IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 4TH DAY OF FEBRUARY 2015/15TH MAGHA, 1936

Crl.Rev.Pet.No. 1971 of 2003 (C)
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AGAINST THE JUDGMENT IN CRL. APPEAL 24/2000 of SESSIONS COURT, MANJERI, DATED 24-02-2003
&
AGAINST THE JUDGMENT IN CC 221/1995 of J.M.F.C., PARAPPANANGADI, DATED 30-12-1999

REVISION PETITIONER(S):
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VENNAYAKKOT RAMADASAN NAIR,
S/O. KRISHNAN NAIR, KOLLAMCHENA P.O.,
OLAKARA AMSOM,
MALAPPURAM DISTRICT.

BY ADV. SRI.P.K.RAMKUMAR

RESPONDENT(S):
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STATE OF KERALA,
REPRESENTED BY CIRCLE INSPECTOR OF POLICE,
THIRURANGADI.

BY PUBLIC PROSECUTOR SMT. V.H. JASMINE.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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**K. RAMAKRISHNAN, J.**

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Crl.R.P.No.1971 of 2003

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Dated this the 4th day of February, 2015

**<u>O R D E R</u>**

Accused in C.C.No.221/1995 on the file of the Judicial First Class Magistrate Court, Parappanangadi, is the revision petitioner herein. He was charge-sheeted by the Circle Inspector of Police, Tirurangadi police station, in Crime No.256/1994 under Section 420 of the Indian Penal Code.

2. The case of the prosecution in nut shell was that, on 15.02.1994, the revision petitioner induced CWs 1 to 6 on the promise that he will procure visa and dishonestly them to deliver ₹2,28,000/- by offering a visa for them to Yemen and thereafter he could not procure the visa and entered into an agreement to refund an amount of ₹2,63,000/- including the expenses met by them when they were in Bombay with a view to prevent CWs 1 to 6 from proceeding against him legally and he

did not pay the amount and thereby he had committed the offence punishable under Section 420 of the Indian Penal Code.

3. After investigation, final report was filed and it was taken on file as C.C.221/1995 on the file of the Judicial First Class Magistrate Court, Parappanangadi. When the revision petitioner appeared before the court below, after hearing both sides, charge under Section 420 of Indian Penal Code was framed against him and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 8 were examined and Exts.P1 to P4 were marked on their side. After closure of the prosecution evidence, the revision petitioner was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence and he had further stated that, he had not

received any amount and he acted only as a mediator in the visa transaction between the prosecution witnesses and one Sadasivam and Sishupalan and he had not executed any agreement and he has been falsely implicated and his thumb impression was obtained in a stamp paper by force after abducting him. In order to prove his case, DWs 1 to 3 were examined and Ext.D1 to D14 were marked on his side. After considering the evidence on record, the court below found the revision petitioner guilty under Section 420 of the Indian Penal Code and convicted him thereunder and sentenced him to undergo simple imprisonment for two years under Section 420 of the Code of Criminal Procedure and set off was allowed for the period of detention already undergone by him under Section 428 of the Code of Criminal Procedure. The revision petitioner filed Crl. appeal No.24/2000 before the Sessions Court, Manjeri, and the leaned Sessions Judge dismissed the appeal, confirming the order of conviction and sentence passed by the court below. Aggrieved by the same, the present revision has been filed by the revision petitioner/accused before the court below.

4. Heard the counsel for the revision petitioner and leaned Public Prosecutor.

5. The counsel for the revision petitioner submitted that, the evidence adduced on the side of the prosecution did not prove that, there was any intention to cheat and if at all the entire prosecution case is accepted, there is only a breach of contract, which will amount to a civil wrong and not a criminal offence. Further, the courts below have not properly appreciated the defence evidence, which will go to show that, the case of the revision petitioner is more probable and believable even as per the prosecution witnesses. The brother of the revision petitioner was also examined as DW1 and he was also a victim of this visa transaction and as per the evidence it was he who

induced them to meet the appellant, but he was not made an accused in this case. He had relied on the decisions reported in **S.W. Palanitker and others v. State of Bihar and Another (2002(1) SCC 241)**, **Babu v. State of Kerala (2013(2) KLT 574)**, **Harmanpreet Singh Ahluwalia and others v. State of Punjab and others (2009(7) SCC 712)**, **Vir Prakash Sharma v. Anil Kumar Agarwal and Another (2007(7) SCC 373)** and **Hira Lal Hari Lal Bhagwati v. CBI, New Delhi (2003(5) SCC 257)** in support of this case.

