
(2000) 06 AP CK 0024

In the Andhra Pradesh High Court

Case No : Criminal RC No. 606 of 1999 and Criminal RP No. 598 of 1999

Maripalli Mahirathnam Gupta

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 22-06-2000

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Penal Code, 1860 (IPC) — Section 120
Theft Act, 1968 — Section 16

Citation : (2000) 6 ALD 180 : (2000) 2 ALD(Cri) 496

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : Mr. T. Niranjan Reddy, for the Appellant; Public Prosecutor, for the Respondent

Judgement

1. The revision petitioner assails the conviction and the sentence passed by the II Additional Judicial Magistrate of First Class, Nellore by his Judgment dated 28-11-1994, in CC No.331 of 1989 convicting him for the offence u/s 420 of IPC and sentencing him to suffer rigorous imprisonment for six months and further sentencing him to pay a fine of Rs.1,000/- and in default to suffer simple imprisonment for one month and confirmed by the I Additional Sessions Judge, Nellore, by his judgement dated 6-5-1999 in Criminal Appeal No.139 of 1994.

2. In connection with picturisation of motion picture entitled "Bharya Bharthala Bhagavatham" in the year 1987, it is said that the petitioner approached PWs.1, 2 and 3 for loan. PW1 paid an amount of Rs.80,000/- to the petitioner as loan on the foot of the promissory note dated 25-8-1987 in Ex.P1. PW2 advanced an amount of Rs.70,000/- on the foot of. another promissory note dated 27-6-1987 in Ex.P9. PW3 paid an amount of Rs.70,000/- on 17-8-1987 under Ex.P10-promissory note. Interest was stipulated at 24 per cent per annum. It is the further case of the prosecution that the petitioner could not repay the amount and when pressure was brought upon him for repayment, he delivered post dated cheques to all the three creditors. Ex,P2 dated 25-8-1988 for Rs.50,000/-;

Ex.P3 dated 26-9-1988 for Rs.50,000/-; and Ex.P13 dated 27-10-1988 for Rs.92,400/- are, according to the prosecution, post dated cheques issued by the petitioner. All these cheques were presented before the Canara Bank three months thereafter. All the three cheques were bounced on the premise that the account was closed. It is further said that thereafter the whereabouts of the petitioner were not known, upon enquiries made by the witnesses-PWs.1 to 3. On a report-Ex.P6 lodged by PW1 with CCS Police, the criminal law was set into motion and eventually after investigation the charge-sheet was filed and cognizance was taken for the offence u/s 420 of IPC against the revision petitioner.

3. In the trial six witnesses were examined on the side of the prosecution and Exs.P1 to P18 were got marked. The plea of the revision petitioner is denial of having executed the promissory notes and denial of having issued the cheques. Upon considering the evidence on record, both oral and documentary, the trial Court, as aforesaid, convicted the petitioner for the offence of cheating u/s 420 of IPC and sentenced him accordingly. The appeal, too, ended in dismissal confirming the conviction and sentence.

4. Having been aggrieved by the said conviction and sentence, the petitioner filed the present revision case.

5. Shri T. Bal Reddy, learned senior Counsel appearing for the revision petitioner, contends that the case against the accused does not come squarely within the four corners of Section 420 of IPC. The learned senior Counsel further submits that at best it is a case of breach of promise, which entails a civil liability and the petitioner cannot be prosecuted for any criminal offence.

6. For brevity and better understanding of the matter, it is expedient here to extract Section 415 of IPC, which defines "offence of cheating", so that the evidence can be better appreciated. Section 415 IPC reads thus;

"415. 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."

7. It is manifest, on a perusal of the said section, that who elements are required to bring forth the said offence. Firstly, that there shall be deception played by a person fraudulently and dishonestly inducing another, either to deliver any property to that person or to consent that person shall retain any property; and secondly there shall be intentional inducement of any person to do or omit to do anything which that person would not do, or omit to do but for the deception

played and which act or omission causes or likely to cause damage or harm to that person either in body or mind or reputation or property. Taking into consideration the facts and circumstances peculiar to this case, the first part of the section has obviously no application to the instant case. Coming to the second part, there must be an intentional inducement on the part of the offender to do or to omit to do anything by the other person who but for the inducement would not do it or omit to do it. It is not ended there. That act or omission either causes or likely to cause any damage to the person or property.

