

(1958) 09 GAU CK 0003
In the Gauhati High Court

Asad Ali Tahsildar

APPELLANT

Vs

Answar Ali

RESPONDENT

Date of Decision : 24-09-1958

Acts Referred:

Evidence Act, 1872 — Section 92
Penal Code, 1860 (IPC) — Section 417

Citation : (1959) CriLJ 1216

Hon'ble Judges : J.N. Datta, J.C.

Bench : Single Bench

Judgement

J.N. Datta, J.C.

1. This is a reference by the learned Sessions Judge, and arises out of a complaint case u/s 417 of the I.P.C.

2. The facts briefly stated are, that in 1952 the complainant (petitioner) filed a complaint against the Non-applicant, alleging that the N. A. had obtained settlement of some lands Benami in the name of the complainant. During the last Great War. the Government acquired these lands for a compensation of Rs. 763/-. As the lands stood in the name of the complainant, Government paid the amount of compensation to him, and he in turn paid it to the N. A. Later the Government found that no compensation was payable, and the complainant was asked to refund the amount.

The complainant approached the N. A. and asked him to pay up, but he refused. The N. A. had thereby committed the offence of cheating. It is difficult to see how these facts would constitute the offence of cheating, but it is not necessary for the purpose of this reference to go into the merits of that question.

3. Be it as it may that case was compromised upon the N. A. agreeing to refund the amount of compensation and the N, A. was acquitted. According to the complainant he owed Rs. 450/- to the N. A. and it was decided in the compromise, that the complainant would retain Rs. 100/- out of it for the costs

incurred in that criminal case by him, and repay Rs. 350/- to the N. A., which he did at the time.

Thereafter the N. A. failed to pay back the amount of compensation, in spite of repeated demands. He therefore filed the present complaint out of which this reference arises, in 1954, alleging that had he known that he would be thus cheated he would neither have withdrawn the previous complaint, nor repaid Rs. 350/- to the N. A. It might be mentioned here that all these terms were neither mentioned in the petition for permission to compromise or the compromise petition, and they contained a bare recital that the parties had compromised the case, being relations.

4. The learned trial Magistrate, after examining the prosecution witnesses framed a charge against the N. A. u/s 417, thus:

That you on or about the 30th day of July 1953 at a time at noon deceived complainant Sri Ansar Ali by fraudulently inducing him to deliver payment of Rs. 350/- to you with commitment to him that you will pay off the government dues which you did not pay in the long run and thereby committed an offence punishable-under Section 417 I. P. C. and within my cognizance. And I hereby direct that you be tried on the said charge.

5. It will be thus clear, that the charge relates only to the inducement leading to the repayment of Rs. 350/-, and we are concerned only with that for the purpose of this reference, the recommendation of the learned Sessions Judge being for quashing that charge.

6. One of the contentions of the petitioner, which found favour with the learned Sessions Judge, was that the present case was hit by Section 403 Cr. P.C. But the facts and charge stated above, will make it amply clear, that the offence alleged in the present case, was a subsequent and different offence, though of the same nature and arising out of the same dispute over the refund of compensation amount.

The transaction was quite different, and so were the alleged facts. The present case was based on a fresh and subsequent inducement, and the point will be clear from the fact, that the present charge could not have been included in the first case. As a matter of fact, it did not and could not exist then. I am therefore of the view that Section 403 is not attracted to the present case, and the learned Counsel for the petitioner, had also to concede this in the course of arguments.

7. Another contention, which was also upheld by the learned Sessions Judge is, that it is not now open to the complainant in view of Section 92 of the Evidence Act, to prove by oral evidence the alleged terms of the compromise, because they were not mentioned in the compromise petition. Here also I must differ, because the case appears to fall within the purview of Proviso (2) to Section 92.

That proviso saves collateral agreements. On the face of it, the compromise petition appears to have been a document of an informal nature, not giving the

complete terms of the compromise. It was therefore open to the complainant to prove the other terms, left out from that document.

8. The remaining point to be considered is whether the facts of the case constitute the offence of cheating. It is complainant's own case that he owed Rs. 450/- to the N. A. and at least Rs. 350/- were due to him from the complainant, which he was bound to pay. That repayment in itself, though it was denied by the N. A. would be quite innocent, and the real question is whether it was due to a deception on the part of the N. A. In the present case it was alleged that the complainant was induced to repay this sum, by the promise of the N. A. that he would clear up the compensation amount. The written complaint and the examination of the complainant by the learned Magistrate, are not however very clear on this point. Complainant's statement from the witness-box, also does not show clearly that the alleged inducement preceded the payment and that inducement was given by the accused himself; because it appears that the compromise was got effected through the intervention of others.

Besides this there is nothing conclusive to show criminal intention on the part of the N. A. Subsequent conduct is no doubt a piece of evidence in this matter but that alone cannot be enough in every case, and it is the circumstances of each case, which have to be considered along with subsequent conduct, for the decision of this point.

It is well settled that a mere breach of a contract cannot give rise to a criminal prosecution. This is so, because at the time of entering the contract a man may honestly have the intention of carrying out the contract, but later may not be able to do so for more than one reason, or may change his mind. The distinction between a case of mere breach of contract and one of cheating therefore depends upon the intention of the accused at the time of the alleged inducement, and where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in a Civil Court the matter should not be allowed to be fought in a Criminal Court see *Sheosagar Pandey v. Emperor* 37 Cri. LJ 38 .

9. After taking all the circumstances of the present case into consideration, I think that the instant case is one of such a nature, and the N. A. should not be put to the harassment of having to undergo a criminal trial. It is rather surprising in the context of what is alleged, that the complainant should not take a writing for all this, or at least have it embodied in the compromise petition. It appears also a little unnatural that he should pay the amount of Rs. 350/- to the N. A., when in fact he should have insisted upon the N. A. paying the difference before the compromise petition was filed, specially when it is from the complainant, that the Government was going to recover the amount of compensation.

All this not only introduces elements of doubt in the prosecution story, but also as regards the question whether any inducement really proceeded from the N. A.

as is now tried to be made out. Over and above this as already stated the possibility of the N. A. having no criminal intention at the time, and it being a case of a mere breach of contract, cannot be reasonably excluded in the circumstances of the case. No useful purpose will therefore be served by allowing the trial to go on, nor is it necessary in the interests of justice.

10. I therefore accept the reference of the learned Sessions Judge, and quash the charge framed by the learned Magistrate against the N. A. It is further ordered that the whole proceeding before the learned Magistrate be quashed and the N. A (accused) be discharged.