6. On the other hand, learned Public Prosecutor supported the concurrent findings of the court below. Further the learned Public Prosecutor submitted that, all these things are facts which has been considered by the court below and no question of law has been raised. Further, the conduct of the party from the beginning and the nature of contentions taken by him also will go to show

that, he had no intention to procure the visa promised. So according to the learned Public Prosecutor, the courts below were perfectly justified in convicting the appellant for the offence alleged.

7. The case of the prosecution as emerged from the prosecution witnesses was that, during February 1994, the brother of the revision petitioner, Achuthan who was examined as DW1, approached PW1 and told that his brother who is the revision petitioner herein was having a group visa for employment in Yemen and he was prepared to give the visa to persons who were interested. It is on that basis, PW1 contacted CWs 2 to 6 and they approached the revision petitioner on 15.02.1994 and he had requested them to give ₹38,000/- each for each visa and accordingly he collected the amount for other persons and handed over the amount to the revision petitioner in the presence of them. Thereafter, as requested by the him, they went to

Bombay, stayed there for some time and the visa could not be obtained as promised and he directed them to go back to the native places. Accordingly they came back and when the revision petitioner came to his native place, he expressed his inability to procure visa and agreed to pay the amount and executed Ext.P1 agreement, agreeing to pay ₹2,63,000/- including the expenses of ₹35,000/- incurred by CWs 1 to 6, while they stayed at Bombay and thereafter he left the place and he did not pay the amount also. These things were done by the revision petitioner with a view to cheat them. So Ext.P2 complaint was filed before the Circle Inspector of Police, which was forwarded to Tirurangadi police station on the basis of which PW7 registered Ext.P3 first information report as Crime No.256/1994 of the Tirurangadi police station against the revision petitioner under Section 420 of the Indian Penal Code. Thereafter, investigation in this case was conducted by PW9, who questioned the witnesses and recorded their statements and he seized Ext.P1agreement as produced by PW1 as per Ext.P4 mahazar in the presence of PW8 and another and he completed the investigation and submitted final report against the revision petitioner.

8. The prosecution relies on the evidence of PWs 1 to 7 to prove the transaction. It is true that, in Ext.P2 complaint, the complainants have only narrated the circumstances and wanted the police to take appropriate action. It was an innocent complaint prepared projecting their grievance without knowing the legal formalities to be incorporated in the complaint, on the hope that by filing a complaint their grievance can be redressed. It was not prepared by a person having any legal knowledge as well. The police had mechanically registered Ext.P3 first information report for the offence under Section 420 of the Indian Penal Code. PWs 1 to 4 have categorically stated

that, DW1 had approached them and told that his brother who is the revision petitioner herein was having a group visa and if they want they can approach him. Accordingly, they approached the revision petitioner and he assured that he was having a group visa and wanted ₹38,000/- to be paid for each visa and accordingly he collected the amounts from CWs 2 to 6 also and at that time all of them were present in the house of PW4 /Velayudhan and the amount was paid along with CWs 1 to 6. They have categorically stated that, it was on the basis of the promise and inducement made by the revision petitioner that he was having the visa and he will give them the visa and on that basis the amounts were paid. Further it will be seen from the evidence of PWs 1 to 5 that, they went to Bombay as requested by the revision petitioner and stayed there for some time and the visa could not be procured as requested by the revision petitioner and they came back. It is thereafter the revision petitioner came to native place and Ext.P1 agreement was executed, whereby he had agreed to return the amount of ₹2,28,000/- received by him and ₹35,000/- being the expenses incurred by these persons when they stayed at Bombay, but he did not pay the amount and they filed the complaint.

9. PW6 also deposed that, the agreement was executed in his handwriting and the revision petitioner and witnesses were present at the time when the agreement was executed. Further it will be seen from the evidence of PW1 that, they believed the revision petitioner because he was their relative and that was the reason why the amount was paid. So it is clear from the evidence adduced of these witnesses that, the amount was paid on the basis of inducement made by the revision petitioner that he would procure the visa and gave it to them and it was on that basis they went to Bombay and spend ₹35,000/- for their stay there and since they did not get back the amount, on the

