

(1985) 06 AP CK 0007

In the Andhra Pradesh High Court

Case No : Criminal Miscellaneous Petition No. 1136 of 1984

P. Eswara Reddy

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 26-06-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 482
Penal Code, 1860 (IPC) — Section 415, 420

Citation : (1985) 3 APLJ 43

Hon'ble Judges : M. Jagannadha Rao, J

Bench : Single Bench

Advocate : C. Padmanabha Reddy, for the Appellant; Addl. Public Prosecutor, for the Respondent

Judgement

1. This is an application under S. 482, Cr.P.C. for quashing the proceedings in C.C. No. 74 of 1984 on the file of the XI Metropolitan Magistrate, Secunderabad. The petitioner has been charge-sheeted under S. 420, I.P.C. on the following facts.

2. It is alleged that the petitioner came to the complainant's shop (some time in February, 1983) and he agreed to purchase a Ashok Leyland Vehicle. As per the terms of the contract, the petitioner-accused paid a sum of Rs. 26,462.30 Ps. being 10% of the total cost of the vehicle and the petitioner promised to pay balance of 90% of the consideration later on. The petitioner was given possession of the vehicle in March 1983. Subsequently after three months, the petitioner is alleged to have come to the seller and represented that due to non-availability of "F" form and the sale-letter from the sellers, the petitioner was unable to register the vehicle and that he could not arrange finance from the Bank. It is stated that on good faith and as a special case, the sellers issued "F" form and the sale-letter to the petitioner.

It is then stated that on 9th of September 1983, the petitioner gave a cheque bearing No. 901535 for an amount of Rs. 38,500/- and that when the cheque

was presented, it was dishonoured. It is further stated that during the course of investigation, L.Ws. 1 to 7 were examined and their statements recorded and that the investigation disclosed that the accused falsely represented to the complainant and obtained "F" form and sale-letter from him and also gave a cheque knowing that there was no balance in his account. Thus, it is stated that the accused committed an offence punishable under S. 420, I.P.C.

3. In this application, it is contended by the learned counsel for the accused-petitioner Sri C. Padmanabha Reddy that on a reading of the charge sheet, no offence under S. 420, I.P.C. is made out. He has relied upon certain rulings of various Courts to show that once a debt is incurred or property is parted with in favour of the accused and no dishonest intention is alleged at that stage merely because a cheque was subsequently issued and the same was dishonoured, does not amount to cheating either under S. 420 or under S. 415 I.P.C.

4. On the other hand, it is contended by the learned Addl. Public Prosecutor Sri Y. Bhaskara Rao that the ingredients of S. 420 as well as S. 415, I.P.C. are satisfied. According to him, even though the property was parted with earlier and a cheque was issued later and then the same dishonoured an offence under S. 420, I.P.C. is made out. In any event, according to him, even though on 9-9-1983, no property was parted with by the sellers, still an offence under S. 415, I.P.C. is made out inasmuch as the seller had to take steps to have the cheque encashed and that action of the sellers would come within that meaning of the words "to do or omit to do anything which he would not do or omit if he were not so deceived" and that had caused damage or harm in the mind of the sellers and that therefore, at any rate, an offence under S. 415, I.P.C. is made out.

5. The allegations can be divided into three parts :

(a) The first stage is when on 7-2-1983, the petitioner paid a sum of Rs. 26,462-30 being 10% of the sale consideration and when a month thereafter the petitioner obtained possession of the vehicle.

(b) The second stage is when the petitioner is said to have come to the sellers in May or June, 1983 represented that due to the non-availability of F-form and sale letter, he was unable to register the vehicle and could not arrange finance from the Bank and the sellers, in good faith as a special case, issued "F" form and sale letter to the accused.

(c) The third stage is when on 9-9-83, the sellers received a cheque for Rs. 38,500/- and when the cheque was presented, it was dishonoured.

6. The question for consideration is whether at any of these three stages or all of them, an offence under S. 415 or 420 I.P.C. is made out, accepting the allegation in the charge-sheet and documents accompanying the same.

