

(1989) 03 BOM CK 0006

In the Bombay High Court

Case No : Criminal Revision Application No. 231 of 1988

Suresh

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 14-03-1989

Acts Referred:

Penal Code, 1860 (IPC) — Section 415, 417

Citation : (1990) 1 DMC 426

Hon'ble Judges : B.G. Deo, J

Bench : Single Bench

Advocate : R.S. Lambat, for the Appellant; V.V. Naik, Assistant Public Prosecutor for the Non-applicant No. 1 and R.M. Sambre, for the Non-applicant No. 2, for the Respondent

Final Decision : Dismissed

Judgement

B.G. Deo, J.—The applicant-accused Suresh son of Vyankatrao Agarkar, aged about 33 years, then serving as a Block Level Supervisor in Primary Health Centre at Nagbhid, District Chandrapur, was convicted of the offence u/s 417 of the Indian Penal Code and sentenced to suffer R.I. for three months and to pay a fine of Rs. 500/-, in default of payment of fine to suffer S.1. for one month, by the learned Judicial Magistrate, First Class, 7th Court, Nagpur by his judgment and order dated 22-6-1987, on the basis of a complaint filed by non-applicant No. 2 Smt. Meera w/o Suresh Agarkar, the present applicant, on the allegation that the applicant-accused has dishonestly induced the complainant Smt. Meera, aged 26 years, to undergo marriage ceremony with him, by professing himself to be a Bachelor, although he had his first wife alive, and thereby cheated the complainant PW 1 Smt. Meera, the present non-applicant No. 2. The learned Sessions Judge, Nagpur dismissed the appeal, bearing Criminal Appeal No. 91 of 1987, filed by the applicant-accused Suresh challenging his conviction and sentences, maintaining the order passed by the learned Magistrate on 22-6-1987. The applicant-accused Suresh has, in this criminal revision

application, challenged both the orders passed by the Courts below.

2. Briefly stated, the facts of the case are as follows :

The complainant PW 1 Smt. Meera, aged 26 years, is a postgraduate of the Nagpur University having taken her degree in M.A. In the year 1984, she was in search of a job and her father PW 5 Sonba Govindrao Tekade was in search of a suitable bride-groom for Smt. Meera. The applicant-accused Suresh V. Agarkar, aged 33 years, who was working as a Block Level Supervisor in the Primary Health Centre at Nagbhid, came to the residence of the father of the complainant Smt. Meera on 19-6-1984 along with his uncle accused No. 2 Bhaurao Agarkar and his cousin brother accused No. 3 Diwakar Khasre (both of them since discharged). The applicant Suresh showed his willingness to marry the complainant PW 1 Smt. Meera. Negotiations were made and marriage was settled. Betrothal ceremony was held on 27-5-1984. The marriage between the complainant and the applicant-accused was solemnised on 20-6-1984 as per Hindu rites in a marriage hall known as "Pragati Hall" in Chhatrapati Nagar, Nagpur. At the time of the negotiations, according to the complainant, the applicant-accused had deliberately misrepresented that he was a bachelor and had dishonestly induced the complainant and her father to go into the ceremony of marriage by professing himself to be a bachelor, although in fact he had his first wife and daughter from the first wife living, which, according to the complainant, had resulted in damage and harm to her body, mind and reputation and to their property.

3. The applicant-accused denied his first marriage and also denied his guilt. His marriage with the complainant PW 1 Smt. Meera was not disputed by him.

4. The complaint was filed by the non-applicant No. 2 Smt. Meera on 26-2-1985 against the applicant-accused Suresh, alleging offences under Sections 417, 420, 427 and 494 read with Sections 109 and 34 of the Indian Penal Code. On perusing the complaint and the statement of the complainant, the learned Magistrate had, on 11-3-1985, issued summons to all the accused for the offence punishable u/s 494 read with Section 109 of the Indian Penal Code.

