

SAMIR SAHAY @ SAMEER SAHAY

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v.

STATE OF U.P. AND ANOTHER

(Criminal Appeal No.1541 of 2017)

AUGUST 25, 2017

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[A.K. SIKRI AND ASHOK BHUSHAN, JJ.]

*Penal Code, 1860 –s.420 – FIR by Respondent No.2 against the appellant and his father u/s.420 alleging that he suffered loss due to false assurance given to him to invest money and get double the amount so invested, in a company wherein appellant's father was Branch Manager – However, no such repayment was made to Respondent No.2 – Chargesheet filed u/s.420 – Application filed by appellant for discharge before Chief Judicial Magistrate (CJM), dismissed – Criminal Revision filed by appellant dismissed by High Court – On appeal, held: In the present case ingredients of s.420 were not made out so as to frame any charge u/s.420 against the appellant – Even in the FIR, allegation of making assurance was made against the father of the appellant and not against the appellant – The only allegation made against the appellant was that he accompanied his father – There was no allegation that the appellant fraudulently or dishonestly induced the Respondent No.2 to deposit money – Order of CJM and the judgment of High Court are set aside – Appellant shall stand discharged from the charges u/ s.420.*

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*Penal Code, 1860 – s.415 – Charge under, for cheating – Ingredients for establishing such charge – Held: The inducement must be fraudulent and dishonest which depends upon the intention of the accused at the time of inducement.*

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*Penal Code, 1860 – s.420 – Charge under, for cheating and dishonestly inducing delivery of property – Ingredients for establishing such charge – Held: It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise.*

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*Hridaya Ranjan Prasad Verma and others v. State of Bihar and another 2000 (4) SCC 168: [2000] 2 SCR*

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A 859; *Dalip Kaur and others v. Jagnar Singh and another* 2009 (14) SCC 696 : [2009] 10 SCR 264 ; *Kerala v. A. Pareed Pillai* 1972 (3) SCC 661 – relied on.

B *Arun Bhandari v. State of Uttar Pradesh and others* 2013 (2) SCC 801 : [2013] 3 SCR 961– referred to.

Case Law Reference

	[2000] 2 SCR 859	relied on	Para 18
	[2009] 10 SCR 264	relied on	Para 19
C	[2013] 3 SCR 961	referred to	Para 21
	1972 (3) SCC 661	relied on	Para 21

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1541 of 2017.

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From the Judgment and Order dated 21.10.2016 of the High Court of Judicature at Allahabad in Criminal Revision No.724 of 2007.

E Pradeep Kant, Sr. Adv., Braj Kishore Mishra, Divyanshu Sahay, Amit Bhagat, Advs. for the Appellant.

D.K. Singh, AAG, Ms. Komal Mudhra, Saurabh Agrawal, Ardhendumauli Kumar Prasad, Alok Kumar Pandey, Advs. for the Respondents.

F The Order of the Court was delivered by

**ASHOK BHUSHAN, J.** 1. Leave granted.

G 2. This appeal has been filed against the judgment of Allahabad High Court dated 21.10.2016 in Criminal Revision No. 724 of 2007 dismissing the criminal revision filed by the appellant. The criminal revision was filed by the appellant challenging the order dated 28.02.2007 passed by Chief Judicial Magistrate, Fatehpur by which order Chief Judicial Magistrate rejected the application of the appellant for discharge in Criminal Case No. 545 of 2002 under Section 420 IPC.

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3. The brief facts giving rise to this appeal are:

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The Company, namely, M/s. Aneja Consultancy (hereinafter referred to as 'the Company') was founded in the year 1984 by one I.J. Aneja as Chairman. Father of the appellant, Major P.C. Sahay (Retd.) joined the Company as Branch Manager at District Fatehpur. Several persons including appellant as well as respondent No.2 deposited different amounts in the Company. Respondent No.2 and his wife deposited total amount of Rs.86,000/- in the Company in June/July, 1987. The owner/Proprietor of the Company on 20.06.1996 made a public declaration that the owner would bear the full liability and responsibility of all deposits made by various investors across the country and employees and staff of the Company have no personal liabilities to repay to the investors. The Company faced a financial trouble, cash/liquidity crunch and was unable to make repayment of the money of the investors. Respondent No.2 lodged First Information Report on 30.05.1998 against the appellant and his father Major(Retd.) P.C. Sahay under Section 420 IPC. A Case Crime No.386 of 1998 was registered against the appellant under Section 420 IPC. A criminal writ petition was filed challenging the FIR dated 30.05.1998 by the appellant as well as his father Major P.C. Sahay(Retd.). The High Court *vide* its judgment dated 21.10.2016 stayed the arrest of the appellant till submission of charge-sheet whereas prayer of the father of the appellant to stay of arrest was rejected. Respondent No.2 and his wife filed a complaint before District Consumer Forum, Fatehpur against the Chairman of the Company/Proprietor and Managing Director of the Company praying for realisation of the amount deposited in June/July, 1997 along with interest and Rs.2000/- as expenditure of the litigation. The complaint was filed on 09.11.1998.