7. In Reg. v. Hazelton (1874) 2 CCR 134 : 44 LJ 11 : 31 LT 451 goods were fraudulently obtained by giving for them in payment as cash, cheques on some

banks where the petitioner had only trifling sums and some others where his account was overdrawn and it was found by the Jury that when the prisoner gave the cheques, he did not intend to meet them and that he intended to fraud. The prisoner was charged with falsely pretending that he then had money in the Banks to the amount of sums mentioned in the cheques and that he had the authority to draw the cheques and that the paper writings (cheques) which he so gave were good and valid orders for the payment of the amounts thereon. It was held by Kelly, C. B. Lush, Breet, and Quain, JJ. and Pollock, B that the accused was guilty of the offence charged.

While deciding the above question, it is accepted by the learned Judges that an offence would have been committed if the fraudulent intention was entertained by the accused at the time when the goods were parted. In that connection, the effect of issuing a cheque which was subsequently dishonoured was considered. Kelly, C. B. observed that on the facts of the case, it was clear that the accused falsely pretended that he then had money to a certain amount in the bank, that he then had authority to draw a cheque upon the Bank for that amount and that the cheque was a good and valid order for the payment of that amount. It was on the basis of these three representations that the sellers parted with the goods and therefore the accused is guilty.

Lush J. observed as follows :

"I also think that the mere giving of a cheque does not convey a representation that the drawer has money to the amount of the cheque in the banker's hands at the time of giving it. Many persons give cheques exceeding their balance at the bank at the time, in the expectation of their being able to pay in money to meet them before they are presented. In this case, the prisoner ordered and obtained goods, saying he wished to pay ready money; invoices were made out and discount deducted, and prisoner gave cheques for the amount. I think that amounted to a representation that the cheques were equivalent to cash, and, therefore, that the false pretence that the cheques were good and valid orders for the payment of money was proved."

8. The above case was considered by Beckett, J. in *Kanwar Sain v. The Crown* ILR (1938) Lah 662 : 40 Cri LJ 494. The case related to the post-dated cheque. The learned Judge observed that the act of drawing a cheque is held to imply at least three statements as to the state of affairs existing at the time when the cheque is drawn first, that the drawer has an account with the bank in question secondly that he has authority to draw on it for the amount shown on the cheque, and thirdly, that the cheque, as drawn, is a valid order for the payment of that amount, or that the present state of affairs is to seek that in the ordinary course of events, the cheque, on future presentation, will be honoured. The learned Judge then observed as follows :

"It does not, however, imply any representation that the drawer already has money in the bank to the amount shown in the cheque, for he may either have

authority to overdraw, or have an honest intention of paying in the necessary money before the cheque can be presented."

9. The learned Judge pointed out that the case in *Reg. v. Hazelton* cited (1874) 2 CCR 134 (supra) was discussed at page 284 of the 15th Edition of Kenny's outlines of Criminal Law and in the foot-note, the author had suggested that the same doctrine probably applied to post-dated cheques as well. Indeed the learned judge state that there seem to be strong reasons for applying the same doctrine to the post-dated cheques as well in view of the illustrations F & G to S. 415, I.P.C. inasmuch as the word "deceiving" appears to have been intended to cover false representations with regard to the future intention, when these representations were false in the marker's mind at the time when they were made.

10. In Kenny's outlines of Criminal Law (19th Edition, 1966 at p. 359) it is stated as follows :

"Similarly, the familiar act of drawing a cheque (a document which on the face of it is only a command of a future act) has held to imply at least three statements about the present : (1) that the drawer has an account with that bank; (2) that he has authority to drawn on it for that amount. (3) that the cheque, as drawn, is a valid order for the payment of that amount (i.e.) that the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured. It may be well to point out, however, that it does not imply any representation that the drawer now has money in his bank to the amount drawn for inasmuch as he may well have authority to overdraw, or may intend to pay it (before the cheque can be presented sufficient money to meet it.)"

