

SUPREME COURT OF INDIA

Dharamdas Hukamatrai Dorwani

Vs.

State of Bombay

Crl.A.No.108 of 1958

(P. B. Gajendragadkar, K. Subba Rao and J. C. Shah, JJ.)

04.11.1959

JUDGEMENT

GAJENDRAGADKAR, J.:

1. The appellant Dharamdas Hukamatrai Dorwani was charged with having committed an offence under S. 420 of the Indian Penal Code in that on or about March 22, 1953 he cheated chhotubhai Nagarji Desai by dishonestly or fraudulently inducing him to enter into and execute an agreement (Ex. F) on March 22, 1953 and to pay Rs. 2,875 and consent to appropriation towards the payment due under the said agreement earlier payments of Rs. 9,875 made by him on and between March 9, 1952 and July 14, 1952 in respect of Flat No. 15 in the Dorwani Mansion and a shop on the representation that the building, the shop and the land on which they stood were owned by him and were not subject to any mortgage. The learned trial magistrate who heard the case held that the charge had not been proved against the appellant beyond a reasonable doubt. The appellant was accordingly acquitted. The State then preferred an appeal against the said order of acquittal in the High Court at Bombay. The High Court held that the order of acquittal was wholly improper and that the charge against the appellant had been clearly proved beyond a reasonable doubt. That is why the High Court set aside the order of acquittal, convicted the appellant under S. 420 and sentenced him to suffer rigorous imprisonment for a period of six months and to pay a fine of Rs. 1,000, in default to suffer rigorous imprisonment for a further period of two months. The appellant then applied to the High Court for leave to appeal to this Court but his application was dismissed. Then he applied for and obtained special leave from this Court to file the present appeal. On his behalf Mr. Sethi has urged that the High Court was not justified in reversing the order of acquittal in exercise of its appellate powers, and on the merits he contends that the findings recorded by the High Court are wholly inconsistent with the evidence on record.

2. The facts on which the prosecution case is based can be briefly stated at the outset. On December 18, 1951 an agreement of sale was made in favour of the appellant in respect of a piece of land at Tulsi Pipe Road. In pursuance of this agreement the plot was purchased by the appellant on March 19, 1952 for Rs. 4,03,245. The appellant had inserted an advertisement in a Bombay newspaper in the third week of February 1952 offering certain flats for sale; and the complainant happened to read this advertisement. So the complainant wrote to the appellant and then met him in the third week of March 1952 along with his father-in-law Mr. T. B. Desai. They were introduced to the appellant by an advocate named Mr. Madnani. The appellant told the complainant and Mr. Desai that he had bought plots of land and was constructing flats and shops which he intended to sell on ownership basis. He also represented that he would be able to give possession within four months.

On March 9, 1952 the complainant and Mr. Desai again went and talked to the appellant, and, after some discussion, the complainant selected Flat No. 15 on the ground floor of the Dorwani Mansion. Its price was fixed at Rs. 12,750. The complainant also selected a shop, No. 9, on the ground floor for his dispensary in the adjoining building, and its price was fixed at Rs. 7,000. Upon an enquiry made by the complainant the appellant informed him that the property had not been mortgaged or transferred. Thereupon the complainant signed two agreements Exs. S-1 and S-2. In pursuance of these agreements amounts were paid by Mr. Desai on behalf of the complainant to the appellant from time to time by cheques, the total amount thus paid was Rs. 9,875.

3. On March 22, 1953, the complaint and Mr. Desai again contacted the appellant and complained that since the work of constructing the flat which had to be given to the complainant had not even commenced they wanted the agreement to be cancelled. It appeared that certain alterations which the complainant wanted to be made when he selected Flat No. 15 had not been effected. Then by consent of parties the complainant agreed to take flat No. 13 and asked that the contract for the shop should be cancelled. The appellant insisted that this could be done provided the full amount due for the flat was paid. Thereupon Mr., Desai, for the complainant, issued a cheque for Rs. 2,875 in favour of the appellant. Thus the whole amount due for Flat No. 13 was paid and a fresh agreement was executed. (Ex. F).

4. In June 1953 the appellant gave possession of Flat No. 13 to the complainant, whereupon a cheque for Rs. 400 was drawn by Mr. Desai in favour of the appellant by way of deposit for the payment of taxes and electric charges. He also paid monthly ground-rent of Rs. 14 for the months of June, July and August 1953.