5. The evidence before the charge was taken and a charge was framed only against accused No. 1 Suresh, the present applicant, for the offence u/s 417 of the Indian Penal Code. The charge reads thus :

"That you on or about the day of 20-6-84 thereabout, you dishonestly induced complainant Meera to perform marriage with you, by implying you your conduct that you were not attached to any other woman which act of marriage Meera would not have performed with you had she known about. Committed an offence punishable u/s 417 I.P.C. and thereby within my cognizance."

6. As many as eleven witnesses were examined by the complainant in the trial. The learned Magistrate found that although there was no direct evidence of marriage between the applicant-accused Suresh and one Shobba, the oral,

documentary and circumstantial evidence shows that on 28-10-1984, when Smt. Meera was taken by the accused to Nagbhid and they had occupied a block of one Madhao Kale, Shobha (the alleged first wife of the accused) along with her daughter entered that house and claimed herself to be the wife of the accused. The accused also allowed Shobha and her daughter to reside there with the result that Meera, having come to know about the deception practised on her and her father by the accused, wrote a letter (Exhibit 37) to her father. This conduct on the part of the complainant PW 1 Meera appears to have impressed the learned Trial Judge who relied on the evidence of PW 2 Baliram who was residing with the accused in the premises of the same landlord according to whom the applicant-accused was residing with one Shobha and had a daughter from her and observed thus :

"Thus the evidence of complainant and the above referred witnesses goes to show that the accused and Shobha were residing as husband and wife in the house of Madhao Kale and they had a daughter." In support of this conclusion, the learned Magistrate also referred to the documentary evidence. Exhibit 38 is the extract of birth register maintained by Grampanchayat, Nagbhid which showed that Shobha, wife of accused, gave birth to a female child on 3-10-1983 at Nagbhid. Another document is Exhibit 88 showing that Shobha Suresh Agarkar gave birth to a female child on 3-10-1983 at Primary Health Centre, Nagbhid in which the name of the accused appears as father of the said female child. It was contended before the learned Magistrate that the complainant Meera, having failed to establish the marriage of the accused with alleged Shobha by cogent proof, was not competent, as an aggrieved person, to make a grievance about bigamy u/s 198 of the Code of Criminal Procedure. The contention was repelled on the ground that the accused was charged with only cheating simpliciter and not u/s 494 of the Indian Penal Code and that, therefore, strict proof of first marriage was not necessary. Exhibit 89 discloses the name of Shobha as the mother of the child and as such Exhs. 88 and 89 together would show that the daughter was born to Shobha from the applicant-accused Suresh, PW 11 Anusaya was summoned and examined as the former wife of the accused. She however, did not support the complainant's case and denied that she was Shobha, much less the wife of the applicant-accused. At the time of the trial, she was residing with the accused as his wife. The learned trial Court found that as she was residing with the accused and had an affair with him, it was natural that she would support the accused and on that ground the evidence of the complainant, oral as well as documentary, adduced by her could not be discarded. According to him, it was sufficient to hold that the accused had cheated the complainant by professing himself to be a bachelor although he had a daughter from one woman by name Shobha who professed to be his wife.

7. In appeal, the learned Sessions Judge, Nagpur, in his well-written judgment, considered the entire evidence and circumstances of the case and came to the conclusion that the complainant PW 1 Meera has proved that the accused dishonestly induced the complainant to undergo marriage ceremony professing

himself to be a bachelor, although he had his first wife alive. The learned Sessions Judge, Nagpur, therefore, came to the conclusion that the complainant was cheated within the meaning of Section 417 of the Indian Penal Code and dismissed the appeal.

8. In the revision before this Court, I have heard Shri Lambat for the applicant-accused and Shri Naik for non-applicant No. 1 State and Shri Sambre for non-applicant No. 2 complainant at length and have gone through the entire evidence from the very beginning in order to satisfy the correctness of the findings and legality of the orders passed by the courts below. It is now well settled that a revisional Court had not to act as an appellate Court and need not go into the question of fact. This Court has, in the case reported in 1981 Mh. LJ 82 Vimal Sukumar Patil v. Sukumar Anna Patil and Anr., held as follows :

"It is by now well settled that normally revisional jurisdiction is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error on the point of law which has consequently resulted in miscarriage of justice. The revisional Court is not expected to act as if it is hearing an appeal."