11. The above passage was cited with approval by Philimore, L.J. in *Reg v. Page* (1971) 2 QB 330, 333.

12. However, in a later case Lord Diplock and Lord Edmund Davies (Viscount Dilhorne striking a different note) in the House of Lords in *Reg. v. Charles* (1977) AC 177 dissented from the proposition No. (2) enunciated by Kenny. Lord Diplock observed at page 182 :

"To take first the case in which no cheque card is involved, it is no doubt true to say that all that payee is concerned with is that the cheque should be honoured by the bank, and that to induce the payee to take the cheques all that the drawer is concerned to do is to assure him that as far as can be reasonably foreseen this is what will happen. But payment by the bank cannot be reasonably foreseen as likely unless the fact be that the cheque is one which the bank on which it is drawn is bound, by an existing contract with the drawer, to pay on presentment or, if not strictly bound to do so, could reasonably be expected to pay in the normal course of dealing. This, I think to be a simpler way of expressing the statement of existing facts which is to be implied from the familiar act of drawing a cheque than that cited by my noble and learned friend,

Lord Edmund-Davies, from Kenny's outlines of Criminal Law. 1st Ed. (1902), pp. 246-247, which was adopted by the Court of Appeal in *Reg v. Page* (1971) 2 QB 330. It combines representations (1) and (3) from Kenny, but it omits representation (2). A customer needs no authority from his bankers to draw a cheque on him, it is the banker who needs authority from the customer to pay it on presentment."

Lord Edmund-Davies observed as follows :

"My noble and learned friend, Lord Fraser of Tullybelton, rightly pointed out that representations, (1) and (2) were supererogatory in the light of representation (3) which embraced both of them. My noble and learned friend, Lord Diplock, also criticised representation (s) on the ground that the representation made by the simple act of drawing a cheque does not relate to or rest upon "authority" but is rather a representation that the drawer has contracted with his bank to honour his cheques. Notwithstanding the antiquity of the quoted passage, it accordingly appears right to restrict the cheque to that which has been conveniently labelled ("page 3"). The legal position created by such an act was even more laconically described by Pollock B. in *Reg v. Hazelton* 2 (1874) CCR 134, 140 in this way : "I think the real representation made is that of the cheque will be paid. It may be said that is a representation as to a future event. But that is not really so. It means that the existing state of facts is such that in ordinary course the cheque will be met."

13. Thus, it is clear that both Lord Diplock and Lord Edmund-Davies made it plain that the relevant representation must be a representation as to existing facts. This was certainly so under the old law relating to obtaining property or securities "by false pretences" before the coming into force of the Theft Act 1968, and that this is still so, is plain from the definition of deception in S. 15(4) of the Act of 1968, referring as it does to deception by words or conduct as to fact, and also confining a representation as to intentions to the present intentions of the accused.

14. The above case fell for consideration before the Court of Appeal in *Reg. v. Gilmartin* (1983) 2 WLR 547. Robert Goff LJ after referring to the various views pressed in *Reg. v. Charles* 1977 ACC 177 above mentioned, observed that the view taken by Lord Diplock and Lord Edmund-Davies was binding on them and should be followed in preference to the view expressed by Viscount Dilhorne. After so observing, the Court of appeal clearly stated that proposition No. (2) mentioned in Kenny's Outlines of Criminal Law is no longer valid viz., that the drawer had authority to draw on his account at the relevant bank for the amount specified on the cheque. Report Goff LJ. observed as follows :