8. Turning to the facts in the instant case, the evidence discloses that the revision petitioner executed Exs.P1, P9 and P10 - promissory notes for amounts of Rs.80,000/-, Rs.70,000/- and Rs.77,000/- in favour of PWs.1 to 3 respectively. Notwithstanding the plea taken by the accused denying of having executed any such promissory notes and issuing the cheques subsequently, the evidence amply discloses, the execution of three promissory notes and existence of relationship of debtor and creditor in between the revision petitioner and PWs. 1 to 3. The evidence on record also discloses the subsequent issuance of the post dated cheques-Exs.P2, P3 and P13 at the respective dates and for the respective amounts as detailed supra. Keeping in juxtaposition, if we see these documents, it is discernable that nearly a few months subsequent to execution of three promissory notes the post dated cheques have been issued. Ex.P4 is the memo issued by the Branch Manager, Canara Bank, whereunder it has been mentioned, inter alia, that the account has already been closed by the petitioner. So, it is obvious that all the three cheques have been bounced as no account has been in existence at the relevant time. The evidence further discloses that even by 14-5-1988 there was no account in the name of the revision petitioner with the said Canara Bank. As a necessary corollary, all the three post dated cheques have been issued knowing pretty well that there has been no account in vogue by then. These facts, which are clearly discernable from the evidence of the witnesses available on record, would attract squarely the offence of cheating as defined u/s 415 of IPC and punishable u/s 420 of IPC or not is the moot question. The issue will not detain me any longer as it is no more *res Integra* and has been the subject matter of discussion of several judgements including that of this Court and the Apex Court.

9. The learned senior Counsel appearing for the revision petitioner seeks to place reliance upon a judgement of the Madras High Court in *Chidambaram Chettiar v. Shanmugham Pillai* AIR 1938 Mad. 129; a judgement of this Court in *P. Eswara Reddy v. State of Andhra Pradesh* 1985 (3) APLJ 43; and that of the Apex Court in *Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another*, , so as to drive home the point that the offence as defined u/s 415 I.P.C has not been attracted. Even before adverting to the three judgments on the point going by the definition given u/s 415 IPC and the essential ingredients enjoined there under to attract the said offence, obviously the first part of the section has not been squarely covered by the facts of this case. The debt was contracted long prior to issuance of the cheques. After having gone through the oral testimony of

PWs.1 to 3, it is not discernable that the revision petitioner had necessary intention at the inception to deceive PWs.1 to 3. Obviously, the debt was contracted for the purpose of producing a motion picture. Therefore, it is a case of subsequent inability to pay the debt. At any rate, it is not a case where the initial contracting of the debt is associated with the necessary intention to play the deception upon PWs.1 to 3. That is one aspect. Now in view of the above discussion, all the three post dated cheques have been issued knowing pretty well that there has been no account in existence by then, is the second aspect.

10. The second limb of Section 415 of IPC ordains that inducement must be to make the other person induced to do or omit to do anything, which he would not do but for the inducement and by such act or omission, he should suffer harm either to his person or damage to his property. By issuing these post dated cheques, it cannot be said that by any stretch of imagination that PWs.1 to 3 were expected to do or omit to do anything, which might ultimately result in the damage of the property. The moment all the three cheques were bounced, PWs.1 to 3 were not as though left with any remedy. They could as well sue the revision petitioner for realisation of the debt covered by the three promissory notes. Therefore, bouncing of the cheques is not the end of the matter. This civil remedy available to the witnesses is not taken away either by the point of limitation or by any legal bar. Obviously, it cannot be said that these witnesses were induced to do anything upon issuance of these cheques, which were later bounced.

11. Let us now consider the law on the point, as enunciated by the Courts in the three judgments referred supra. The former judgment is that of the Madras High Court, wherein the matter pertains to issuance of post dated cheques. It was held by the Madras High Court at Page 130 as follows:

"In my judgment the complaint in question does not on its face show that any criminal offence has been committed. In the offence of cheating (Section 415, IPC) there are two elements-deception and dishonest inducement to do or omit to do something. Let it be assumed that petitioner deceived and was dishonest. Mere deception is not a criminal offence. Mere dishonesty is not a criminal offence. The crux of the question in this case is whether A.S. Manickam & Co. were induced by petitioner's dishonest deception not to file a suit at once against him. On the facts stated it is clear that they were not. The post dated cheque was given on 23rd March, 1937 and dishonoured on 5th April, 1937 (an interval of 13 days), but no suit was filed until 9th August, 1937 (a further delay of four months). Moreover, to establish the offence of cheating, the complainant would have to show not only that he was induced not to file a suit for 13 days but that this induced omission on his part caused or was likely to cause him some harm or damage in body, mind reputation or property-which are presumed to be the four cardinal assets of humanity."

