

(1997) 06 BOM CK 0024

In the Bombay High Court

Case No : Criminal Revision Application No. 107 of 1991

Smt. Malini S. Kale and others

APPELLANT

Vs

Smt. Kamlabai S. Shirodkar and another

RESPONDENT

Date of Decision : 25-06-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 244
Penal Code, 1860 (IPC) — Section 114, 415, 420

Citation : (1997) CriLJ 3455

Hon'ble Judges : Vishnu Sahai, J

Bench : Single Bench

Advocate : R.P. Kadam, for the Appellant; R.S. Deshpande, Assistant Public Prosecutor and Rajendra Shirodkar, for the Respondent

Judgement

Vishnu Sahai, J.—By means of this revision application, the applicants assail the judgment and order dated 7-3-1991, passed by the Additional Sessions Judge, Greater Bombay, in Criminal Revision Application No. 77 of 1990, whereby the order dated 3-1-1990 passed by the Metropolitan Magistrate, 13th Court, Dadar, Bombay, discharging them for an offence u/s 420, r/w. 114 I.P.C., has been reversed.

2. The present revision application, arises out of a complaint dated 15-4-1988 filed by the respondent No. 1 for an offence u/s 420 I.P.C. r/w 114 I.P.C., against the applicants. In short, case of the respondent No. 1 is that she was landlady of a building called "Matru Smruti" situated at 26, Vincent Square Street, No. 2, Dadar, Bombay-14. On or about January, 1979, the applicant No. 1- Smt Malini Kale approached her for giving her and the applicant Nos. 2 and 3, who were her husband and son respectively, some accommodation in the building. Initially, she did not accede to the request of the applicant Malini but, yielded as a consequence of the frequent visits of the applicants and basically because, applicant Malini stated that applicant No. 3 was selected as a Flight Purser in Air India and his appointment was dependent on his having a residential

accommodation in Bombay. It has also been averred in the complaint that the applicant No. 3 beseeched her to treat her as her own son and the applicants promised that they would find alternate accommodation for their residence in a short time, and would then vacate the premises and would give back the peaceful possession thereof to her. It is alleged in the complaint that the applicants gave a sum of Rs. 10,000/- as security deposit.

The complainant has stated that on the said representations made by the applicants and being moved by their plight, she gave them two rooms on the second floor of her building with effect from 30-1-1979 and the applicants came to reside in them. It is stated in the complaint that representations made by the applicants were placed on record by the applicant No. 1 through her letter dated 16-10-1981 which was counter-signed by the other two applicants. The said letter is Exh A, and is a part of the record. It is stated in the complaint that in order to make her believe that they would shift in alternate accommodation, as early as possible, the applicants booked a flat, being Flat No. 603, on 6th floor, in Radha Kunj at Manim, Bombay. It is also alleged in the complaint that as the applicants were short of money for purchasing their flat at Mahim, they sought refund of Rs. 10,000/- which was given as security money, and the complainant returned the money on their executing a promissory Note. It is also alleged that the applicants borrowed Rs. 45,000/- from the complainant in order to make payments towards the flat which they had booked at Mahim, Bombay. She gave the money to the applicant Nos. 1 and 2 executing a Promissory Note which was destroyed after the money was repaid.

Allegations in the complaint further is that the complainant came to know later on that the applicants did not occupy the said flat, but had sold the same at the market price making a big capital gain. She has stated in the complaint that her suspicion was aroused when on 9-12-1986, the applicant No. 3 along with his wife left her premises along with baggage. She then questioned the applicant Nos. 1 and 2 as to why they had not left and on that they kept on giving evasive replies.

Averment in the complaint is, that the said allegations which are contained in the complaint, make out a prima facie case against the applicants for an offence u/s 420 r/w 114 I.P.C.

3. After filing of the complaint and the usual verification, the learned Metropolitan Magistrate was pleased to call for a police report and thereafter, issued process against the applicants for an offence u/s 420 r/w 114 I.P.C. Thereafter, it appears that statements of the complainant and one witness Narayan Gogte, were recorded u/s 244 Cr.P.C. They were not cross-examined by Counsel for the applicants.

4. It appears thereafter, the applicants moved an application u/s 245 Cr.P.C. praying that they be discharged. The said application was allowed by the Metropolitan Magistrate, 13th Court, Dadar, Bombay on 3-1-1990.

5. The respondent No. 1 complainant feeling aggrieved by the discharge order, passed in favour of the applicants preferred Criminal Revision Application No. 77 of 1990 in the Court of Sessions, for Gr. Bombay. In the said revision, the prayer was that the order of discharge, dated 3-1-1990, passed in favour of the applicants be set aside, and the case be remanded to the Magistrate for framing a charge against the applicants for an offence u/s 420 r/w 114 I.P.C. Vide orders dated 7-3-1991, the Additional Sessions Judge, Gr. Bombay allowed her revision application.

As observed earlier, the present revision has been directed against the order dated 7-3-1991.

6. I have heard Mr. R.P. Kadam for the applicants, Mr. Rajendra Shirodkar for the respondent No. 1, and Mr. R.S. Deshpande, Additional Public Prosecutor for, the respondent No. 2 - State of Maharashtra. I have also perused the impugned orders, the complaint and statements recorded u/s 244 Cr.P.C.

