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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE G.GIRISH

THURSDAY, THE 30TH DAY OF NOVEMBER 2023 / 9TH AGRAHAYANA, 1945

CRL.REV.PET NO. 441 OF 2005

AGAINST THE JUDGMENT DATED 19.10.2004 IN CRA 96/2003 OF ADDITIONAL SESSIONS JUDGE, NORTH PARAVUR

JUDGMENT DATED 08.01.2003 IN CC 561/1999 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I, ALUVA

PETITIONER/DE FACTO COMPLAINANT:

T.O.SOURIYAR, [redacted]

BY ADV SRI.K.RAMAKUMAR (SR.)

RESPONDENTS/APPELLANT/ACCUSED & COMPLAINANT:

1 [redacted]

2 STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SRI.SANAL P.RAJ

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR FINAL HEARING ON 07.11.2023, THE COURT ON 30.11.2023 DELIVERED THE FOLLOWING:

G.GIRISH, J.

Crl.R.P No.441 of 2005

Dated this the 30th day of November, 2023

O R D E R

Whether the offence of cheating punishable under Section 417 I.P.C or Section 420 I.P.C is attracted if a person, after voluntarily closing his account, issues a cheque towards the discharge of a pecuniary liability, leading to the inevitable consequence of its dishonour on the ground 'account closed'? It is the above question, which is to be resolved in this revision petition.

2. The facts, in conspectus, necessary for the disposal of this petition are as follows :

The revision petitioner is the de facto complainant, and the 1st respondent is the accused, in C.C.No.561/1999 of Judicial First Class Magistrate Court-I, Aluva, a case instituted on Police Report in respect of the offence under Section 420 I.P.C. Offering a job for the son of the revision petitioner at Appollo Tyres, the 1st respondent is said to have obtained an amount of

Rs.50,000/- from the revision petitioner on 07.10.1997. When the revision petitioner demanded repayment of the above amount after the failure of the 1st respondent to arrange a job to his son as agreed, the 1st respondent is said to have issued a cheque on 25.04.1998, bearing the same date, for an amount of Rs.50,000/- to the revision petitioner. When the cheque was presented for collection, it was dishonoured stating the reason that the 1st respondent had closed the account in which the above cheque has been drawn, as early as 13.01.1998. A complaint preferred by the revision petitioner before the Judicial First Class Magistrate-I, Aluva, alleging the commission of the offence under Section 420 IPC against 1st respondent, was forwarded to the Police under Section 156 (3) Cr.P.C., leading to the registration of Crime No.927/1998 by the Aluva Police. After the completion of the investigation, the Assistant Sub-Inspector of Police, Aluva filed final report before the Judicial First Class Magistrate-I, Aluva, alleging the commission of offence under Section 420 IPC.

3. In the trial that followed five witnesses were examined from the part of the prosecution as PW1 to PW5, and five

documents marked as Exts.P1 to P5. The 1st respondent also tendered evidence as DW1, and brought on record four documents, which are marked as Exts.D1 to D4. The learned Magistrate, after evaluation of evidence and hearing both sides, found the 1st respondent guilty of commission of Section 420 IPC and convicted him. He was accordingly, awarded a sentence of simple imprisonment for one year with a direction to pay compensation of Rs.50,000/- to the revision petitioner under Sec.357(3) Cr.P.C with a default clause of simple imprisonment for three months.

4. However, in the appeal preferred by the 1st respondent before the Additional Sessions Court, North Paravur as Crl.Appeal No.96/2003, the learned Additional Sessions Judge found that the offence under Sec.420 IPC is not attracted in the facts and circumstances of the case. Accordingly, the 1st respondent was acquitted of the above charge by setting aside the conviction and sentence imposed by the learned Magistrate. Aggrieved by the above judgment of the Additional Sessions Court, North Paravur, the de facto complainant is here with this revision petition.

5. In spite of service of notice, the 1st respondent did not care to appear in these proceedings or to advance arguments.

6. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor representing the 2nd respondent – State of Kerala.

7. Sec.415 of the Indian Penal Code reads 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 facts is a deception within the meaning of this section."*

8. Going by the above provision, the following particulars are required to be established for attracting the offence of cheating:

(i) There should be deception perpetrated upon a person by the accused.

(ii) By perpetrating such deception, the accused should have fraudulently or dishonestly induced the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or should have intentionally induced the person so deceived to do or omit to do anything which he would not do or omit to do, if he were not so deceived.

(iii) The act or omission on the part of the person so deceived should have either caused or likely to have caused damage or harm to that person in body, mind, reputation or property.

9. In addition to the contingencies amounting to cheating mentioned under Sec.415 IPC, Sec.420 IPC covers a situation wherein the person who has been cheated happens to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security. The punishment for such an

act is imprisonment of either description for a term which may extend to seven years, and also fine.