"It appears from the speeches of their Lordships, however, that the often quoted passage from Kenny can no longer be regarded as providing an accurate guide to the relevant representation in that the second element, viz., that the drawer has authority to draw on his account at the relevant bank for the amount specified on

the cheque, must be rejected for the reason stated by Lord Diplock. More over the first of Kenny's three elements is, as Lord Edmund-Davies pointed out in agreement with Lord Fraser of Tullybelton, logically covered by the third. The third element specified by Kenny Was expressed by him in two different ways, that is to say (1) statement that the cheque as drawn is a valid order for the payment of the amount of the cheque and (2) as an explanation of the first, a statement that the present state of affairs is such that in the ordinary course of events the cheque will on its future presentment be duly honoured. These two are, if the first is read literally, not identical, since the first statement can be read as referring to the future. It is, however, for the reasons we have already given only relevant to have regard to a representation as to existing facts and therefore the first of these two statements must be read as limited by second. The second is, moreover, plainly derived from the words of Pollock B. in *Reg. v. Hazelton* (1874) LR 2 CCR 134, 140 quoted with approval of Lord Edmund-Davies in *Reg. v. Charles*, Viz, that the representation implied in the giving of a cheque is that "the existing state of facts is such that in ordinary course the cheque will be met." This terse but neat epitome of the representation is in our judgment entirely consistent with the view expressed in rather different words by Lord Diplock in *Reg. v. Charles* and should properly be regarded as an authoritative statement of the law."

15. The Court of Appeal further held that they saw no reason why in the case of a post-dated cheque the drawer does not impliedly represent that the existing facts at the date when he gives the cheque to the payee or his agent are such that in the ordinary course the cheque will, on presentation on or after the date specified in the cheque, be met. Therefore proposition No. (2) laid down by Kenny no longer holds good.

16. 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 S. 420, I.P.C., in the eye of law. Vide *Chidambaram Chettiar v. Shanmugham Pillai* AIR 1938 Mad 129 : 39 Cri LJ 261.

17. The next point is : Whether the "evasion" or "deferring" the payment of the existing debt is in itself an offence under S. 415 I.P.C. as contended by the Addl. Public Prosecutor. In this context it is necessary to point out the difference in language between S. 415 and 420, I.P.C. on the one hand and the provisions of S. 15 of the Theft Act 1968, in England. The English Law expressly makes "Evasion" or "deferring" payment offence under the penal law.

18. Under the Indian Penal Code, S. 415 provides as follows : Whoever by deceiving any person, fraudulently or dishonestly induces the person, as deceived 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". Thereafter S. 420 provides

as follows : Whoever cheat and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

19. Newsam, J. in Chidambaram Chettiar's case (1938) Cri LJ 261 pointed out in the Madras High Court that "body, mind, reputation and property" are the four cardinal assets of humanity. The learned Judge pointed out that there was before him no allegation that by the dishonour of the cheque issued for payment of antecedent debt, the complainant had incurred any harm or damage to his body, mind, reputation and property. The Kerala High Court, in the undermentioned case, decided a further point as to the legal position of the effect of such an allegation, even if made.

20. K. K. Mathew, J. (as he then was) in K. Surendran v. P. Ramachandran Nair (1967) CriLJ 793 in the Kerala High Court, had occasion to consider the question whether the fact that the complainant presented the cheque at the bank and was told that the cheque is dishonoured is, in itself, "cheating" under S. 415, I.P.C. The question was whether that brought the case within the words "to do or omit to do anything which he would not do or omit if he were not so deceived." and whether it caused damage to the complainant's body, mind or reputation.

21. Negating the plea of the prosecution, Mathew, J. observed :

"Can it be said that this act has caused any damage to the complainant's body, mind, reputation or property ? I think not. His position after taking the cheque and its dishonour was the same as it was before. The liability of the accused to the complainant for the amount remained the same after and before the dishonour of the cheque. It cannot, therefore, be said that by taking the cheque the complainant sustained any damage to his body, mind, reputation or property. There are no allegations in the complaint that by taking the cheque on the faith of the complainant's implied representation of the accused, the complainant sustained any damage in his mind, body, reputation or property. If that be so, the complaint does not disclose the elements necessary to constitute the offence of cheating."

22. Thus, it has to be held that mere taking of the cheque by the complainant for encashment does not, in case of its dishonour, amount to any damage to the body, mind, reputation or property of the complainant, under the Indian law.