assurance given by the revision petitioner, Ext.P1 agreement was executed and since he did not pay that amount, which resulted in filing of Ext.P2 complaint. There is no dispute regarding the prepositions laid down in the decisions reported in **S.W. Palanitkar and others v. State of Bihar and Another (2002(1) SCC 241)**, **Muraleedharan v. Vijayakumar (2006(4) KLT 342)**, **Babu v. State of Kerala (2013(2) KLT 574)**, **Harmanpreet Singh Ahluwalia and Others v. State of Punjab and Others (2009(7) SCC 712)**, **Vir Prakash Sharma v. Anil Kumar Agarwal and Another (2007(7) SCC 373)** and **Hira Lal Hari Lal Bhagwati v. CBI, New Delhi (2003(5) SCC 257)** that, in order to attract the offence under Section 420 of the Indian Penal Code, the prosecution has to prove that, the accused had the dishonest intention of cheating the persons at the time when he entered into the agreement itself or make the promise itself.

10. On going through the allegations in those cases, it will be seen that, there was some transactions between them and on the basis of the promise made certain articles were delivered or some things had happened and when that promise was broken criminal complaints were filed and some part of the transactions were also complied with by the accused persons. So under such circumstances, the courts have held that, mere breach of contract will not amount to cheating. But in this case, it will be seen from the evidence and the conduct of the revision petitioner that, he had no intention to fulfill his promise even at the time when the promise was made and the amounts were obtained.

11. The case of the prosecution was that, he had obtained the amount making them to believe that, he was in possession of the group visa on the basis of which several persons could be sent to Yemen for job. He was aware of

the fact that he was not having the visa with him even at that time. The promise was made that, he was in possession of the visa and he would be able to provide the visa to them. But now his case was that, he had no direct dealing with these transactions and he had not received any amount, but he intervened in the matter in which one Sadasivan and Sishupalan were the real person who received the amount and when they came to procure the visa, he intervened as a mediator at the request of his brother/DW1 and since he was intervened and the amount could not be obtained from Sishupalan and Sadasivan, he was abducted by these prosecution witnesses and he was made to put his thumb impression by force on a stamp paper and misusing the same Ext.P1 agreement was created and the complaint was filed. He had further stated that, any of the dates on which the alleged amount or the execution of the document said to have been executed on as per the prosecution, he was in

Bombay and he was working in the company in which he was employed. In order to prove this fact, he examined DWs 2 and 3 and relied on Ext.D4 series punching cards said to have been issued to the revision petitioner. It may mentioned here that, normally the punching cards will be with the person to whom it was issued or with concern in which he worked. The person who was examined as DW2 had no explanation, as to how he had come in possession of those cards. Further this can be proved only by person who issued the same and whose signature or handwriting is there in the document, but that person was not examined. Admittedly, DW3 was examined to prove that, the revision petitioner and himself were residing in the same room and Ext.D9 was produced to show that it was the account maintained by him regarding the mess conducted by him, but unfortunately, there is nothing on record to show that the revision petitioner was also the party to that document.

Further certain documents were produced, namely Ext.D12 to D14 to show that, Sishupalan had issued certain receipts for the amounts received from one Unni, who was examined as CW2, Vasu, Velayudhan, Rajan and Sathyan. But when these documents were put to PW2 and PW1, they denied having such document been given to them by Sishupalan. If really these documents were intended to be given to the persons in whose favour it was given, it is not known as to how the revision petitioner had come into possession of those documents. So all these things will go to show that, he was in the habit of creating documents to avoid payment of amount to persons and put the responsibility on another. DW1 is non other than his brother, he will have an interest to help his brother as well. So under the circumstances, courts below were perfectly justified in discarding the documentary evidence, namely Ext.D3 to D14 and the evidence of DWs 1 to 3 to prove the case of the revision petitioner on his alibi claimed and he had no connection with the transaction and this court find no reason to interfere with that finding of the court below.

12. The execution of Ext.P1 agreement was also proved by PWs 1 to 6, who were examined before the court and they have categorically stated that, all of them were present at the time when the document was executed. Further Ext.D1 was produced to prove that, PW4 had filed Ext.P1 complaint against the revision petitioner on the basis of a cheque given under Section 138 of the Negotiable Instruments Act and in Ext.D1 complaint, it was mentioned that he had borrowed an amount of ₹50,000/- including the amount payable for procuring a visa and also for the expenses for obtaining the visa and when that was not fulfilled, he gave the cheque and it was dishonoured for the reason 'funds insufficient' and in spite of notice issued, he did not pay the amount, and that attitude of the revision

petitioner also shows that, even at the time when he issued the cheque he had no intention to pay the amount.

