

(1989) 12 MP CK 0020

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 2710 of 1989 (J)

Mahima Kant Chatterjee and others

APPELLANT

Vs

Shashank Shekhar Mukherjee and another

RESPONDENT

Date of Decision : 04-12-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1990) MPJR 145

Hon'ble Judges : Gulab C. Gupta, J

Bench : Single Bench

Advocate : Anoop Choudhary, for the Appellant; P.R. Bhawe, Advocate, for the Respondent

Judgement

Gulab C. Gupta, J.

Applicant-accused persons, in Misc. Cr. Case No. 349/89 pending before the Judicial Magistrate Class I, Raigarh, seek interference of this Court u/s 482 Code of Criminal Procedure to quash those proceedings on the ground that they amount to abuse of the process of the Court and it is otherwise necessary to do so to secure the ends of justice.

The non-applicant No. 1 and applicant No. 4 Smt. Sujata Mukharjee were married on 8-2-1984 at Raipur in accordance with Hindu rites, after which the applicant No. 4 went to Raigarh to stay with the non-applicant No. 1. The non-applicant, in his complaint alleged that he could not consummate his marriage by performig sexual act as the applicant No. 4 avoided the same on one pretext or the other. The non-applicant further alleged that while avoiding the sexual intercourse, the applicant No. 4 had been stealthily getting treatment from Doctor Mst. Shrivastava at Raigarh. It is further alleged that the applicant No. 4 suffered from physical disability and was, therefore, incapable of engaging in sexual intercourse. The applicants are alleged to have got the applicant No. 4. treated at Raipur and for that purpose a D. & C. operation was performed on 15-11-85. The complainant/non-applicant further alleged that the applicants had

not informed him of the aforesaid physical disability of the applicant No. 4. and had thereby dishonestly induced him to get married. This, according to the non-applicant, amounted to an offence punishable u/s 419, 420 read with Section 120-B, I.P.C. The complaint was filed before the Magistrate on 5-4-1985 on which date the statement of the applicant was also recorded. The learned Magistrate, however, did not issue process on 5-4-1989(sic) and adjourned the case for taking statement of other witnesses. On 15-6-89 one Rajendra Prasad was examined as a witness of the non-applicant and the case again postponed to 17-6-89 for consideration. On 17-6-89 the learned Magistrate formed the opinion that the facts alleged establish commission of offence u/s 417/34 I.P.C. against the applicants 1 to 3 and Section 417 against the applicant No. 4 and directed issue of summons to the applicants for their appearance in the Court challenging legality of the aforesaid order.

Section 417 I.P.C. punishes "cheating", defined u/s 415 I.P.C. In order to "constitute", within this provision, it is necessary that: (i) there should be "fraudulent" or dishonest inducement of a person by deceiving him; (ii) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or the person so deceived should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by second part of (ii) above, the "act" or "omission" should be one which causes or is likely to cause "damage" or "harm" to the person induced in body, mind, reputation or property. These ingredients have been fully explained by the Supreme Court in *Ram Jas Vs. State of U.P.*, and are otherwise clear from the language of Section 415 I.P.C. In order to satisfy these requirements, the complaint, in the instant case, should prima facie disclose that the applicants "fraudulently" or "dishonestly" induce the non-applicant by deceiving him to agree to marriage. It should, therefore, be shown prima facie that the non-applicant would not have married if he was not so deceived and, thereafter it must prima facie be established that the marriage has caused him "damage" or "harm" in body, mind, reputation or property. "Deceit" is, therefore, an essential element of this offence and unless there is evidence of deception no charge under this provision can be framed. The facts aforesaid do not, in the opinion of this Court, satisfy this requirement. Assuming that the applicant No. 4 is incapable of engaging in sexual intercourse, her silence and thereby not disclosing this physical defect to the non-applicant before marriage would not be dishonest. It is not the non-applicant's case that he had asked the applicant No. 4 about her physical capacity and she had dishonestly or fraudulently deceived him. If Indian condition is taken into consideration such examination of the future bride by a future bride groom is really unthinkable. Then the complainant himself states that he knew the physical defect in the applicant No. 4 immediately after marriage and got her treated by a Vaidya. This would not justify inference of any intention to deceive on the part of the applicant No. 4. It is otherwise reasonable to assume that the physical defect of the type alleged could possibly not have

