

3 SCOB [2015] AD 1

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mrs. Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO.54 OF 2007.

(From the judgment and order dated 7.2.2007 passed by the High Court Division in Criminal Miscellaneous No.5938 of 2005.)

Prof. Dr. Motior Rahman: ...Appellant

=Versus=

The State and another : ...Respondents

For the Appellant: Mr. Rafique-ul-Huq, Senior Advocate, instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.

For Respondent No.1: Mr. Diliruzzaman, D.A.G., instructed by Mr. B. Hossain, Advocate-on-Record.

For Respondent No.2: Mr. Khondaker Saiful Huq, Advocate, instructed by Mr. Md. Nurul Islam Chowdhury, Advocate-on-Record.

Date of hearing: 28th January, 2015.

Date of Judgment:28th January, 2015.

Difference between cheating and breach of contract:

In every case of cheating there is implicit agreement between the parties. The vital factor to be considered is whether at the time of agreement there was intention to carry out the terms of the contract or not. If there is nothing to show that there was no intention at the time of agreement which was arrived at, but the failure to fulfill the terms of the agreement was the subsequent event, the offence of cheating cannot be said to have been committed. It would only be a case of breach of contract. ... (Para 8)

Penal Code, 1860

Section 39 and 491:

Section 39 of the Penal Code defines the term voluntary, means a willful omission to attend on the employer. Such willful omission must arise from something more than mere careless or negligence. It must be an omission of which the employee is conscious though he may not advert to the consequence. The legal contract must take shape of service for the helpless master or employer, for example, a curator of a lunatic, or a

doctor and a nurse employed in the hospital, who may render himself liable to the penalty under this section if he agreeing to look after the patient, voluntarily deserts the patient or omits to attend the patient.

The complainant was not the one who is neither a lunatic nor a bodily incapable person or has been suffering from a disease for which he has entered into a contract with the appellant to take care of him and in that view of the matter, the offence alleged in the complaint does not attract section 491 of the Penal Code. ... (Para 9 & 10)

J U D G M E N T

Surendra Kumar Sinha, CJ:

1. This appeal by leave is from a judgment of the High Court Division declining to quash the proceeding in C.R. Case No.5179 of 2004 pending in the Court of Metropolitan Magistrate, Dhaka.

2. Relevant facts which gave rise to the initiation of the proceeding are that the respondent made a complaint before the Chief Metropolitan Magistrate, Dhaka against the appellant alleging, inter alia, that complainant attended the respondent's chamber, a reputed surgeon, for treatment of fistula. The respondent upon examination advised him to get admitted into BIRDEM hospital for operative treatment. Complainant accordingly admitted into the hospital and in due course he was taken to the operation theater, when he noticed that the respondent was not present and that another surgeon Dr. Abdullah Al-Amin was taking preparation for conducting operation. Complainant thereupon declined to undergo operation under Dr. Abdullah Al-Amin, when the attending nurse and other physicians told him that Dr. Abdullah was conducting such type of operation. The complainant refused to undergo operation under Dr. Abdullah but he was forcibly applied anesthesia and later on he came to know that Dr. Abdullah Al-Amin conducted his operation and in the consent letter, it was mentioned that his consent was taken. Complainant alleged that the respondent by exploiting his fame and name collected patients by giving assurance that he would conduct operation but in fact he never conducted such operation and thus, he had committed the offence of breach of trust, which act constituted offences punishable under sections 406/420/491 and 337 of the Penal Code.

3. The learned Chief Metropolitan Magistrate took cognizance of the offences punishable under sections 420/491 of the Penal Code against the appellant. The appellant then moved the High Court Division for quashment of the proceeding. The High Court Division was of the view that the allegations in the complaint petition prima-facie disclose offences punishable under the aforesaid provisions of the Penal Code and that since the appellant had not exhausted the other remedy available to him, the proceeding could not be quashed at such stage.

4. Mr. Rafiqe-ul-Huq, learned counsel appearing for the appellant argues that the allegations made in the complaint even if they are taken to be true, no criminal offence discloses at all against the appellant far less a dispute of civil nature, and the High Court Division has failed to comprehend that aspect of the matter. It is further argued that since the ingredients of initial deception are absent in the complaint petition, inasmuch as, admittedly the respondent was given operative treatment at a public hospital like BIRDEM as an indoor patient, the High Court Division erred, therefore, in law in not interfering with the

proceeding. It is added that the High Court Division has also committed a fundamental error in finding that the facts alleged in the complaint disclose an offence punishable under section 491 of the Penal Code without assigning proper reasons. On the other hand Mr. Khondaker Saiful Huq, learned counsel appearing for the respondent, argues that the High Court Division is perfectly justified in holding the view that the allegations made in the complaint disclose prima-facie offences against the respondent.