9. It is no doubt true that High Court, while exercising jurisdiction under Sections 435-439 of the Cr. P.C. has very wide powers to consider the legality and propriety of the order made by a Sessions Judge. Nevertheless, it is well settled now that High Court will be slow to interfere with the conclusions on the question of fact arrived at by the Judge. Firm Govind Moti and Co. v. Sindhu Resettlement Corporation Ltd. and Anr. reported in AIR 1954 Kutch 33. Even otherwise, having gone through the entire record and the circumstances of the case, there does not appear to be any doubt in my mind that the deception practised by the applicant-accused on the complainant Meera who, being in an advanced marriageable stage, was gullible enough along with his father to fall a prey to the concealment of the fact that the accused was not, in a proper sense of a term, "bachelor" having a daughter and also a wife or at least a concubine from whom he had a daughter. Section 415 of the Indian Penal Code defines the offence of cheating as under :

"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."

A dishonest concealment of facts amounts to deception within the meaning of Section 415 of the Indian Penal Code. In the instant case, the dishonest concealment is about the fact that the accused had kept a wife or a concubine

from whom he had a daughter and yet had the audacity of marrying an educated girl and ruining her life. It was contended in this connection that there was no dishonest inducement on the part of the applicant-accused by telling the father of the girl or the girl herself that he was a bachelor. It is a case of concealment of the fact although not asked about the same or not enquired into about the same by the father of the girl or other relations of the girl. The fact came to the knowledge of the complainant only after her marriage and that too when she started residing with the applicant-accused at Nagbhid. Till then, she was blissfully ignored of the entire affair. It must have been a shock to her when Shobha alias Anusaya went to their residence soon after their arrival at Nagbhid and posed herself to be the wife of Suresh and the mother of a daughter from Suresh. It was, therefore, a clear case of dishonest concealment. It was contended that assuming that there was a concealment, it had no nexus with any property and that therefore the ingredient of the offence u/s 415 of the Indian Penal Code was not made out. In support of this contention, the learned counsel for the applicant-accused relied upon the case reported in 1975 Cri. L.J. 173 Ramkrishna Baburao Maskara v. Kisan Shivraj Shelke and Ors. which was also followed in an unreported decision delivered by Puranik, J. in Criminal Revision Application No. 13 of 1982 decided on 18th Sept. 1982 Smt. Nivjot Kaur and two Ors. v. Onkar Singh and two Ors.. In Ramkrishna's case, it was held that dishonest concealment of fact should be with intention of causing wrongful gain to one person or wrongful loss to another and that was not the case when the complainant in that case was induced to marry by the parents of a daughter by concealing the fact that their daughter was pregnant at the time of marriage. Assuming that such an offence must relate to property, there is more than sufficient evidence in the instant case to show that a large amount was parted by way of gifts by the father of the complainant Meera and a sizeable amount was spent by him for the marriage of his daughter. Had he known about the concealed facts, he would not have given her daughter in marriage to the accused. The complainant Meera herself would not have married the accused had she known that the accused was already attached to a woman who had begotten a child from him.