13. Further Ext.D2 was produced to show that, the mother of the revision petitioner and his wife had filed complaint alleging that on 29.10.1994, CW1 to 6 had kidnapped the revision petitioner. It is also admitted that, a case was registered for that purpose and after investigation final report was filed and it was pending as C.C.No.343/1995. It was brought out in evidence that, this complaint was filed after Ext.P2 complaint was filed by them and after the final report was filed in the case. So the courts below were perfectly justified in coming to the conclusion that Ext.D2 was created for the purpose of making a case after Ext.P2 complaint was filed, that he had been abducted and the documents were created. Further he had not taken any action independently against the persons who alleged to have abducted him as well. The

courts below were also perfectly justified in not relying on Exts. D5, D6, D7 and D8, as those documents were also not original documents, only Photostat copies and Ext.D5 was a letter said to have been given by active consultants and that was also not proved by examining the person who issued the same as well and as to how they had to come in possession was also not properly proved and none of the persons mentioned in that document had acknowledged such receipt as well. If really that was prepared in the presence of those persons, normally some acknowledgment could have been given or individual receipts would have been given to those persons regarding this aspect.

14. Further the evidence of PW1 will go to show that, even at the time when Ext.P1 agreement was executed by the revision petitioner, he was having the apprehension that, he would not comply with the same. So the conduct of the revision petitioner from the beginning and also the

subsequent conduct and the nature of defence taken by him will go to show that, even at the time when the transaction had taken place, he had no intention to fulfill the promise and when Ext.P1 agreement was also executed, he had no intention to fulfill the same. When Ext.P1 was executed, making them to believe that, he will pay the amount and it was delivered to them, making them to forbear from proceeding against the revision petitioner or allowing him to keep the amount and this agreement was executed by the revision petitioner with a dishonest intention to cheat the persons mentioned therein and he had no intention to fulfill the promise, then the ingredients of cheating under Section 415 of the Indian Penal Code is attracted and that is punishable under Section 420 of the Indian Penal Code. So the dictum's in the decisions relied on by the counsel for the revision petitioner is not applicable to the facts of this case and the principles laid down in the decisions will have to be appreciated on the basis of the evidence and facts in each case. So the facts in this case as narrated above will go to show the evil mind of the revision petitioner in inducing the persons to pay the amount and also executing Ext.P1 agreement on the promise of paying the amount and making the persons whose favour the document has been executed to keep them away from initiating action against the revision petitioner for recovery of the amount and allowing him to retain the amount, but for which they would not have agreed for the same as well. So under the circumstances, the courts below were perfectly justified in coming to the conclusion that, the prosecution has proved beyond reasonable doubt that the revision petitioner had committed the offence punishable under Section 420 of the Indian Penal code and rightly convicted him for the said offence and the concurrent findings of the court below on facts do not call for any interference.

15. As regards the sentence is concerned, the court below had sentenced him to undergo simple imprisonment for two years and that was confirmed by the appellate court. It may be mentioned here that, the transaction had taken place in the year 1994. Even now the aggrieved persons could not get back the amount and the right to file civil action for recovery of the amount is also lost on account of the promise made by the revision petitioner. So under the circumstances, merely sending him to jail alone will not meet the ends of justice and applying the principle of victimology by making the wrong doer to pay compensation to the victim to compensate the loss sustained on account of the wrong committed by the wrong doer has to be applied in this case. So considering this aspects, this court feels that, some reduction can be made in the substantive sentence, on making him to pay the amount payable or some compensation will be sufficient and

that will meet the ends of justice. So the sentence imposed by the court below and confirmed by the appellate court is hereby set aside and the same is modified as follows:

> The revision petitioner is sentenced to undergo simple imprisonment for two months and also to pay a compensation of ₹2,63,000/- to CWs 1 to 6 jointly, from whom he had received the amount and agreed to pay the same as per Ext.P1 agreement under Section 357(3) of the Code of Criminal Procedure and in default of payment of the same, he is further directed to undergo simple imprisonment for six months more. If the compensation amount is realised, then the lower court is directed to pay the same equally to CWs 1 to 6. Two months time is granted to the revision petitioner to pay the amount. Till then the execution of sentence is directed to be kept in

abeyance.

With the above modification of the sentence alone, the revision petition is allowed in part and disposed of accordingly. Office is directed to communicate this order to the concerned court, immediately.

Sd/-
**K. RAMAKRISHNAN, JUDGE**

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P.A. to Judge

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