



2023/KER/39786

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 14TH DAY OF JULY 2023 / 23RD ASHADHA, 1945

CRL.MC NO. 2455 OF 2016

CRIME NO.274/2015 OF KADAKKAL POLICE STATION, KOLLAM

CMP 1301/2015 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, KADAKKAL

PETITIONERS/ACCUSED NOS.1 AND 2:

- 1 VIJAYAN
AGED 50 YEARS
S/O. MADHAVAN, PUNAYATH PUTHAN VEEDU,
DHARBHAKKAD, KADAKKAL, KOLLAM
- 2 KUNJAMMA
AGED 71, THADATHIVILA VEEDU, KUTTIKKAD, KADAKKAL, KOLLAM
BY ADV SRI.LIJU. M.P

RESPONDENTS/DE FACTO COMPLAINANT & COMPLAINANT:

- 1 STATE OF KERALA
REP. BY SUB INSPECTOR OF POLICE, KADAKKAL POLICE STATION,
KOLLAM DIST., PIN- 691 536
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM
- 2 BABY LATHIKA
W/O. GOPALAKRISHNAN, AGED 60, MANAKKUNNIL VEEDU, MAITHRI
NAGAR NO. 189, KOTTARAKKARA, KOLLAM DIST., -PIN- 691 506
R1 BY SR.PUBLIC PROSECUTOR SRI.P.G.MANU
R2 BY SRI.N.UNNIKRISHNAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD 10.07.2023,
THE COURT ON 14.7.2023, PASSED THE FOLLOWING:

**CR****A.BADHARUDEEN, J.****-----
Crl.M.C.No.2455 of 2016
-----****Dated this the 14th day of July, 2023****ORDER**

This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure and the petitioners are accused Nos.1 and 2 in Crime No.274/2015 of Kadakkal Police Station, Kollam, now pending as C.C.No.471/2016 on the files of Judicial First Class Magistrate Court, Kadakkal.

2. The respondents herein are State of Kerala as well as the original complainant.

3. Heard the learned counsel for the petitioners as well as the learned Public Prosecutor, in detail.

4. Perused the relevant documents made available.

5. Background facts:



The original complainant is a widow and the 1st accused is her brother. The 2nd accused is the relative of the 1st accused. The specific allegation is that, accused Nos.1 and 2 availed loan to the tune of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand only) from Kadakkal Service Co-operative Bank No.3456 and offered the property of the complainant towards security of the loan by creating mortgage. The sum and substance of the allegation in the complaint lodged by the complainant is that, the accused herein failed to repay the amount and accordingly, the bank proceeded against the property to recover the debt. It is on this premise, the complainant would allege that the accused herein cheated her without repaying the loan amount. When a private complaint was lodged before the Judicial First Class Magistrate Court, Kadakkal, narrating the said allegations, the same was forwarded to the police and the same culminated in filing of Annexure D - Charge Sheet.

6. The petitioners, who are accused Nos.1 and 2, would allege that, no offence under Section 420 r/w Section 34 of the Indian Penal Code (for short 'the IPC' hereinafter) would attract in the facts of the given case. The specific case put up by the



accused is that, the 1st petitioner availed a loan of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand only) from Kadakkal Service Co-operative Bank, after mortgaging the property of the de facto complainant, to secure money for treatment of carcinoma. Therefore, the petitioners had no deceitful intention at the time of inception to cheat or defraud the complainant in any manner and therefore, the final report produced as Annexure D, is liable to be quashed.

7. Whereas, it is submitted by the learned Public Prosecutor that, when there is intention of cheating at the very inception, the matter has to go for trial to elicit the ingredients of Section 420 of IPC.

8. The crucial question arises for consideration is; whether in the facts of the given case, an offence under Section 420 r/w Section 34 of IPC would attract?

9. Insofar as the ingredients to attract offence under Section 420 of IPC is concerned, the law is well settled. In the decision reported in **Raghavender N. v. State of Andhra Pradesh, CBI** [2021 KHC 6834 : 2021 KHC OnLine 6834 :