23. This lacuna in the penal law has been filled in the English Law recently. Evasion or deferring payment of a cheque covered by the provisions of S. 16 of the Theft Act, 1968. S. 16 of that Act provides :

"(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to

imprisonment for a term not exceeding five years (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person or cases where (a) any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part or deferred; or (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or, obtains a improvement of the terms on which he is allowed to do so; or (c) he is given the opportunity to earn remuneration or greater remuneration in an officer or employment, or to win money by betting. (3) For purpose of this section "deception" has the same meaning as in S. 15 of this Act."

24. The above provisions of S. 16 of the Theft Act, 1968 came up for consideration before the house of Lords recently in Director of Prosecutions v. Turner 1974 AC 357. In that case, the respondent who had employed "B" and his brother as decorators, at the end of one week owed pounds 24 to B and pounds 14 to B's brother. Knowing that there were insufficient funds in his bank account, the respondent gave B a cheque for pounds 38 and B gave pounds 14 to his brother. The respondent was convicted on indictment of dishonestly obtaining a pecuniary advantage by deception, contrary to S. 16 of the Theft Act, 1968. The conviction was quashed by the Court of Lords, it was held on the true construction of S. 16(2) it did not matter whether or not the respondent obtained any pecuniary advantage; and that the words "debt" in para (a) meant an obligation to pay and therefore a debt was "evaded" even though the escape was not permanent. It was further held that by giving a worthless cheque the respondent evaded his obligation to pay immediately any legal tender and was rightly convicted. However the provisions of the S. 415, I.P.C. do not include the gaining of a pecuniary advantage even by way of the House of Lords in Turner's case cannot have any obligation.

25. Bearing the above principles in mind I shall now consider the allegations in the complaint.

26. So far as the transaction which took place on 7-2-83 is concerned there is not even an allegation that on that day the petitioner had any dishonest intention. Nor is there any allegation that when the petitioner obtained possession of the vehicle some time in March 1983 he had any dishonest intention. Admittedly the petitioner paid 10% of the consideration as required by the terms of the contract. So no offence either under S. 415 or S. 420, I.P.C. can be said to have been committed at these stages. Coming to the second stage when the complainant is said to have issued a "F" form and sale letter on the representation of the accused that he could not register the vehicle or arrange for finance from the bank for want of the aforesaid document it is clear that the complainant does not dispute the correctness of these representations. On the other hand the complainant acted upon treating them to be bona fide representations. On those allegations no offence under either of the sections can be said to have been made out. It is true that in the last paragraph of the

complaint it is stated that these documents were obtained with a dishonest motive. On a reading of the recorded statement of the complainant under S. 167, Cr.P.C. which accompanies the complaint clearly shows that the complainant did not infer any dishonest motive on the part of the accused when he made the representations based upon which these two documents were given to the accused. On the other hand the complainant has accepted these representations to be true and does not dispute their correctness. I am therefore unable to hold that any offence was committed at the second stage. The third stage is the date on which the cheque for Rs. 38,500/- was dishonoured. That was on 9-9-1983. As pointed out above in Chidambaram Chettiar's case (1938) Cri LJ 261 (Mad) the dishonour of a cheque for an antecedent debt does not amount to cheating. Admittedly on the date when the accused gave the cheque to the complainant to goods or other securities were received by the accused from the complainant. That had happened much earlier and the debt was already incurred. Nor can the circumstance that the complainant was obliged to present the cheque before the bank in respect of a cheque which was dishonoured can be said to amount to cheating under S. 415, I.P.C. in view of the judgment of Mathew, J. in Surendran's case 1967 CriLJ 793) (supra) 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 maybe offence under S. 16 of the Theft Act, 1968 in England.

27. For all the aforesaid reasons, even assuming the facts stated in the complaint to be true no offence either under S. 415 or S. 420, I.P.C. can be said to be made out. Accordingly the petition is allowed and the complaint and all further proceedings are quashed.

28. Petition allowed.