10. As far as the present case is concerned, the pertinent aspect to be looked into is whether the act of the 1st respondent receiving an amount of Rs.50,000/- from the revision petitioner upon the unfulfilled promise of arranging job to the revision petitioner's son, and thereafter issuing a cheque for the said amount on an account which he had voluntarily closed three months prior to the date of issuance of the cheque, towards the repayment of the said amount, leading to the dishonour of the said cheque, would amount to cheating, as envisaged under Section 415 IPC. If it is shown that the 1st respondent was not having any intention at all to return the amount and that the cheque was issued only as a ploy to deceive the revision petitioner, the element of cheating, as envisaged under Section 415 IPC would be clearly brought out in the case on hand.

11. A perusal of the records of this case would reveal that the petitioner had adduced evidence before the trial court that the 1st respondent had obtained an amount of Rs.50,000/- from him on 07.10.1997 upon the promise that he would arrange job

for the petitioner's son in a private establishment. It is further stated by the petitioner in his testimony as PW1 before the trial court that the 1st respondent did not arrange the job to his son as agreed, and that he demanded the money back due to the above reason. After such repeated demands, PW1 would state, the 1st respondent went to his house on 25.04.1998 and handed over Ext.P4 cheque after getting it signed, making him believe that he could encash the above cheque by presenting it before SBI, Aluva where the 1st respondent was having account. PW1 has also stated that he presented Ext.P4 cheque for collection on 19.08.1998 as instructed by the 1st respondent, but it was dishonoured for the reason that the account in which it was drawn had been closed as early as 13.01.1998. Thus it is clearly made out from the above evidence of PW1 that at the time when the 1st respondent executed and issued Ext.P4 cheque on 25.04.1998 to the petitioner towards payment of the amount mentioned in that cheque, the 1st respondent was fully aware of the fact that the said account had been closed by him three months prior to that date, and hence the said cheque would definitely be dishonoured for that reason. The above conduct of

the 1st respondent would definitely amount to deception in so far as it relates to the fraudulent and dishonest inducement made by the 1st respondent to make the petitioner believe that he would be able to get back the amount of Rs.50,000/- which the 1st respondent had obtained from him, by presenting and encashing the said cheque.

12. It seems from the judgment of the appellate court that the learned Additional Sessions Judge was carried away by the impression that if a person issues a cheque after the closure of his account, in respect of an antecedent liability, and the said cheque happens to be dishonoured due to that reason, the above act of that person will not come within the purview of cheating as defined under Section 415 I.P.C. The above conclusion of the learned Additional Sessions Judge, in my view, is patently wrong.

13. It is true that the dishonour of a cheque due to the closure of the account by the drawer, may attract the offence under Section 138 of the Negotiable Instruments Act in certain cases, including those cases where the person executing and issuing the cheque did not have the expectation that his account is closed, or that it is likely to be closed, before the presentation

of that cheque by the payee for encashment. However, in a given case, if it is shown that a drawer of the cheque, after voluntarily closing his account, executed and issued it to the payee with the intention to see that the payee would not encash the amount covered by the cheque which he was indebted to pay, the offence of cheating defined under Section 415 I.P.C will be definitely attracted in the facts and circumstances of that case. The distinction lies on the pertinent question as to the mens rea of the drawer to deceive the payee at the time when he issues the cheque, pretending it to be one drawn on a valid and live account maintained by him. True that the evidence in such cases shall be meticulously analysed to ascertain whether the drawer was having the intention, right from the very beginning, to defeat the attempt of the payee to encash the cheque which he had issued ostensibly to make payment of the amount covered by it.

14. The Hon'ble Supreme Court in **Sangeetaben Mahendrabhai Patel v. State of Gujarat and Another : AIR 2012 SCC 2844** has observed that though there may be some overlapping facts in a prosecution for the offence under Section 138 of the Negotiable Instruments Act and Section 420 I.P.C in

connection with the dishonour of the same cheque due to closure of the account, the ingredients of the said offences are entirely different, and subsequent prosecution under Section 420 I.P.C in respect of a case which had already been prosecuted under Section 138 of the Negotiable Instruments Act, is not barred by any statutory provisions. Paragraphs 27 and 28 of the judgment of the Hon'ble Supreme Court in the aforesaid case are extracted as follows:

> *"27. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of S. 138 NI Act and the case is sub judice before the High Court. In the instant case, he is involved under S. 406/420 read with S.114 I.P.C. In the prosecution under S.138 N.I.Act, mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under S.420 I.P.C is a serious one as the sentence of 7 years can be imposed. In the case under NI Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In*

the case under NI Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under NI Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.

28. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions."

15. Thus, it could be safely concluded that the offence of cheating envisaged under Indian Penal Code would be attracted in those cases of dishonour of cheques due to closure of account where the mens rea, that is, the fraudulent or dishonest intention of the drawer at the time of issuance of the cheque, to deceive the payee, is established from the facts and circumstances of the case.