12. In the second judgment, following the above judgment of the Madras High Court, this Court held in Para 15 as follows:

"Once the debt is already incurred by the accused and the vehicle (as in this case) is received without there being any dishonest intention at that stage, there is no "cheating" within Section 420 IPC, in the eye of law. Vide *Chidambaram Chettiar v. Shanmugham Pillai* AIR 1938 Mad. 129)".

That was again a case of post dated cheques. The Apex Court in *Hridaya Ranjan Prasad Verma* 's case (supra), had an occasion to deal with the provisions of Section 415 IPC. That was a case where FIR registered against the appellant was sought to be quashed and there has been a case and counter case between both the parties. A land was sold by the appellant in favour of the Society for a consideration of Rs.16 lakhs and sale deed was executed pursuant to the terms settled between the parties and the same was registered. A part of consideration was said to have been paid by way of drafts and remaining part by means of three cheques to the tune of Rs.5,50,000/-. When the cheques were dishonoured for want of adequate funds in the account of the drawer, a criminal case was filed against the Society for the offences under Sections 406, 420 and 120-B of IPC. As a counter blast on a report given by the Society, the offences under Sections 418, 420, 423, 504 and 120-B have also been registered against the appellant, on the complaint alleging that the appellant suppressed the fact of existence of suit for partition between him and the other co-sharers and there was no clear title to be conveyed by him, as promised earlier. At page 177 in para 15 the Apex Court held as follows:

"In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From this mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

13. There is any amount of paucity of evidence in this case so as to show that there was necessary intention to deceive PWs.1 to 3 at the initial stage when the three debts were contracted under Exs.PI, P9 and P10-promissory notes. Even if it is such that the necessary intention was there at the time when the three post dated cheques were issued under Exs.P2, P3 and P13, there was no simultaneous act or omission on the part of PWs.1 to 3 pursuant to three cheques which are said to have been resulted in damage to the property. Although it is said that the element of deception had been there when the cheques were issued knowing pretty well that there has been no account in existence by then, going by a bare perusal of Section 415 of IPC it is not a case where the facts can squarely attract

the offence u/s 415 of IPC. Every evasion of debt, on one ground or the other, cannot be brought under an action in criminal law. The effective remedy to realise the debt is always available under the common law. It has been specifically held by this Court taking note of the law in vogue in U.K. u/s 16 of the Theft Act, 1968 that the same tenor cannot be treated as an offence under Indian law. The observation in this regard in para 24 at page 50 is expedient to be excerpted thus:

"The mere evasion or deferment in the realisation of the amount due which amounts to a pecuniary advantage obtained by the accused cannot, under the Indian law, be treated as an offence even-though it may be offence u/s 16 of the Theft Act, 1968 in England."

14. It is not in the interests of justice to allow a civil liability to be converted into a criminal liability. Perhaps, it might be the lurking intention or idea on the part of the creditors that criminal action is more effective than the civil action on account of the loss or delay in realisation of the debt.

15. I am of the considered view that it is a case where the party ought to have proceeded in availing civil remedy. It is apposite here to mention Section 138 of the Negotiable Instruments Act. Chapters XVII containing Sections 138 - 142 had been incorporated in the Negotiable Instruments Act by Act No.66 of 1988 which came into effect far subsequently. The bouncing of the cheques either on account of insufficiency of the funds in the account or no funds in the account of the drawer which was made punishable u/s 138 of the Negotiable Instruments Act. That is an indicia that the existing law prior to the advent of Act No.66 of 1988 incorporating Sections 138 - 142 in the Negotiable Instruments Act, is not covering any such instances, so as to make them liable under criminal law. Curiously, in this case, no complaint has been lodged under the provisions of the Negotiable Instruments Act. It is also pertinent to note that no suits have been filed in realisation of the debt covered by three promissory notes. Perhaps, the creditors may be under the impression that the criminal prosecution would yield the necessary fruits. Such an attitude on the part of the creditors cannot be permitted to be allowed and I am afraid that it may amount to sheer abuse of process of the Court.

16. In any view of the matter, for the foregoing discussion, it is not a case where the criminal prosecution for the offence u/s 420 of IPC can be maintained against the revision petitioner. Both the Courts have not addressed themselves to the necessary provisions under the Indian Penal Code and the essential ingredients enjoined u/s 415 of IPC to see whether the facts in the case would attract such ingredients or not. The conviction and the sentence passed against the revision petitioner are legally unsustainable.

17. For the above reasons, the revision case is allowed and the conviction and the sentence passed by the Courts below against the revision petitioner are set aside. The bail bonds of the revision petitioner shall stand cancelled forthwith.

The fine amount, if any, paid shall be refunded to the revision petitioner.