

GAHC010009282011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./196/2011

KHANIN DAIMARY
S/O SRI LAKSHESWAR DAIMARY, A R/O VILL. BHAKRAPARA, PART-II,
UNDER THE P.O., P.S. and DIST. BONGAIGAON, ASSAM.

VERSUS

STATE OF ASSAM AND ANR

2:SAROJ YONZONE

S/O LT.G.P. YONZONE
PROPRIETOR OF M/S DHENDUP ENTERPRISE INC" A R/O M.G. ROAD
BIRPARA
DIST. JALPAIGURI
WEST BENGAL

Advocate for the Petitioner : MR.A T SARKAR

Advocate for the Respondent : MS B R A SULTANA (AS LEGAL-AID-COUNSEL FOR R-2)

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

JUDGEMENT AND ORDER (CAV)

Date : 21-08-2023

Heard Mr. M.U. Mahmud, learned counsel for the appellant. Also Mr. B. Sarma, learned Additional Public Prosecutor for the State/respondent No.1 and Ms. B.R.A. Sultana, learned Legal Aid Counsel for the respondent No.2.

2. This appeal is directed against the judgment and order dated 14.09.2011 passed by the learned S.D.J.M.(S), Bongaigaon in C.R. Case No. 171/08 under Section 406/420 IPC, whereby the respondent No.2 as accused was acquitted.

3. The brief facts of the case is that the respondent No.2 was the proprietor of M/S Dhendup Enterprise. He was also a railway contractor and he got a contract in the year 2005 for railway construction from the railway department for manufacturing, supplying and loading Hopper/Wagon of 47,447 cum machine crushed ballast under Rangia Division. After getting the said contract, the respondent No. 2 met the appellant and his associates for completion of the said railway contract jointly being unable to do so by himself. In this regard, the respondent No. 2 entered into an agreement with them and executed a deed of agreement dated 09.01.2007. He also executed one irrevocable power of attorney dated 23.07.2007 in the name of the appellant/complainant for carrying, controlling and managing the works. According to the agreement, they were 50% share holders and it would be divided among the four partners but the respondent No. 2 did not give them any share of the contractual job rather without their knowledge, executed another agreement to cause loss to them.

4. It is further alleged that the respondent No. 2 executed another general power of attorney on 31.12.2005 in the name of another person, Ashim Ganguly through which he allowed the said attorney to do any works connected with proprietorship firm and allowed to

withdraw cheque from the railway authority against the railway contract. Accordingly, the said attorney holder had withdrawn all the amount from railway which was in violation of the terms and conditions of the agreement executed between them. It is further alleged that in this way, the respondent No. 2 had cheated the appellant and this was a clear case of fraud, cheating and criminal breach of trust. Accordingly, a complaint case was lodged by the present appellant.

5. On receipt of the complaint by the learned CJM, Bongaigaon, the complaint case was transferred to the court of learned S.D.J.M.(S), Bongaigaon for disposal. After recording the initial statement of the complainant under Section 200 Cr.P.C., cognizance was taken and summons was issued to the respondent No. 2 for appearance. On appearance of the respondent No. 2 as accused before the learned trial court, charge was framed under Section 420/406 IPC which was read over and explained to the accused/respondent No. 2 to which he pleaded not guilty and claimed to be tried.

6. The complainant examined four witnesses to substantiate his claim before the learned trial court. The respondent No. 2 did not adduce any evidence in support of his case. After completion of trial, the statement of the respondent No. 2 was recorded under Section 313 Cr.P.C. wherein he denied the allegation and pleaded his innocence.

7. After hearing the learned counsel for the parties, the learned trial court has acquitted the respondent No. 2 on the ground that there was no document on record to prove that the respondent No.2 was the proprietor of M/S Dhendup Enterprise. The complainant also failed to prove any document that the P.W.1, P.W.2, P.W.3 and P.W.4 contributed Rs. 22 lakhs for carrying out the contract work. The learned trial court also held that from the evidence on record it has come out that the complainant had initiated a civil proceeding for recovery of money against the respondent No. 2 but the complainant/appellant has failed to produce and exhibit the certified copies of those documents before the learned trial court. The learned trial court further observed that necessary element of the offence of criminal breach of trust is that there should be entrustment of property to the accused but in the instant case, it

appears clearly from the evidence on record that there was no any entrustment of property to the accused person so that offence under Section 406/420 IPC was not made out. Hence, acquitted the respondent No. 2.

8. The learned counsel for the appellant has submitted that the appellant could not produce the original or certified copies of the agreement dated 09.01.2007 and irrecoverable power of attorney dated 23.07.2007 for which the learned trial court had considered the same as a ground for acquittal. According to the appellant, the original documents were submitted before the Civil Court wherein a money suit was pending against the respondent No. 2. It is further submitted by the learned counsel for the appellant that it might be a technical mistake for which the respondent No. 2 cannot be acquitted.

9. It is also the submission of learned counsel for the appellant that all the ingredients to prove the offence under Section 420 IPC was present from the very beginning of execution of the agreement and power of attorney between the parties. Hence, the earlier execution of power of attorney with one Ashim Ganguly was kept concealed when the subsequent power of attorney and the agreement was executed with the appellant. Under such background, the offence under Section 420 IPC is made out against the respondent No. 2. Hence, the judgment of acquittal is liable to be set aside and the conviction should be awarded as per provision of law.