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4. The Police carried out investigation in Criminal Case NO.386 of 1998 recorded the statement of respondent No.2 and his wife and a chargesheet No.358 of 2001 dated 14.10.2001 was submitted by the Police under Section 420 IPC. The cognizance was taken on 15.02.2002. The appellant filed an application for discharge alleging that neither sufficient allegations are made nor evidence to prosecute the appellant under Section 420 IPC was produced. Chief Judicial Magistrate rejected the application for discharge *vide* his order dated 28.02.2007 against which Criminal Revision was filed by the appellant in the High Court. The Criminal Revision has been dismissed on 21.10.2016 against which order this appeal has been filed.

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A 5. We have heard Shri Pradeep Kant, learned senior counsel appearing for the appellant and learned counsel for the State of U.P.

6. Although, notices were published in the newspaper, Amar Ujala, Kanpur on 12.08.2017 as well as in Amar Ujala, Fatehpur on 13.08.2017 but no one has appeared for respondent No.2.

B 7. Learned senior counsel for the appellant in support of the appeal submits that in the First Information Report lodged by respondent No.2 against the appellant for the offence under Section 420 IPC, the ingredients of Section 420 IPC are not present in the allegation and the courts below committed error in rejecting the application for discharge filed by the appellant.

C 8. Learned senior counsel for the State submits that both in the First Information Report as well as in the statement made by complainant under Section 161 Cr.P.C., it was alleged that false assurance was given to the complainant to deposit money. He submits that it is not necessary that accused should be an employee of the Aneja Consultancy. There D the loss was caused to the complainant due to the false assurance given by Major P.C. Sahay (Retd.) and the appellant who was his son.

9. We have considered the submissions made by the learned counsel for the parties and perused the records.

E 10. The copy of First Information Report lodged by respondent No.2 against the appellant and his father is at Annexure-P6 to the paper book. It will be useful to reproduce the entire First Information Report lodged by respondent No.2 which is as follows(as translated into English):

F *"To, the S.H.O. Kotwali Fatehpur Janpat Fatehpur Sir, It is requested that the applicant colonel R.K.Singh(Retired) is a R/o Mohalla Nasirpur Lal Bahadur Shashtri Marg, City, Fatehpur P.S. Kotwali Fatehpur Janpat Fatehpur. In the City Fatehpur in Mohalla Civil Lines of the applicant an office was opened at I.T.I. Road in the name of Aneja Group Consultancy. Their People came to the applicant and make him understand and assured him if I or any person will deposit money with their company, their company will return the double amount after three years but the applicant did not assure on them. (3) But In the month of June 1997 retired Major P.C.Sahay R/o Lavrol House 145 Civil Lines Fatehpur*

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who was known to the applicant being an army personnel and a resident of the same locality contacted to the applicant and assured him that he is the Regional Manager of the said company and whatever amount the applicant will deposit he will give the receipt of the same with his signature it was also assured that the money of the applicant will not be lost this and all responsibility will be on him. Along with him his son Samir Sahay Advocate who was already acquainted with the applicant also accompanied his father. Major PC Sahay gave the above said assurance, and the applicant and his wife, Smt. Uma Devi deposited Rupees one Lakh with Major P.C.Sahay in this regard and he gave the receipt of the same to the applicant of which the applicant is enclosing the photocopy. Like this Major P.C.Sahay(retired) has got deposited total amount of Rs.86,000/- from me and my wife (4) But after some days it came to know that the said company has ran away along with the lakhs of rupees of the depositors after closing its office. I personally went and found the office closed. (5) I met with Major P.C.Sahay(retired) and his son Samir Sahay they denied their responsibility and said that due to loss the company has been closed. (6) In this way the owner of company Aneja Group Major P.C.Sahay(retired) Regional Manager and his son Samir Sahay have committed forgery by giving false assurance to the depositors and caused loss to them on their deposited amount earned profit illegally and have committed the offence of conspiracy and forgery. (7) It is therefore prayed that after registering the F.I.R. appropriate legal action may be taken against the above said persons. It has also come to knowledge that goods worth about one lakh are kept in the office of the company which has been taken into his possession by the owner of the shop(office). In this regard a list of the property and goods given by flight lieutenant Nagendra Vikram Senior Branch Manager Aneja Group is enclosed. Which may be attached so that some money of the depositors be returned (8) Details of the receipts and deposited amount."