5. It appears that the complainant came to know in about October 1953 that the appellant had mortgaged the property to the vendors on March 19, 1952. The complainant then contacted the appellant and complained but he was assured that the mortgage would be paid and the complainant's title would be cleared up. Then the complainant wrote to the Police Commissioner complaining that the appellant had committed an offence of cheating. On this complaint investigation commenced and ultimately the appellant was charged under S. 420 of the Code. The appellant denied the charge. He admitted that the property had been mortgaged as alleged by the complainant but he urged that the complainant and all other allottees knew about the mortgage at the time of their respective transactions; and so, according to him, since the complainant entered into the transaction with full knowledge of this mortgage there was no question of cheating him.

6. In support of his case the complainant examined himself and his father-in-law Mr. Desai. For the defence Amarlal and Asrani gave evidence. The two lawyers Mulchandani, father and son, also were examined by the defence. The learned magistrate took the view that the complainant's version was not established beyond a reasonable doubt. He thought that if an enquiry had been made as alleged by the complainant the representation made by the appellant would have been mentioned in the documents which were formally drawn. He also felt impressed by the fact that though the complainant knew about the mortgage in October 1953 he did not give any notice to the appellant alleging misrepresentation by him nor did he complain to the police immediately thereafter. The magistrate observed that Mr. Desai occupied a responsible judicial position and as such his evidence was entitled to weight; but he was impressed by the argument that if Mr. Desai had really made enquiries as stated by him he would have insisted upon including an appropriate recital in the documents that the property was free from any encumbrance. On the whole he was not satisfied that the charge had been proved beyond a reasonable doubt.

7. On the other hand, the High Court has taken a contrary view. It has held that the evidence given by Mr. Desai and the complainant was reliable and that the statements made by Amarlal and Asrani could not be believed. On the probabilities the High Court held that the complainant's story appeared to be true. In coming to this conclusion the High Court was influenced by two important considerations. It observed that the statements about enquiry made by the complainant and Mr. Desai had not been challenged in cross-examination; and it referred to the fact that the learned Magistrate had completely overlooked the positive case made by the appellant in his written statement when he appreciated the evidence led by the parties before him. That in brief is the effect of the findings made by the High Court.

8. It is true that in exercising its appellate powers in dealing with orders of acquittal the High Court should not interfere unless there is sufficient ground to do so. If the questions decided by the trial court are pure questions of fact and their decision depends merely on appreciation of oral evidence the High Court would not be justified in interfering with the order of acquittal passed by the trial court. But, where the trial court's appreciation of evidence has been vitiated by its failure to take note of a very important fact the position becomes different. The trial magistrate has not expressed any definite opinion about the evidence of Mr. Desai or even of the defence witnesses. He has also not stated whether he believed the two lawyers, Mulchandani, or not. His judgment shows that his appreciation of the evidence given by all the witnesses is somewhat halting, and he hesitated to express any definite opinion about the credibility of most of them. On the whole, however, he seems to have been inclined to take the view that no representation had been made by the appellant as alleged by the complainant. The question is whether such a conclusion is reasonably possible having regard to the specific case made by the appellant in his written statement.

9. In his written statement (Ex. 16) the appellant has specifically averred that he had made it clear to everybody that the property was mortgaged at the time of their entering into agreements and that the allottees including the complainant knew about the existence of this mortgage. These averments contained in paragraph 8 are absolutely clear and unambiguous. Mr. Sethi, however, contends that we must read these averments along with the statements in paragraph 6 where the prosecution case has been denied specifically by the appellant. We have carefully considered this argument and we have read the two paragraphs together. In paragraph 6 what the appellant has denied is the prosecution case that he made a representation that there was no mortgage. It is not a denial of the enquiry itself. It is a denial of the representation alleged to have been made at the enquiry. Paragraph 6 also says that the allottees knew about the mortgage but their knowledge is obviously derived from the positive statement made by the appellant as stated in paragraph 8. Thus there can be no doubt that the case which the appellant set up in his written statement clearly is that he had told the complainant and the other allottees at the time that he entered into agreements with them that the property was mortgaged. If that is the case made by the appellant it is impossible to accept the evidence led by him that no enquiry was made; and yet the learned magistrate in substance has accepted the defence evidence and has held that no enquiry was held and so no representation could have been made. In our opinion, this infirmity in the judgment vitiates the conclusion of the learned magistrate; and so the High Court was justified in considering the evidence for itself.