10. In response, Ms. B.R.A. Sultana, learned Legal Aid Counsel for the respondent No. 2, has argued that the appeal filed by the appellant is not maintainable with the purview of criminal jurisprudence. The matter is purely a civil dispute and a money suit Vide M.S./03/2008 was pending for disposal at the time of filing of the complaint case. Thereafter, again filing a complaint case on the same fact with a view to recovery of money or punishment for the offence is not maintainable under the criminal law. It is also submitted that to prove his case, the appellant had not produced any original documents before the learned trial court. Besides all the witnesses examined by the appellant are interested witnesses as they are the partners of the agreement of contractual work.

11. It is also the submission of learned Legal Aid Counsel for the respondent No. 2 that all the partners invested money towards contractual works done under the proprietorship of the respondent No. 2 are not supported by any piece of paper. Their completion work of 25% and undone 75% is also not supported by any official or independent witnesses.

12. It is further submitted that while the subject matter of the case relates with the monitory and business transaction depending upon documentary proof, hence, in absence of those documents one cannot be convicted under Section 420 IPC. Learned Legal Aid Counsel also pointed out that Section 406 IPC i.e. criminal breach of trust is not attracted in this case as there was no entrustment by the respondent No. 2 to the appellant. According to learned Legal Aid Counsel, the judgment of acquittal passed by the learned S.D.J.M.(S), Bongaigaon is justified and prays for dismissal of the appeal.

13. The main contention raised on the side of the respondent No. 2 is that the ingredient for the offence under Section 420 IPC is not made out from the complaint as well as from the evidence and the oral evidence adduced by the appellant and his witnesses disclosed only a money transaction between the respondent No. 2 and the appellant and the entire evidence available on records would go to show that no criminal liability is made out as against the respondent No. 2 and the respondent No.2 had no intention to cheat the appellant.

14. The learned Legal Aid Counsel for the respondent No. 2 also argued that it is alleged by the appellant that terms of agreement were breached as such, the remedy open to the aggrieved person is to file a civil suit against the person, who breached the terms of agreement and no criminal case can be proceeded as against the wrong doer. It has also come out from the evidence of the complainant and his witnesses that the appellant lodged one money suit against the respondent No. 2 for recovery of money.

15. In the case of in ***Hridaya Ranjan Pd. Verma & Ors. Vs. State of Bihar & Anr.*** reported in ***2000(2) Crimes 72 SC***, it reads as follows-

"15.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 his 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."

16. One of the ingredients of cheating as defined in Section 415 of the Indian Penal Code is existence of an intention of making initial promise or existence thereof from the very beginning of formation of contract.

17. In the case of ***Hira Lal Hari Lal Bhagwati v. CBI*** reported in ***(2003) 5 SCC 257***, it was held that:

"It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities

as office bearers right at the time of making application for exemption."

18. In another case of **Vir Prakash Sharma v. Anil Kumar Agarwal**, reported in **(2007) 7 SCC 373**, it was held that:

"The ingredients of Section 420 of the Penal Code are as follows:

(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit. No act of inducement on the part of the appellant has been alleged by the respondent. No allegation has been made that he had an intention to cheat the respondent from the very inception....."

19. In the case of **All Carogo Movers (I) Pvt.Ltd. v. Dhanesh Badarmal Jain & Anr.** reported in **(2007) 12 SCALE 391**, it was held that:

"For the said purpose, allegations in the complaint petition must disclose the necessary ingredients therefor. Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said allegations are prima facie cannot notice the correspondences exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of

the process of the Court. Superior Courts while exercising this power should also strive to serve the ends of justice."

20. Reverting to the present case, as seen from the finding of the learned trial court that there cannot be any amount of doubt that the transaction between the parties was purely a civil transaction and the admitted position is that a money suit was pending between the parties when the complaint was filed before the criminal court.

21. The Hon'ble Supreme Court in the cases of ***Radhakrishna Nagesh v. State of Andhra Pradesh*** reported in ***2013 vol. 11 SCC 688*** and also in the case of ***Guru Dutt Pathak v. State of Uttar Pradesh*** reported in ***2021(6) SCC 116***, held that under the Indian criminal jurisprudence, the accused has two fundamental protections available to him in a criminal trial or investigation. Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation. Both these facets attain even greater significance where the accused has a judgment of acquittal in his favour. A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication. But then, this has to be established on record of the Court.

22. In Guru Dutt Pathak's case (supra), the Hon'ble Supreme Court held as follows:

"In Chandrappa v. State of Karnataka reported in ***(2007) 4 SCC 415***, this Court reiterated the legal position as under :

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive

powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

23. Coming to the case in hand, it appears that the alleged agreement and the power of attorney executed by the respondent No. 2 and the complainant were not exhibited before the learned trial court. Admittedly, no any original documents had been produced by the appellant during trial as a result of which, it is not proved before the learned trial court that any such agreement or power of attorney had been executed between the respondent No. 2 and the appellant and his witnesses. The appellant has also failed to prove the fact that the respondent No. 2 had an intention to cheat the appellant at the initial stage when the agreement and power of attorney were executed between the parties. The appellant has also failed to prove the essential ingredients of Section 405 IPC, i.e. entrustment and whether the accused was actuated by the dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons was entrusted it. Hence, the offence under Section 420/406 IPC is not made out against the respondent No. 2.

24. In view of the above discussions, going by the judgment of the trial court and the evidence and materials on record, it can be seen that the findings of the trial court are on the basis of the evidence and materials available on record and there is no perversity in the findings and judgment of the trial court. Thus, on examination of facts and circumstances

involved in the case, especially in the light of the dictum laid down in the aforesaid decisions, this court finds that the appellant has miserably failed to show any exceptional circumstance to interfere by this court with the order of acquittal or to show the judgment of the trial court is perverse or illegal.

25. Therefore, I find no merit in the appeal. In the result appeal is dismissed.

26. Send down the LCR.

JUDGE

Comparing Assistant