10. In 1977 Cri. L.J. 228, we find a case on all four-- M.H.A. Achar v. Dr. D.L. Ritupal and Ors.. In that case, the accused dishonestly induced the complainant to get his daughter married with him by professing himself to be a bachelor. It was an offence of cheating, by personation, by a person who, by professing himself to be bachelor, cheated a girl and her father and induced them to marry with him. In such cases, it is not correct to say that unless there was any delivery of property to any person, the offence of cheating will not be made out. A look at the ingredients of the offence of cheating, as given in Section 415 of the Indian Penal Code, would show that if a person is deceived who but for the deception would not have done the thing desired by the accused, the offence of deception is complete, whether or not the offence has a connection with the property. Certainly, when such deception causes harm to that person in mind,

body and reputation, the offence of cheating would be complete. In M.H.A. Achar's case (supra), D.B. Lal, J. has observed :

"It is not correct to say that unless there was any delivery of property to any person, the offence of cheating will not be made out. A bare reading of Section 415 of the Indian Penal Code will indicate that the person deceiving if he intentionally induces the person deceived to do or omit to do anything which he would not do or omit if he were not so deceived, would none-the-less be guilty of the offence of cheating provided some damage or harm to that person is caused in body, mind, reputation or property. Thus, where the accused dishonestly induced the complainant as well as his daughter to go into the ceremony of marriage by professing to be a bachelor and it was found that he had his first wife which resulted in damage or harm to the complainant and his daughter in body, mind, reputation or even property, the offence under Sections 416 and 417 was made out."

In the instant case also, there cannot be any doubt in one's mind that the offence of cheating had taken place and the accused was guilty of the same as soon as he represented himself to be a bachelor and by keeping silent over the fact that a woman was attached to him from whom he had a daughter induced the complainant and her father to perform the marriage ceremony with him. It is an additional fact on record which has come out in the evidence of the father of the complainant that on 4-6-1984 Rs. 7,000/- were collected by the accused from him as per the negotiations in consideration of the contract for making arrangements. The evidence of the father of the complainant also shows that the expenses incurred by him for the marriage were worth Rs. 18,000/- or so. All these amounts would not have been spent by the father of the complainant had there been any knowledge that the accused was not a bachelor. A wrongful loss in money may have been caused to the father, though not to the complainant, but the fact remains that the complainant has lost her status as a maiden and it has caused considerable harm to her mind, body and reputation. These facts certainly amount to cheating or at least cheating by personation.

11. It was next contended that although a process was issued u/s 494 read with Section 109 of the Indian Penal Code against the three original accused, a charge for the offence u/s 417 of the I.P. Code was framed only against the applicant-accused Suresh. It was argued that once cognizance was taken u/s 494, the learned Magistrate was not competent to take cognizance u/s 417, I.P. Code. It need only be said in this respect that u/s 190(1)(a) of the Code of Criminal Procedure, cognizance is taken not only of the offence but of the facts constituting the offence and once cognizance of the facts constituting the offence is taken, it does not matter whether initially process is issued of one offence and later on, after evidence, charge is framed of another offence. As a matter of fact, the offence could have been properly dealt with by framing a charge u/s 495 of the Indian Penal Code. u/s 495 of the Indian Penal Code, offence u/s 494 when committed having concealed the former marriage, a punishment of imprisonment

extending upto ten years has been provided for. The offence committed by the applicant-accused was a graver offence than one u/s 494 of the Indian Penal Code and it must be said that the trial Court, having framed a charge only u/s 417 for cheating simpliciter, had erred on the side of leniency.

12. A strict proof of marriage is not necessary in cases of such type. Then a fact of former marriage is concealed and it is posed that the person is a bachelor, it is difficult to prove for the complainant that the accused had already negotiated a former marriage with some other woman. It is only by circumstantial evidence that one can come to such a conclusion. To demand a strict proof of marriage u/s 494, I.P. Code, or even in the instant case which is one u/s 417, is to ask for an impossibility in most cases. More often than not, the complainant would be at a loss to adduce evidence, beyond all reasonable doubts, of such a marriage. A preponderance of probabilities showing the first marriage is all that is sufficient in such cases. What more was required than to prove in the instant case that Shobha alias Anusaya and the accused lived for some time or had an opportunity to live together as husband and wife and that Shobha delivered a female child on 3-10-1983 which has been recorded in the records of Grampanchayat and also of Primary Health Centre at Nagbhid, which, taken together, would show that the applicant-accused was the father of the female child delivered by Shobha alias Anusaya.

