

(1959) 11 AP CK 0016

In the Andhra Pradesh High Court

Case No : Criminal Miscellaneous Petition No. 1121 of 1959

Md. Hussain Faisi and Another

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 03-11-1959

Acts Referred:

Penal Code, 1860 (IPC) — Section 420
Transfer of Property Act, 1882 — Section 55(1)

Citation : AIR 1960 AP 405

Hon'ble Judges : Munikanniah, J

Bench : Single Bench

Advocate : K. Sarala Devi, for the Appellant; R. Balakrishna Rao, for R.V. Ramarao, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Munikanniah, J.—This application is u/s 561-A Cr. P. C. for quashing the charge framed by the Fourth City Magistrate, Hyderabad against the accused u/s 420, I. P. C. The charge reads:

"That on or about 26-6-1959 at Hyderabad you cheated Md. Yakub by dishonestly suppressing the fact of prior mortgage of your house 15-5-570-71 situate in Osmanshahi and dishonestly inducing Md. Yakub to deliver you Rs. 2300/- towards the sale money you had obtained and thereby committed an offence..... What the accused have, according to the charge, to answer is that they dishonestly Suppressed the fact of prior mortgage of the house which they sold in public auction. Qamar Brothers issued a a notice about the auction and also specified the terms subject to which the bids have to be offered or to be accepted. According to those terms, the auction-purchaser should pay immediately, on the conclusion of the auction 1/4th consideration and commission at 5 per cent to the auctioneer and 3/4th of the amount shall have to be paid in the presence of the Registrar at the time of registration to the owner of the property within one week from the date of auction.

The complainant happened to be the highest bidder and purchased the property; but did not pay the balance, 3/4th of the purchase money, as per the terms. When the same has been demanded by the accused he turned round and charged the accused that as there was suppression of the fact that the property sold was subject to a usufructuary mortgage, he was under no obligation to fulfil his part of the contract. He further filed the Criminal Case C. C. No. 3976/4 of 1959 alleging that he was cheated and that the accused are liable to be punished.

2. The petitioners who are the accused seek to quash the charge framed u/s 420 I. P. C. by the Magistrate on 24-9-1959 as set out above. On behalf of the petitioners, it is contended by Miss K. Sarala Devi that there was no dishonest concealment of any particulars regarding the property advertised for auction and if there was an encumbrance such as the usufructuary mortgage executed in favour of Mohan Yousuf Ali, son of Mohboob Ali, resident of Panja Shah, there was information available regarding it in the Urdu Daily "Rahanum-E-Deccan" in its issue dated 23-3-1959 and the registration of the usufructuary mortgage itself would constitute notice to a wary purchaser, and that it is not necessary that all encumbrances of a property should be notified to the purchaser at the time of auction. The learned advocate has relied upon the decision in Emperor v. Bishan Das ILR 27 All 561 and contended that the provisions of Clause (a) of Sub-section (1) of Section 55 of the Transfer of Property Act would be inapplicable to prosecutions for an offence u/s 420 T. P. C. In the decision cited by the learned advocate for the petitioners it has been decided that the vendor of immovable property cannot be convicted of cheating because he omits to mention that there was an encumbrance on the property because according to Aikman, J., who decided that case, "the conduct of the accused in such a case, might be immoral but it would not be fraudulent".

The distinction between a case where there is active representation by the vendor and one in which the omission to mention a particular fact does not result in any dishonest inducement of another has also been brought out by illustrations mentioned in that decision. In a decision of the Madras High Court in In Re: Sellamuthu Padayachi, a Division Bench ruled while dealing with a civil appeal that the non-disclosure about the prohibition regarding the use to which the property is to be put is itself not one falling under Clause (a) of Sub-section (1) of Section 55 of the Transfer of Property Act for it was stated, the fact that the plot is within the municipal area must put any purchaser on notice that the provisions of Town Planning Act would apply. It therefore stands to reason that it cannot be taken for granted that a property is always free from encumbrances and that a mere non-mention of the encumbrances by a vendor provides a sufficient guarantee that the property is free from encumbrances. It would undoubtedly be different if in case the purchaser enquired about the encumbrances and he was told by the vendor that there were none or that there was a representation by the vendor in respect of the encumbrances even voluntarily; but these two eventualities are not there. The case of non-mention of encumbrances cannot be taken as dishonest non-disclosure of any material

defect in the property which the buyer could not be made aware of if he was only diligent as a vendee ought to be.

3. There is also the significant fact that the successful bidder at the auction is made to pay only 1/4th of the amount when the hammer falls and another week's time is given for the balance to be paid. This interregnum afforded for the payment of the balance is not only to find time for the balance of purchase money but also must be taken to be the time afforded for ascertaining in regard to encumbrances, if any, pertaining to the property. If in spite of this opportunity which is so afforded the successful bidder does not choose to make enquiries of the auctioneer or obtain an encumbrance certificate for himself, it cannot be said the neglect of his own duties by the auctioneer is capable of imputing the existence of other factors as constituting dishonest conduct on the part of the vendor.

4. The learned Public Prosecutor however relied on the decision reported in *Gondur Ramasubba Iyer Vs. Muthiah Kone and Others*, where Devadoss, J., considered the case of non-disclosure of a material defect which could not be discovered with ordinary care by the buyer. It would be found from the facts of the case that there was no active representation by the vendor saying that he had not effected any kind of encumbrances except those which had been made by him. That case is therefore certainly distinguishable. In *Chaturbhuj Sangji Vs. Mansukhram Motilal*, the restricted scope of the obligations arising u/s 55 T. P. Act in respect of a covenant restricting the enjoyment of the property sold had alone been considered. That decision, in my view, cannot be taken for guidance in respect of the ingredients for an offence under S. 420 I. P. C. The decisions in *Jhamaklal v. Mishrilal*, AIR 1957 MP 23 and *Mt. Sundara Bai v. Pandharinath* AIR 1938 Nag 441 are not concerned with the offence of cheating by any vendor but only for the non-disclosure of Gwalior Government's permission to use the agricultural land for building the house and the liability in damages arising from a non-disclosure, respectively. Those decisions do not arise in regard to criminal cases. Therefore, in my considered view, no guidance in regard to the validity of the charge framed for cheating u/s 420 I. P. C. could be derived from the decided cases relied on by the learned counsel for the accused.

5. From the foregoing it follows that the allegations of the complainant would not make out a prima facie case of cheating, as it could not be said that there was any dishonest representation nor concealment of anything which the accused were bound in duty to disclose. In the result, the charge is quashed and this petition is allowed.