10. The other point on which the High Court has relied is that the complainant and Mr. Desai have not been specifically cross-examined in regard to the alleged enquiry. Mr. Sethi says that this observation is wholly unjustified. He has referred us to several questions put to the two witnesses in cross-examination; and his argument is that these questions have a material bearing on the alleged enquiry. In a sense this contention is justified; but the point about the criticism made by the High Court is that it was not directly put to the witnesses that no enquiry had been made as alleged by

them. If the defence had intended specifically to challenge this part of the case several questions could have been put about the alleged enquiry directly disputing the truthfulness about that statement. Questions had no doubt been put in cross-examination which suggest the improbability of the alleged enquiry but that is an indirect way of attacking the story. That in substance appears to be the effect of the criticism made by the High Court about the cross-examination of the complainant and Mr. Desai. But even if this criticism is left out of consideration the point still remains that on the written statement of the appellant it is common ground between the prosecution and the defence that a representation was made. The only question which arose for decision was the representation which the appellant made, and on that question the probabilities inexorably suggest only one answer. It is extremely unlikely, if not impossible, that the complainant could have parted with Rs.12,000 and odd if he had known that the title of the property was likely to become the subject-matter of litigation as the appellant had executed a mortgage over it. The consideration for the purchase of the plot was Rs. 4,00,000 and odd and the mortgage amount was more than Rs. 3,50,000. That clearly brings out the nature and extent of the charge over the property. Mr. Sethi no doubt attempted to argue that even with the knowledge about the subsistence of this agreement the complainant would have paid the money and taken the flat. In our opinion this suggestion is clearly unreasonable.

11. Mr. Sethi also argued that the complainant had not specifically stated on oath that it was as a result of the misrepresentation that he executed the contract and asked Mr. Desai to pay the requisite amount on his behalf. We do not think there is any substance in this contention. If it is proved that a false representation was made dishonestly intending to take advantage of the fact that many citizens in Bombay are in need of flats, the proof of misrepresentation would inevitably lead to the conclusion that the complainant and other allottees like him parted with money as a result of the said misrepresentation. Mr. Sethi's present argument entirely ignores the significance of the enquiries repeatedly made by Mr. Desai and the complainant.

12. Mr. Sethi also contended that it is very unlikely that the enquiry about the title of the appellant could have been repeatedly made as suggested by Mr. Desai; and he relied on the fact that the complaint had been filed after a long delay, no notice had been given to the appellant after the complainant knew about the mortgage and that this was a dispute essentially of a civil nature. We do not think that these arguments can be of any assistance to the appellant because once we hold that the High Court was justified in considering the merits of the prosecution case for itself in view of the serious infirmity in the judgment of the trial court it was for the High Court to consider the facts and come to its own conclusions. If the evidence adduced by the prosecution is accepted, as it has been by the High Court, these arguments cease to be material. Besides, the case made by the appellant himself and the probabilities are, according to the High Court, very much in favour of the prosecution case. The reasons given by the High Court in support of its conclusions do not appear to be open to any serious objection, and so on the whole we see no reason to interfere with the final order passed by it.

13. The result is the appeal fails and the order of conviction passed against the appellant is confirmed.

14. Mr. Sethi has appealed to us to modify the order of sentence in so far as it relates to rigorous imprisonment. He points out that the appellant is an old man and that he would be prepared to pay to the complainant the whole of the amount received from him provided the complainant relinquishes his flat to the appellant. He also sought to suggest that the cloud created by the mortgage on the appellant's title to the property can no longer cause any threat to the claims of the allottees because subsequent events would show that the amount due to the mortgagee can and

would be satisfied without much difficulty We have not allowed Mr. Sethi to refer us to the documents on which he based this plea. In our opinion it would be difficult to accede to the argument that the sentence imposed by the High Court is unduly severe. After all, sentence is a matter of discretion, and unless we are satisfied that the discretion has been improperly exercised we cannot interfere with the order of sentence. Therefore we see no justification for accepting Mr. Sethi's argument that the sentence of rigorous imprisonment should be set aside.

15. In the result the appeal fails and the order of conviction and sentence passed by the High Court is confirmed. The accused to surrender.

Appeal dismissed.

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