16. The same view has been expressed by the Full Bench of Andhra Pradesh High Court in **OPTS Marketing Pvt.Ltd. (M/s.) and Others v. State of A.P and Others : 2001 KHC 2132** wherein, after an elaborate discussion on the case laws on

this point, it has been observed in paragraph No.27 of that judgment as follows:

> *"27. In the result, we hold that (i) even after introduction of S. 138 of the Negotiable Instruments Act, prosecution under S. 420, IPC is maintainable in case of dishonour of cheques or postdated cheques issued towards payment of price of the goods purchased or hand loan taken, or in discharge of an antecedent debt or towards payment of goods supplied earlier, if the charge sheet contains an allegation that the accused had dishonest intention not to pay even at the time of issuance of the cheque, and the act of issuing the cheque, which was dishonoured, caused damage to his mind, body or reputation, (ii) private complaint or FIR alleging offence under S. 420, IPC for dishonour of cheques or postdated cheques cannot be quashed under S. 482. Cr. P.C. if the averments in the complaint show that the accused had, with a dishonest intention and to cause damage to his mind, body or reputation, issued the cheque which was not honoured. Point No. 2 is answered accordingly."*

17. The observation of the learned Additional Sessions Judge about the non-applicability of Section 415 I.P.C, by relying on the decision of this Court in **Surendran v. Ramachandran Nair : 1967 KLT 804 : 1967 KHC 265**, appears to be erroneous

since the facts and circumstances of the case discussed in the said decision are totally different from the facts and circumstances of the present case wherein the mens rea of the 1st respondent to cheat the petitioner is clearly brought on record. So also, it is seen from the impugned judgment of the learned Additional Sessions Judge that, upon a wrong interpretation of the dictum laid down by this Court in **Salim v. Thomas : 2004 (1) KLT 816**, it has been concluded that, until the last unused cheque leaf is returned to the bank by the drawer, it must be held that such account holder continued the account with the bank, and hence the dishonour of the cheque involved in this case, will not constitute the offence of cheating. In fact, the said concept of presumption of account remaining live till the unused cheque leaves are surrendered to Bank, has been invoked by this Court in that decision to ensure that the drawer of a cheque cannot escape from the criminal liability of Section 138 of the Negotiable Instruments Act, by contending that the dishonour of cheque was for the reason of closure of accounts, and not due to insufficiency of funds in his account, as envisaged under the said provision. There is absolutely nothing

laid down in the said decision to the effect that under no circumstances, the offence of cheating would be attracted in a case where the drawer of a cheque issues the same, after the closure of his account, with the fraudulent and dishonest intention to prevent the payee from getting the amount due from him.

18. Thus, it has to be stated that the finding of the learned Additional Sessions Judge about the non-applicability of the offence of cheating in the facts and circumstances of this case, is manifestly against the settled principles of law. Needless to say that the judgment rendered by the appellate court upon the above finding, is liable to be set aside.

19. As already stated above, the requirements of Section 415 I.P.C to constitute the offence of cheating are clearly attracted in the facts and circumstances of this case. The offence so attracted is punishable under Section 417 I.P.C with imprisonment of either description for a term which may extend to one year, or with fine, or with both. Having regard to the facts and circumstances of the case and the present stage of this litigation, which has been pending for a quarter of century, I feel

that the sentence shall be limited to imprisonment till the rising of court and fine Rs.1,00,000/- (Rupees One Lakh only), out of which an amount of Rs.90,000/- (Rupees Ninety Thousand only) shall be paid as compensation to the revision petitioner under Section 357(1)(b) Cr.P.C.

20. In the result, the revision stands allowed as follows:

(i) The judgment dated 19.10.2004 of the Additional Sessions Judge, North Paravur in Crl.Appeal No.96/2003, is hereby set aside.

(ii) The 1st respondent (accused in C.C.No.561/1999 of Judicial First Class Magistrate Court-I, Aluva) is found guilty of Section 417 I.P.C., and he is convicted thereunder.

(iii) The 1st respondent (accused in C.C.No.561/1999 of Judicial First Class Magistrate Court-I, Aluva) is sentenced to imprisonment till the rising of court and fine Rs.1,00,000/- (Rupees One Lakh only).

(iv) Out of the above fine of Rs.1,00,000/-, if realized, an amount of Rs.90,000/- (Rupees Ninety Thousand only) shall be paid as compensation to the petitioner (PW1 in C.C.No.561/1999) under Section 357(1)(b) Cr.P.C.

(v) In the event of default of payment of fine, as directed above, the 1st respondent shall undergo simple imprisonment for a term of six months.

Transmit a copy of this order, along with case records, to the trial court, for expeditious enforcement of the sentence.

(sd/-)

G.GIRISH, JUDGE

jsr/vgd