13. That the offence u/s 417 i.e. "cheating" occurs in Chapter XVII of the Indian Penal Code which chapter relates to offences against property and it was contended that there should be nexus with the property. In this connection, I was referred to the case reported in State of Orissa Vs. Krushna Chandra Sahu, in which it has been observed : "Held, that one of the essential ingredients of the Section 416 is cheating. There cannot be any manner of doubt that to constitute an offence under the section, all ingredients must be present. Therefore, the ingredients of Section 415, I.P.C. which defines "cheating" must be established, to attract the provisions of Section 415, I.P.C. it must be established that the accused fraudulently or dishonestly induced a person so, deceived to deliver any property and as such an ingredient was totally lacking in the instant case the offence was not at all established and therefore acquittal was proper."

Even assuming that such offence has to be committed in relation to a property, in the instant case there is sufficient evidence to show that the complainant and her father had sustained a wrongful loss of a considerable amount of property on account of the said decision. They had to spend in the beginning Rs.7,000/- and at the time of marriage Rs. 18,000/- to marry her daughter Meera with the accused who dishonestly and fraudulently concealed the fact that he was not a bachelor.

14. While assessing the evidence of Shobha alias Anusaya, the learned Sessions Judge has made some pertinent observations in para 14 of his judgment:

"14. P.W. 11 Anusaya Gangaram has stated that her name, is Anusaya and not

Shobha. However, it is pertinent to note that she has been arrested under the warrant issued in the name of Shobha. She thus surrendered herself to the process of the court under the name of Shobha which would mean that her name is Shobha and not Anusayabai. Anusaya seems to be an assumed name to show that she is not the wife of the accused. But in the cross-examination, she has stated that she used to work at the house of the accused and that during one night, the accused gave her shelter. In the cross-examination by the complainant, she has stated that her golden pot was seen on the person of the complainant when she went to the house of the accused. This would go a long way to show that her Mangalsutra was given to the complainant by none else other than the accused. She has stated that she had given Mangalsutra for safe custody to the accused. I, therefore, feel that all these statements would go to show that Anusaya who poses to be Shobha is none other than Shobha who underwent the marriage with the accused. The accused has thus one wife living and that although they resided together in such a manner without open celebration of marriage, the marriage, could be easily inferred by members of the public at large."

15. Although I have gone in the facts of the case to find out whether the offence of cheating u/s 417 of the Indian Penal Code was made out, it was not really necessary to do so. The learned trial Court had every jurisdiction to take cognizance of the offence u/s 417 of the Indian Penal Code by framing charge after evidence, although initially the process was issued u/s 494 alone, since the facts in both the offences were the same and that on the facts and evidence and probabilities of the case, both the Courts below have come to a conclusion that Shobha alias Anusaya was the first wife of the appellant-accused, that the applicant-accused got a daughter from her and that by dishonestly concealing all these facts from the complainant and her father and by inducing them to perform his marriage with the complainant Meera at a considerable cost to her father, the accused had committed a grave offence. In this revisional jurisdiction, there is no error of jurisdiction or perversity of findings noticed. No interference in the correctness of the decisions and orders passed by both the Courts below is, therefore, called for, in the interest of justice, in the instant case. As a matter of fact, it is necessary in the interest of the health of society that such offences should be taken note of and the offenders booked in accordance with law. The revision, therefore, has to be dismissed. The following order is, therefore, passed :

The revision application is hereby dismissed. The order of conviction and sentences passed, against the applicant-accused Suresh, by the learned- Judicial Magistrate, First Class, 7th Court, Nagpur on 22-6-1987 and further confirmed by the learned Sessions Judge, Nagpur on 20-12-1988, is hereby confirmed. Copy of the order be furnished to the applicant-accused within ten days from today. One and a half-month's time from today is granted to the applicant-accused to get a stay order from the Supreme Court. Till then, the operation of the impugned order shall be stayed. The applicant-accused to surrender to his

bail bonds, if any, thereafter.