7. On 23-6-1997, when the matter was first taken up by me, Mr. R.P. Kadam made a statement that the applicant No. 1 Ms. Malini Kale is dead and he fortified it by producing a xerox copy of her death certificate. Since Mr. Rajendra Shirodkar, did not dispute the correctness of the said death certificate, which I had ordered to be kept on record, leave to amend was granted to Mr. R.P. Kadam who thereupon deleted name of the applicant No. 1 from revision application. Submission of Mr. R.P. Kadam is that the order dated 3-1-1990 passed by the Metropolitan Magistrate is based on sound and tenable reasons and warrants no interference. On the converse, that made by Mr. Rajendra Shirodkar is that since the averments in the complaint and in the statement of the complainant and her witness Narayan Gogte, made out a prima facie case u/s 420 r/w 114 I.P.C., the Additional Sessions Judge, Gr. Bombay was justified in reversing the order dated 3-1-1990. I may also add that Mr. R.S. Deshpande, learned Additional Public Prosecutor for the respondent No. 2 has adopted the submission of Mr. Rajendra Shirodkar. After thoughtfully reflecting over the matter, I am inclined to accede to the submission canvassed by Mr. Shirodkar, Counsel for the respondent No. 1. A perusal of the order dated 3-1-1990 shows that the learned Metropolitan Magistrate was primarily persuaded to pass it because, in his judgment, the averments as contained in the complaint and in the evidence recorded u/s 244 Cr.P.C. made out a dispute of a civil nature and not an offence u/s 420 I.P.C. r/w 114 I.P.C. I am afraid, I am not able to subscribe to this conclusion of the Metropolitan Magistrate.

8. The Additional Sessions Judge, Gr. Bombay in his order dated 7-3-1991, has given very cogent reasons for reaching the conclusion that the dispute was not of a civil nature and prima facie an offence u/s 420 r/w 114 I.P.C., has been made out. The offence of cheating has been defined in section 415 of I.P.C. The said section reads thus: --

Section 415--- Cheating

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.

A perusal of the said section would show that if a person/persons by deceiving any person, fraudulently or dishonestly induces that person to deliver any property to any person, such person or persons, would commit an offence of cheating. A perusal of the complaint and the evidence recorded u/s 244 Cr.P.C. would show that initially, the complainant was not inclined to give the premises to the applicants but, as a result of their dishonest inducements, she gave them the said premises. The learned Additional Sessions Judge in para 24 of the impugned judgment, has summed up the representations made by the applicants to the complainant. They are as under :---

- 1) that the accused have accommodation at Dombivali at Rajani Co-operative Housing Society where they were residing permanently.
- 2) that the accused No. 3 was selected for the post of Flight Purser in Air-India. But he would not be appointed if the accused No. 3 was not able to secure an accommodation in Bombay to the satisfaction of the; Air India authorities about the same.
- 3) when the complainant refused to concede to their request, they beseeched her to treat accused No. 3 as her son.
- 4) that the accused represented to her that they would find out an alternate accommodation for their residence within a short time and as soon as the same was available, they would vacate the complainant's premises.
- 5) the accused wanted the complainant's premises for temporary period:
- 6) They offered a sum of Rs. 10,000/- as security deposit against due performance of their promise to vacate and handing over peaceful possession of the premises to the complainant.

In para 25 of the impugned judgment, the learned Additional Sessions Judge has observed the fact that the applicants made aforesaid representations to the complainant is corroborated from the letter written by the applicant Malini Kale to the complainant on 16-10-1981 and the factum of the letter written by her is not disputed from the side of the applicants. In para 26 of the impugned judgment, the Additional Sessions Judge, has also observed that illustration (f) to section 415 I.P.C. would be applicable against the applicants. The said illustration reads thus :---

A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

9. It needs to be emphasised that the order of discharge is to be only passed if the averments taken in the complaint and in the evidence recorded u/s 244 Cr.P.C., unrebutted, make out no case. In my view, if this test is applied to the facts of the present case, it would become clear that a prima facie case u/s 420 r/w 114 I.P.C. is made out against the applicants. In that view of the matter, the proper course in law for the Magistrate would be to frame a charge against the applicants. The Hon"ble Supreme Court in para 4 of the oft-quoted judgment of State of Bihar Vs. Ramesh Singh, has observed that even if at the initial stage, there is a strong suspicion which leaves the Court to think that the accused have committed an offence, it would not be open to the court to say that there is no sufficient ground for proceeding against them.

10. In the result, this revision is dismissed. The impugned order dated 7-6--1991 passed by the Additional Sessions Judge, Gr, Bombay, in Criminal Revision Application No. 77 of 1990 reversing the order dated 3-1-1990 is confirmed. As applicant No. 1 is dead the Metropolitan Magistrate, 13th Court, Dadar, Bombay, is directed to frame a charge against the applicants No, 2 and 3 in accordance with law. Since the matter is nearly 18 years old, the Metropolitan Magistrate is directed to decide it as far as possible within 6 months from today.

It is directed that the parties shall appear before the Metropolitan Magistrate on 16-7-1997. Counsel for the applicants, at this stage, prayed that attendance of the applicants No. 2 and 3 in the Court of the Metropolitan Magistrate, be exempted on dates other than 16-7-1997. In my view, the proper course would be to make such a request to the Metropolitan Magistrate, and I have not the least doubt that in case such a request is made, he would consider it very sympathetically. I may make it clear that whatever observations I have made, are only limited to the disposal of this Application and the Metropolitan Magistrate would not be influenced by them, when he decides the case of the applicants No. 2 and 3 on merits.

Rule stands discharged. Office is directed to send a copy of my judgment to the trial Court along with the records and proceedings by or before 8-7-1997.

11. Revision dismissed.