitioner alone under Section 420 IPC. Four witnesses were examined on behalf of the prosecution, while none was examined on behalf of the defence and after considering the facts, circumstances and materials on record the learned Magistrate found the petitioner guilty under Section 420 IPC, convicted him thereunder and sentenced him to suffer R.I. for two years and to pay fine of Rs. 5,000/- i.d. to S.I. for six months which was affirmed in appeal by the learned Additional Sessions Judge, First Track Court No. III, Barrackpore by the impugned order dated 31.08.2004.

3. Being aggrieved by and dissatisfied with the said order in appeal, the petitioner has come up before this Court.

4. Mr. Moitra, learned Counsel for the petitioner, assailed the impugned order mainly on three-fold grounds viz. (1) there was no inducement nor any dishonest intention on the part of the petitioner, since he being one of the heirs after the death of his father in or about 1979 executed an agreement for sale on 24.09.85 while he was not aware of the Will executed by his father and thereafter he executed the Deed of sale on 02.02.87, and as such no charge under Section 420 IPC can lie against him, (2) the finding of the learned Appellate Court that as the petitioner who has been residing in the paternal house with his wife who is one of

the petitioners in the Probate Suit, he was well aware of the execution of the Will by his father in 1974, is based on surmise and conjecture which cannot be the basis for any conviction, and (3) as the learned Court of appeal did not scan the evidence nor applied its mind, the impugned Judgment and order is liable to be set aside, in support of which the cases of Badam Singh v. State of Madhya Pradesh reported in : 2004 CriLJ22 , Rairiav. State of Rajasthan reported in 2002 SCC (Cr) 829 and L.L. Kale v. State of Maharashtra reported in 2000 (1) Crimes 49 (SC) were relied upon.

5. Mr. Kundu. learned Counsel for O.P. No. 1, on the other hand, fully supported the findings of the learned Court of appeal below and contended that there being no material to interfere with the same, the present application should be dismissed.

6. The object of the revisional jurisdiction under Section 401 is to confer power upon superior Criminal Courts, a kind of paternal or jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted, on the one hand, or on other hand, in some undeserved hardship to individuals. The controlling power of the High Court is discretionary and it must be exercised in the interest of justice with regard to all facts and circumstances of each particular case, anxious attention being given to the said facts and circumstances which vary greatly from case to case. Reference may be made to the case of Janata Dal v. H.S. Chowdhury reported in : 1993 CriLJ600 . The terms of the section are wide enough to permit interference with the findings of facts; but a practice of long standing has grown up to confine the exercise of the jurisdiction only to questions of law. Yet the High Court does interfere with the findings of facts where there are very exceptional grounds for its interference in the interest of justice, or when miscarriage of justice is patent, or where there are such exceptional grounds e.g. a misstatement of evidence by the lower Court, or a misconstruction or misreading of documentary evidence, or the placing by the Court of the onus of proof on the accused contrary to the law of evidence, or to prevent a gross and palpable failure of justice, or where the finding of fact depends on a correct interpretation of law, or where the lower Courts have approached the

case from a wrong point of view and the evidence produced has not received due consideration, or where the findings of fact are not based on evidence on record and are proved to be wrong from the record itself etc. Appellate Court's concurrence with a patently wrong finding of guilt does not render it immune from interference, if acceptance of such a finding by the revisional Court also would result in miscarriage of justice.

7. Section 415 IPC has two parts. While in the first part, the person must 'dishonestly' or 'fraudulently' induce the complainant to deliver any property, in the second part, the person should intentionally induce the complainant to do or omit to do a thing. A guilty intention is an essential ingredient in the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating, 'mens rea' on the part of that person, must be established. In this connection, *G.V. Rao v. L.H.V. Prasad* reported in : 2000 CriLJ3487 may be relied on. In other words, if the alleged victim of alleged cheating is not induced to deliver any property or any valuable security there is no cheating, as was held in *Suresh Kumar v. Om Prakash* reported in 1977 Cr LJ 1416. In the case on hand, though there is an averment in the petition of complainant that on the repeated requests of the accused persons, the complainant (P.W. 1) purchased the land from accused No. 1 by a registered deed dated 02.02.87 on good faith due to intimacy without making any enquiry, all that has been deposed by P.W. 1 is that the accused persons entered into an agreement for sale of their land and expressed that the land stands in the name of Araar Nath Bhattacharjee and accordingly without making any enquiry about the land he purchased the same on good faith. There is virtually no evidence of inducement on the part of the present petitioner/accused, and as such there is no scope for invoking the penal provision of Section 420 IPC.

8. Furthermore, to robe an accused with the offence of cheating, fraudulent or dishonest intention must have to be shown right at the beginning of the transaction. Here, it transpires from the evidence of P.W. 1 that the agreement for sale was executed about 1 years back (on 24.09.85) from the date of registration of the sale deed. A concealment of fact cannot be said to be dishonest unless the accused was under an obligation to disclose the facts concealed. There is no obligation on the seller to disclose any defect unless it is a defect which the buyer

could not with ordinary care discover. The doctrine is known as caveat emptor i.e. 'Let the buyer beware'. In this case as deposed by P.W. 1, he had sufficient scope to enquire about the nature, character etc. of the land but he did not make any search as regards the land. It is his further evidence that when he went for mutation he came to learn that the land did not stand in the name of the present petitioner, for which he filed a civil suit. He became a party to the civil such being T.S. 256/91 pending between the brothers of the petitioners when he came to learn from a Will produced by the brothers of the petitioner that the father of the petitioner executed a Will in respect of the said land in favour of the wife of the petitioner. The sale deed was executed and registered on 02.02.87. and the agreement for sale was executed on 24.09.85 i.e. about one year four months back. The Probate Suit being 81/84 for granting Probate in respect of the Will executed by the father of the petitioner in favour of brothers and wife of petitioner was instituted in 1984 which was subsequently renumbered as 196/90. Merely because the petitioner had been residing in his paternal house with his wife who is one of the petitioners in the said Probate Suit, knowledge of the said Will at the time of execution of the agreement for sale dated 24.09.85 or execution of the sale deed dated 02.02.87 is not necessarily attributable to the petitioner, and accordingly such finding of the learned Court below can be said to be based on surmise and conjecture which cannot be the basis for any conviction howsoever strong it might be. It has been contended by the learned Counsel for the petitioner that since on the death of father in 1979 the property devolved upon his client as one of the legal heirs and representatives, he sought to transfer his share in the property having no knowledge of the said Will, and had he any such knowledge of the Will, at best his wife Shila Bhattacharjee would have joined in the deed to avoid any complication, and had O.P. No. 1 in pursuance of the said doctrine of caveat emptor made necessary search in possible places including municipality which he had enough opportunity to do within the period of more than one year and four months before execution of the sale deed on 02.02.87 and which he practically did but long after execution of the sale deed, he could easily avoid the transaction if so needed, but it is no ground for implicating his client with the offence of cheating, and there appears to be enough force in such contention. Therefore, as the petitioner had no legal obligation to disclose the patent defect

which the buyer could with ordinary care discover, it did not amount to cheating.

9. In the premises, in the light of the above discussion, the prosecution cannot be held to have brought home the charge against the petitioner beyond all reasonable doubts, and accordingly the present application be allowed.

10. As such, the impugned order dated 31.08.2004 passed by learned Court of appeal below in Criminal Appeal No. 30/2003 be set aside.

11. The petitioner being found not guilty be acquitted of the charge under Section 420 IPC and he be set at liberty at once.

Let a copy of this order along with the LCR be sent down at once to the learned Court below.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties as expeditiously as possible.

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