remained unknown after marriage and, therefore, its concealment would not be possible. Under the circumstances, something more than mere concealment would be required to attract application u/s 415 I.P.C. Be that as it may, these facts do not justify the inference that the facts alleged disclose dishonest or fraudulent inducement of the non-applicant by deceiving him. There would, therefore, be no justification for alleging "cheating" by the applicant No. 4. As regards applicants 1, 2 and 3, they would also not, in the opinion of this Court, be liable u/s 415 I. P. C. It is the natural desire of every parent of a marriageable girl to get her married. The parents are, however, not expected to either know physical defects in the girl particularly when those defects are not visible. If the physical defect complained of was visible, the non-applicant would not have gone through the marriage. There can be no dishonest concealment of alleged defect unless the defect was within the knowledge of the applicants No 1.2 and 3. Appreciating allegations in the context of Indian Social Conditions, it is not possible to believe that the father and brothers of a grown-up girl would normally know that she was incapable of engaging in sexual intercourse or procreate after marriage. They cannot, therefore, be prosecuted for offence of "cheating". The mother of marriageable girl may, in some cases, be aware of physical defect in her daughter but such a conclusion cannot be drawn on the basis of relationship alone and much will depend on the social and educational status of the mother and the character of relationship. There is nothing either in the complaint or in the statement of witnesses recorded by the Magistrate to show even prima facie that the applicant No. 3 was aware of the so called physical defect in the applicant No. 4. The general statement of the non-applicant that the applicants Nob. 1 to 3 had not disclosed any physical defect in the applicant No. 4 cannot by any stretch of imagination be accepted as indicative of their knowledge of the defect or it's intentional concealment. In this view of the matter, the necessary ingredients to constitute offence of cheating would remain totally absent.

This Court is also not satisfied that the third ingredient of offence of "cheating" is existing in this case. The non-applicant has not either in the complaint or statement, stated as to what damage or harm he suffered in body or mind. A mere stress or strain would not, in the opinion of this Court, be sufficient to meet this requirement. Damage or harm is something more than mere strain. A childless couple does not necessarily suffer damage or harm though they may remain worried about it.

In view of the aforesaid, it must be held that the complaint and the evidence do not prima facie disclose commission of offence u/s 415 I.P.C. and, therefore, it would be abuse of the process of the Court to put the applicants on trial. The interest of justice, therefore, requires that they are spared of it by exercise of extra-ordinary powers of this Court u/s 482 Cr.P.C.

Two facts apparent of the face of the record prompt this Court to express its concern about the easy style of functioning of the Judicial Magistrate. Rajendra Prasad Sahu has, in para 3 of his statement, deposed that he along with non-

applicant and Nakul Prasad had taken the applicant No. 4 to Banga for treatment. This is also the statement of the non-applicant in para 6 of his evidence. It indicates that the non-applicant knew the physical defect, if any, in the Appellant No. 4 immediately after his marriage in February 1984. If the physical defect was of the type alleged in the complaint treatment from Vaidya in a village would not have been resorted to. This, therefore, required clarification. Then the further fact that applicant No. 4 was subjected to D. & C. operation would also cast doubt about the correctness of the allegation of the physical defect and needed clarification. The impugned order of the trial Magistrate does not disclose any reason and, therefore, it is not possible to ascertain why and how the learned Magistrate thought that the complaint discloses prima facie commission of offence punishable u/s 417 I.P.C. A judicial order necessarily contains reasons leading to any particular conclusion. It is not necessary for the Magistrate to write a judgment at this stage and yet the law requires him to briefly state reasons for its conclusion. Registering a complaint necessarily means that the person accused will be required to face trial which, in the context of present factual situation, may last for about five years. Before subjecting any person to such a trial, it would be in the interest of justice to seriously consider whether the facts alleged against him really constitute an offence. The fact that such an exercise has not been undertaken must be regretted.

The learned Counsel for the applicants has brought to notice of this Court that the non-applicant had earlier filed a similar complaint before Shri A. K. Poddar, Judicial Magistrate, First Class, Raigarh, on 16-12-88 which was sent for investigation by the police officials. The police report on the said complaint did not disclose commission of any offence and on the contrary, found that the evidence collected during the investigation does not disclose the type of physical defect alleged by the non-applicant. The said complaint was, therefore, dismissed in the absence of non-applicant on 1-4-89. This fact has not been disclosed in the present complaint. No reason has been assigned for its non-disclosure. It is, therefore, possible to hold that the non-applicant is not an honest litigant and is capable of misleading the Magistrate by concealing such an important fact. In a situation like this, and in the context of allegations made, it would have been proper for the Judicial Magistrate to require the police officials to conduct investigation into the complaint and submit report. Such a course might have brought the aforesaid concealment to the knowledge of the Magistrate and would have also saved him of the remark of not handling the matter as seriously as required by law.

The application succeeds and is allowed. The impugned order of Shri A. K. Samantre, Judicial Magistrate First Class, Raigarh dated 17-6-89 in Criminal Case No. 349/89 is hereby quashed and the complaint filed by the complainant dismissed as not disclosing sufficient ground for issuing process against the applicants.