

Abdul Fazal Siddiqui

Vs

Fatehchand Hirawat and Another

Criminal Appeal No. 42 of 1981

(Dr. A. S. Anand, K. T. Thomas JJ)

20.08.1996

JUDGMENT

1. Respondent 1 filed a complaint in the Court of Additional Chief Presidency Magistrate, Calcutta, against the appellant (A-1), Kochi Mia (A-2) and Fazlur Rahman (A-3) alleging offence under Section 120-B read with Section 420 IPC and in the alternative under Section 420 IPC read with Section 34 IPC.

2. According to the complainant, Kochi Mia (A-2) and the appellant met him and requested him to advance money against the stock-in-trade of business of the Calcutta Cafe of which Fazlur Rahman (A-3) was represented to be the proprietor. The complainant wanted to meet Fazlur Rahman (A-3) himself before agreeing to advance the loan. After a few days, Fazlur Rahman (A-3), Kochi Mia (A-2) and the appellant went to the place of business of the complainant to meet him. A friend of the complainant by name Mangtural Bagaria was also present at that time with the complainant. The three accused represented to the complainant that Calcutta Cafe was free from all encumbrances and that the money could be advanced against hypothecation. Both the complainant and his friend Mangtural Bagaria agreed to advance Rs. 30,000 to Fazlur Rahman. On the next date, a deed of hypothecation was drafted and executed in the office of Mr G. Bagaria (PW 4) between the parties. In the deed of hypothecation, it was stated that the business in question was free from all encumbrances and charges etc. The deed of hypothecation was signed by Fazlur Rahman (A-3). On the basis of the specific representation made orally and in the deed, the complainant and Mangtural Bagaria advanced a sum of Rs. 30,000 to Fazlur Rahman (A-3). The amount was advanced against six hundies. Fazlur Rahman (A-3) also executed a general irrevocable power of attorney in favour of the complainant and Mangtural Bagaria authorising them to take charge of the management of the Calcutta Cafe in case of default of payment as agreed to in the deed of hypothecation. Some payments were subsequently made towards repayment of the loan by Fazlur Rahman (A-3) to the complainant and Mangtural Bagaria but after 28-11-1966 admittedly no payments were made. On an enquiry made by the complainant, it transpired that the representation made by Fazlur Rahman (A-3), Kochi Mia (A-2) and the appellant was false because the property in question was an encumbered property and in a suit filed in the Calcutta High Court, Joint Receivers had been appointed regarding Calcutta Cafe. After recording the preliminary evidence all the three accused were sent up for trial. It transpires that no charge was framed against Kochi Mia (A-2) while Fazlur Rahman (A-3) died during the pendency of the trial. The defence of the appellant was that he was in no way connected with the alleged crime nor had he cheated the complainant and his friend Mangtural Bagaria and that he had not made any false representation to the complainant to induce him to part with his money. He asserted that he was not present at the time when the alleged representation was made by A-3 to the complainant, at the time of the drawing up of the hypothecation deed and that he had only subsequently identified the executant at the request of the

complainant and Kochi Mia (A-2).

3. In the trial court the case, therefore, proceeded only against the appellant. The learned trial Magistrate vide his order dated 24-4-1972 convicted the appellant for an offence under Sections 420/34 IPC and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs. 500 and in default to undergo further rigorous imprisonment for two months. The appeal filed by the appellant in the High Court failed on 30-8-1979. By special leave the appellant is before us.

4. We have examined the record and heard the learned counsel for the parties. We find that the complainant who appeared as PW 7 in the trial court in his examination-in-chief stated that the amount was advanced "on believing in good faith on the representation of Accused 2-3 that the property was not encumbered". There is no mention of any representation having been made by the appellant that the property was free from encumbrances. PW 8, Mangtural Bagaria has also not referred to any representation made by the appellant as regards the property of Calcutta Cafe. PW 4 Mr D. Bagaria, Solicitor, who drafted the hypothecation deed stated that he had prepared the hypothecation deed on the statement made to him by Fazlur Rahman (A-3) and that at that time besides Fazlur Rahman (A-3), Mangtural Bagaria and the complainant were present and that the hypothecation deed was drafted under instructions of these three persons at his office. He stated that it was Fazlur Rahman (A-3), who on being asked by him, disclosed that Calcutta Cafe was not encumbered in any way. He also has not implicated the appellant in any manner. This is all the crucial evidence in this case. According to the complainant, however, the appellant had along with A-2 and A-3 told the complainant that he may advance loan to A-3 against the stock-in-trade. Did the appellant know that the stock-in-trade stood hypothecation ? There is no such averment much less any evidence on the record.

5. The evidence on the record does not show that the appellant made any statement to the complainant, which he knew to be a false statement. Section 415 IPC reads thus :

"415. Cheating. - 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 facts is as deception within the meaning of this section."

6. The expression 'dishonestly' has been defined in Section 24 IPC as "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'". 'Fraudulently' has been defined in Section 25 as "a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise".

7. Although, there is some evidence on the record to show that the amount of Rs. 30,000 was advanced by the complainant and Mangtural Bagaria to Fazlur Rahman (A-3) on a representation made by all the accused, including the appellant, but taking the complainant's case at its best, even if it be assumed that the appellant had made a representation in the manner deposed to by the complainant, there is nothing on the record to show that the appellant had any knowledge about the Calcutta Cafe being an encumbered property or about the appointment of the Joint Receivers by the

Calcutta High Court in a suit in respect of that property. There is no evidence to show that the appellant, knowingly made any false representation much less dishonestly or fraudulently. The basic ingredients of the offence of cheating are, therefore, missing in the case. The evidence on the record does not connect the appellant with the crime alleged against him at all. The courts below did not properly examine the legal position as adverted to by us. A mere representation, which is neither claimed or alleged to be dishonest or fraudulent would not attract the charge of cheating only because the complainant parts with his money on the basis thereof. In the present case the dishonest representation, both orally and in the deed of hypothecation, was made by A-3, proprietor of the Calcutta Case. The conviction and sentence against the appellant as recorded by the trial court and confirmed by the High Court, under the circumstances is unsustainable. We accordingly accept this appeal and set aside the conviction and sentence of the appellant and acquit him. The appellant is on bail. His bail bonds shall stand discharged.