2021 (6) KLT OnLine 1071: AIR 2022 SC 826], the Apex Court considered the ingredients necessary to attract offence under Section 420 of IPC and held that, *in order to attract the provisions of S.420 IPC, the prosecution has to not only prove that the accused has cheated someone but also that by doing so, he has dishonestly induced the person who is cheated to deliver property. There are, thus, three components of this offence, i.e., (i) deception of any person, (ii) fraudulently or dishonestly inducing that person to deliver any property to any person, and (iii) mens rea of the accused at the time of making the inducement. It goes without saying that for the offence of cheating, fraudulent and dishonest intention must exist from the inception when the promise or representation was made. It has been settled further that, the phrase 'dishonestly' emphasizes a deliberate intention to cause wrongful gain or wrongful loss, and when this is coupled with cheating and delivery of property, the offence becomes punishable under S.420 IPC. Contrarily, the mere breach of contract cannot give rise to criminal prosecution under S.420 unless fraudulent or dishonest intention is shown right at the beginning of the*



transaction. It is equally important that for the purpose of holding a person guilty under S.420, the evidence adduced must establish beyond reasonable doubt, mens rea on his part. Unless the complaint showed that the accused had dishonest or fraudulent intention 'at the time the complainant parted with the monies', it would not amount to an offence under S.420 IPC and it may only amount to breach of contract.

10. In a subsequent decision reported in **Vijay Kumar Ghai and Others v. State of West Bengal and Others** [2022 KHC 6328 : 2022 (1) KLD 683 : 2022 KHC OnLine 6328 : 2022 (5) SCALE 154: 2022 (2) KLT OnLine 1142 : 2022 (7) SCC 124 : 2022 SCC OnLine SC 344] also, the Apex Court reiterated the ingredients as under:

"To establish the offence of Cheating in inducing the delivery of property, the following ingredients need to be proved: 1. The representation made by the person was false. 2. The accused had prior knowledge that the representation he made was false. 3. The accused made false representation with dishonest intention in order to deceive the person to whom it was made. 4. The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise



committed. Ingredients to constitute an offence under S.420 are as follows: i) a person must commit the offence of cheating under S.415; and ii) the person cheated must be dishonestly induced to; a) deliver property to any person; or b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under S.420 IPC.”

Similarly, in **Vijay Kumar Ghai and Others (supra)**, the Apex Court drawn distinction between mere breach of contract and cheating and held that breach of contract could not give rise to criminal prosecution for cheating, but fraudulent or dishonest intention is the basis of the offence of cheating.

11. Coming back to the facts of this case, going by the available materials, it is emphatically clear that, loan was availed by accused Nos.1 and 2 for the treatment of cancer suffered by the 1st accused and for which, the property of the de facto complainant, who is the direct sister of the 1st accused, was offered as security by creating mortgage to ensure realisation of the loan amount from the property. It may be true that the understanding between the parties might be to clear the loan by accused Nos.1 and 2. When the property of



the complainant was offered as security to avail loan to meet the cancer treatment of her own brother, the said purpose could not be held as an act, where deceitful intention is available at the threshold or inception. It is true that, if accused Nos.1 and 2 failed in fulfilling the terms of the contract to repay the amount and to discharge the liability, then, the said act would attract only breach of contract and the same shall not come under the purview of cheating. That is to say, mere breach of contract by itself, would not constitute an offence of cheating and cheating as an offence shall be established by the ingredients hereinabove extracted and by establishing deceitful intention to get wrongful gain to the accused and corresponding loss to the victim at the very inception.

12. On analysis of the facts of the case as discussed herein, on no stretch of imagination, it can be held that the accused herein had deceitful intention at the very inception to cheat the de facto complainant in any manner, even though they might have failed in fulfilling the contract to repay the amount, so as to discharge the property from liability. Holding so, I am of the view that the petition would succeed.



Accordingly, entire proceedings in Crime No.274/2015 of Kadakkal Police Station, Kollam, now pending as C.C.No.471/2016 on the files of Judicial First Class Magistrate Court, Kadakkal, stand quashed.

Sd/-
A. BADHARUDEEN
JUDGE

Bb



APPENDIX OF CRL.MC 2455/2016

PETITIONERS' EXHIBITS

ANNEXURE A CERTIFIED COPY OF THE FIR IN CRIME NO.274/2015 OF KADAKKAL POLICE STATION, KOLLAM AND PRIVATE COMPLAINT VIZ. C.M.P NO 1301/2015 ON THE FILE OF JUDICIAL FIRST CLASS MAGISTRATE COURT, KADAKKAL.

ANNEXURE B TRUE COPY OF THE PLAINT IN OS NO 735/2015 ON THE FILE OF MUNSIFF'S COURT, KOTTARAKKARA

ANNEXURE C TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER IN INJUNCTION PETITION, VIZ. I.A.NO 5362/2015 IN OS NO 735/2015 ON THE FILE OF MUNSIFF'S COURT, KOTTARAKKARA.

ANNEXURE D CERTIFIED COPY OF THE FINAL REPORT IN CRIME NO.274/2015 OF KADAKKAL POLICE STATION, KOLLAM

RESPONDENTS' EXHIBITS NIL

//TRUE COPY//

PA TO JUDGE