

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL MISC.APPLICATION NO. 31397 of 2017**

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PROPRIETER OF RAJU CONSTRUCTION

Versus

STATE OF GUJARAT

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Appearance:

MR YOGENDRA THAKORE(3975) for the PETITIONER(s) No. 1

MR LR PUJARI, ADDL.PUBLIC PROSECUTOR for RESPONDENT(s) No.1

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI**Date : 28/12/2017****ORAL ORDER**

1.This is an application preferred by the applicant seeking leave to appeal under section 378(4) of the Code of Criminal Procedure, 1973, against the judgment and order of acquittal dated October 25, 2017, rendered by the learned 3rd Additional Chief Judicial Magistrate, Mahesana, while dealing with Criminal Case No.6768 of 2013, whereby the learned Magistrate has acquitted the respondents-accused from the charge of offences punishable under sections 420, 406, 506(2) and 114 of the Indian Penal Code.

2. The brief facts which led to lodgment of the complaint are as under :

2.1 The applicant-original complainant was running business of construction for the last 12 years in the name and style of 'Raju Construction'. The respondent No.3 was also in the same business i.e. construction business and, hence, he came in contact with the applicant. The respondent Nos.2 and 3 are relatives.

2.2 It is the case of the applicant that the respondent No.2 under the pretext that he was facing financial crisis borrowed an amount of Rs.10 lakh from the applicant through the respondent No.3 and the applicant in good faith lent the said amount of Rs.10 lakh by issuing a cheque on April 06, 2009.

2.3 Since the said amount was not returned by the respondent No.2, a complaint was lodged before the Court of the learned 3rd Chief Judicial Magistrate, Mahesana, bearing Criminal Case No.6768 of 2013. The learned

Magistrate after issuing summons to the respondent-accused under the Code of Criminal Procedure, framed the charges and the plea of the respondents-accused has been recorded, however, they have pleaded not guilty to the charge and claimed to be tried; and the trial Court at the end of the trial acquitted the respondents-accused from the charges levelled against them and, therefore, the present appeal.

3. Shri Yogendra Thakore, learned counsel appearing for the applicant, has urged that the amount of Rs.10 lakh was paid by way of a cheque to the respondent No.2, who happens to be the relative of the respondent No.3 and the said amount has not been paid back and, therefore, since beginning there was an intention on the part of the respondent No.2 to commit fraud with the applicant. There is sufficient material to link the respondents-accused with the crime and, therefore, the trial Court has committed serious error in holding that the prosecution has failed to prove the charges beyond reasonable doubt.

3.1 The learned counsel appearing for the applicant has taken this Court through the provisions of sections 420 and 406 of the Indian Penal Code and also the report of the inquiry officer, tendered on October 20, 2011 and, thereby prayed for allowing the present application.

4. Shri L.R. Pujari, learned Additional Public Prosecutor, has supported the case of the applicant-original complainant and has urged to allow the present application for special leave to appeal.

5. This Court has considered the submissions made by Shri Yogendra Thakore, learned counsel appearing for the applicant-original complainant and the learned Additional Public Prosecutor appearing for the respondent-State, as also the oral as well as documentary evidence, which have been produced on record by the learned counsel appearing for the applicant for the purpose of hearing of this application for special leave to appeal.

6. It emerges from record that the Police Inquiry No.74 of 2011 eventually culminated into the report of the Police Sub Inspector, Mehsana Taluka Police Station. The report tendered does not reveal any kind of offence. The case of the respondent No.3 is also noted and according to him, the complainant and the respondent No.3, both, had kept the work of construction. Prior to about 2½ years, the complainant needed pipes for his construction work and the pipes worth Rs.6 lakh were supplied and Rs.4 lakh were to be paid for JCB machines; and also towards labour work, the amount was to be paid to the respondent No.2-Hasmukhbhai. The cheque for an amount of Rs.10 lakh had been given to the respondent No.2. A notice issued by the complainant through his learned advocate in this regard also, according to this report, has reflected an inconsistent story. The trial Court after having considered the disputes of the partnership and also on noting the ingredients necessary to attract the provisions of sections 406 and 420 of the Indian Penal Code being

absent, construed the dispute as civil dispute between the parties and dismissed the complaint.

7. At this stage, it would be to refer to the decision of the Apex Court in the case of **Harmanpreet Singh Ahluwalia and others v. State of Punjab and others**¹, reported in, wherein the Apex Court has held that the intention of cheating at the time when the person has induced to deliver any property to any person, is necessary. It would be refer to both the sections 405 and 415 of the Indian Penal Code, which read as under :

"Section 405 : Criminal breach of trust:

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to

¹ 2009 Cr.L.J. 3462

do, commits "criminal breach of trust".

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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'."

An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied :

"i) deception of a person either by making a false or misleading representation or by other action or omission;

(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."

8. Thus, in the opinion of this Court, the trial Court committed no error in holding that there is complete absence of intention of cheating at the time of making initial promise and that being absent, no offence punishable under section 420 of the Indian Penal Code is made out. The complainant needed to show that the respondents-accused had fraudulent or dishonest intention at the time of making dishonest representation. On the contrary, the glaring facts speak of the civil dispute with regard to the supply of pipes and the JCB machine engaged with the labourers. The amount of cheque given towards such fees to the third party at the instance of the respondent No.3, is sought to be alleged as an amount dishonestly induced to deliver the immoveable property.

9. In view of aforesaid, it transpires that no case is made out for this Court to grant any special leave to appeal. Hence, the present application

deserves to be rejected and the same is, accordingly, rejected.

In view of rejection of the application for special leave to appeal, the main appeal does not survive and the same stands disposed of accordingly.

(MS SONIA GOKANI, J.)

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