5. Now the first question to be examined is whether on the facts disclosed in the complaint that on assurance of the appellant that he would conduct the operation of the complainant, the latter admitted into BIRDEM but the operation was conducted by an another surgeon without his consent by force, such assurance gave rise to initial deception for constituting an offence of cheating.

6. Section 415 defines cheating and under this provision a person is said to cheat another when he induces the person so deceived to deliver any property to him or to consent that he 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 was 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. On a plain reading of the complaint it does not disclose that the appellant had induced the complainant with dishonest intention to deliver any property to him or to do or omit to do anything which act or omission causes or likely to cause damage or harm to the complainant in body, mind, reputation or property.

7. Admittedly, the respondent had undergone operative treatment in a public hospital. It is not the case of the complainant that the appellant advised the respondent to get admitted into his private clinic where he would conduct operation and in violation of the contract or the representation, he was compelled to undergo operation through an unqualified or novice surgeon, which caused damage to any organ or that by such operation various complications cropped up, by which, the complainant had suffered both physically or mentally or that any harm had caused to him. There is no allegation of monetary transaction between the appellant and the complainant over the operation. Neither the appellant had derived any undue advantage by such operation nor the complainant had suffered any loss or damage. In the absence of those elements, the initial deception which is a constituent for committing an offence of cheating is totally absent. There is allegation that there was misrepresentation by the appellant for which the complainant was deceived. This is merely an allegation and even if it is assumed that there was such misrepresentation for, mere words of commendation do not amount to warrantee. It attracts the civil law. In the absence of any undue advantage being derived, the question of misrepresentation does not arise. A misrepresentation is given to any person to do any act or to refrain from doing any act or to omit to do anything with an object to deriving any undue advantage. Here as observed above, the appellant had derived no financial or any sort of benefit by reason of giving the complainant advice to get admitted into BIRDEM for operation. Rather, it could be said that the complainant had gained benefit by the operative treatment given at BIRDEM through Dr. Abdullah. He was fully cured of his fistula ailment. More so, the complainant did not make any allegation that Dr. Abdullah Al-Amin was not a reputed surgeon for the disease he was suffering from.

8. Even if it is assumed that there was contract between the complainant and the appellant that the appellant would conduct the operation upon the complainant if the latter had admitted into BIRDEM, a mere breach of contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the

intention of the accused at the time of alleged inducement which must be judged by his subsequent act. In every case of cheating there is implicit agreement between the parties. The vital factor to be considered is whether at the time of agreement there was intention to carry out the terms of the contract or not. If there is nothing to show that there was no intention at the time of agreement which was arrived at, but the failure to fulfill the terms of the agreement was the subsequent event, the offence of cheating cannot be said to have been committed. It would only be a case of breach of contract. As observed above, there was no intention to deceive the complainant. Admittedly by reason of the operation being done by Dr. Abdullah Al-Amin no consequence resulted from that operation, and therefore, the act of the appellant, even if there be any, does not attract the offence of cheating.

9. The second question of is whether the complaint discloses an offence punishable under section 491 of the Penal Code. Section 491 refers to a case where one who is helpless or is incapable of taking care of himself by reason of youth or unsoundness of mind or of disease or of bodily weakness, enters into a contract with another to attend on or to supply the wants of the employer, who after accepting the engagement deserts the employer voluntarily. To hold the person liable under this section, he must not be a general servant or domestic help, but the one who is specially retained or employed for the supervision of the helpless employer. A domestic help or a servant may be given such engagement, but for such engagement his general duties does not make him amenable to this section. To constitute the offence if the person employed to attend on or to supply the wants of the employer, voluntarily omits to attend him or to supply his wants, though he may not actually withdraw himself from the service of the employer. Section 39 of the Penal Code defines the term voluntary, means a wilful omission to attend on the employer. Such willful omission must arise from something more than mere careless or negligence. It must be an omission of which the employee is conscious though he may not advert to the consequence. The legal contract must take shape of service for the helpless master or employer, for example, a curator of a lunatic, or a doctor and a nurse employed in the hospital, who may render himself liable to the penalty under this section if he agreeing to look after the patient, voluntarily deserts the patient or omits to attend the patient.

10. The complainant was not the one who is neither a lunatic nor a bodily incapable person or has been suffering from a disease for which he has entered into a contract with the appellant to take care of him and in that view of the matter, the offence alleged in the complaint does not attract section 491 of the Penal Code. The High Court Division has totally overlooked that aspect of the matter. The other ground on which the High Court Division has declined to interfere with the proceeding is non-exhaustion of alternative remedy. This is not a legal ground for, after taking cognizance of the offences, the accused person can move the High Court Division challenging the legality of the proceeding on any of the grounds available under section 561A of the Code of Criminal Procedure. In view of the above, we find that the allegations made in the complaint do not attract offences punishable under sections 420/491 of the Penal Code and therefore, the initiation of the proceeding is a sheer abuse process of the court. Appeal is allowed. The proceeding is quashed.