11. After lodging the First Information Report, respondent No.2 and his wife had also filed Petition No.318 of 1998 before the District

A Consumer Forum, Fatehpur against Inderjeet Aneja, Proprietor of Aneja Consultancy, President and Managing Director of Aneja Financial Services Limited and Aneja Group of Companies. In the complaint filed before the District Consumer Forum neither the appellant nor his father was arrayed and no allegation was made against the appellant and his father in the complaint. It is also relevant to note that the said complaint filed by respondent No.2 and his wife ultimately was allowed by the District Consumer Forum on 27.12.2006. The District Consumer Forum directed the amount as claimed to be paid within 15 days after receiving the copy of the order.

12. It is also relevant to note that the appellant had also filed a complaint being No.111 of 1999 along with his wife, son, father and other family members alleging that applicants had deposited an amount of Rs.3,49,415/- in the Company which has not been returned back. The District Consumer Forum allowed the complaint filed by the appellant *vide* order dated 16.08.2001 directing payment with interest at the rate of 9% per annum.

13. In the statement made before the Police under Section 161 Cr.P.C. both respondent No.2 and his wife have repeated the same allegations which were made in the First Information Report. In the statement which has been brought on record under Section 161 Cr.P.C., respondent No.2 and his wife had alleged that Major P.C. Sahay (Retd.) who was known to respondent No.2 contacted respondent No.2 and assured him that if any amount was deposited with the Company, he would take the entire responsibility. It was further stated that the appellant accompanied his father Major P.C. Sahay (Retd.) who was known to respondent No.2.

14. The application was filed by the appellant seeking discharge on the ground that there are no evidence to frame charge under Section 420 IPC. Learned Chief Judicial Magistrate while rejecting the application filed by the appellant for discharge has observed that on the assurance of both Major P.C. Sahay (Retd.) and the appellant, the complainant and his wife deposited Rs.86,000/-. Learned Chief Judicial Magistrate has given following reasons for rejecting the application:

*"It has been clearly mentioned in the F.I.R. that after the assurance of deceased P.C. Sahay and his son Samir Sahay the money was invested in the Company. As well as it has also*

*been mentioned that accused Samir Sahay was receiving commission from the Company after perusing all the evidence in the file as per law there is proof to frame allegation against accused Samir Sahay."*

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15. The order passed by the Chief Judicial Magistrate was challenged. The High Court by brief order has dismissed the revision observing that counsel for the revisionist could not point out any manifest error or otherwise illegality so as to warrant interference.

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16. Before we proceed further to examine the contentions of the learned counsel for the parties, it is necessary to notice the ingredients for establishing a charge under Section 420 IPC. Section 415 IPC defines cheating which is to the following effect:

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*"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"."*

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17. Section 420 IPC is with regard to the cheating and dishonestly inducing delivery of property which is to the following effect:

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*"Section 420. Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

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18. According to Section 415 IPC, the inducement must be fraudulent and dishonest which depends upon the intention of the accused at the time of inducement. This Court had occasion to consider Sections 415 and 420 IPC in *Hridaya Ranjan Prasad Verma and others vs.*

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A **State of Bihar and another, 2000 (4) SCC 168.** This Court after noticing the provisions of Section 415 and 420 IPC stated following in paragraphs 14 and 15:

B “14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be C fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

D 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 E 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 F failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.”

G 19. Again in **Dalip Kaur and others vs. Jagnar Singh and another, 2009 (14) SCC 696**, this Court noticed the ingredients of Section 420 IPC. In paragraphs 9 to 11 following was stated:

“9. The ingredients of Section 420 of the Penal Code are:

“(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to H 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.*" A

10. *The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code. (See Ajay Mitra v. State of M.P., 2003 (3) SCC 11)* B C

11. *There cannot furthermore be any doubt that the High Court would exercise its inherent jurisdiction only when one or the other propositions of law, as laid down in R. Kalyani v. Janak C. Mehta, 2009 (1) SCC 516 is attracted, which are as under: (SCC p. 523, para 15)* D

*"(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.* E

*(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.* F

*(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.* G

*(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."* H

A 20. Applying the ratio laid down by this Court as noted above, it is clear that ingredients of Section 420 IPC are not made out in the present case, either from the First Information Report or from any other material. From the First Information Report as extracted above only allegation made against the appellant was that he accompanied his father Major P.C. Sahay (Retd.) when he assured that the money of the applicants will not be lost and it shall be the responsibility of his father (late P.C. Sahay). Following allegations made in the First Information Report need to be specially noticed:

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 “Along with him his son Samir Sahay Advocate who was already acquainted with the applicant also accompanied his father. Major PC Sahay gave the above said assurance, and the applicant and his wife Smt. Uma Devi deposited Rupees one Lakh with Major P.C.Sahay in this regard and he gave the receipt of the same to the applicant of which the applicant is enclosing the photocopy. Like this Major P.C.Sahay (retired) has got deposited total amount of Rs.86,000/- from me and my wife (4) But after some days it came to know that the said company has ran away along with the lakhs of rupees of the depositors after closing its office.”

E 21. In the First Information Report even allegation of making assurance was not made against the appellant but was made against Major P.C. Sahay (Retd.), father of the appellant. There was no allegation that the appellant fraudulently or dishonestly induced the complainant to deposit money. This Court in *Arun Bhandari vs. State of Uttar Pradesh and others, 2013 (2) SCC 801*, has held that it is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating. An earlier two-Judge Bench judgment of this Court in *State of Kerala vs. A. Pareed Pillai, 1972 (3) SCC 661*, was quoted with approval in paragraph 21. Paragraphs 21, 22, 23 and 24 which are relevant are to the following effect:

G 21. Before we proceed to scan and analyse the material brought on record in the case at hand, it is seemly to refer to certain authorities wherein the ingredients of cheating have been highlighted. In *State of Kerala v. A. Pareed Pillai* a two-Judge Bench ruled that: (SCC p. 667, para 16)

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"16. ... To hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise [and] such a dishonest intention cannot be inferred from [a] mere fact that he could not subsequently fulfil the promise." A

22. In *G.V. Rao v. L.H.V. Prasad*, 2000 (3) SCC 693, this Court has held thus: (SCC pp. 696-97, para 7) B

"7. As mentioned above, Section 415 has two parts. While in the first part, the person must 'dishonestly' or 'fraudulently' induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in *Jaswantrai Manilal Akhaney v. State of Bombay*, AIR 1956 SC 575, a guilty intention is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating, 'mens rea' on the part of that person, must be established. It was also observed in *Mahadeo Prasad v. State of W.B.*, AIR 1954 SC 724, that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered." C D E

23. In *S.W. Palanitkar v. State of Bihar*, 2002 (1) SCC 241, it has been laid down that: (SCC p. 250, para 21)

"21. ... In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating." F G

24. In the said case while dealing with the ingredients of criminal breach of trust and cheating, the Bench observed thus: (*S.W. Palanitkar case*, SCC p. 246, paras 9-10)

- A            *"9. The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust.*
- B            *10. The ingredients of an offence of cheating are: (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by, (ii)(b) the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."*
- C            *"*
- D            *"*

E            22. The Chief Judicial Magistrate while rejecting the application of the appellant for seeking discharge has not even referred to any allegation or evidence on the basis of which it can be said that ingredients of Section 420 IPC were made out in the facts of the present case.

F            23. We are, thus, of the considered opinion that in the present case ingredients of Section 420 IPC were not made out so as to frame any charge under Section 420 IPC against the appellant.

G            24. In the result, the appeal is allowed, the order of the Chief Judicial Magistrate dated 28.02.2007 and the judgment of the High Court dated 21.10.2016 are set aside. The appellant shall stand discharged from the charges under Section 420 IPC in Case No.545 of 2002.