



1989 CRI. L. J. 1892
GUJARAT HIGH COURT
B. S. KAPADIA, J.

Criminal Misc. Appln. Nos. 883 of 1986 and
2166 of 1987, D/- 30 - 9 - 1988

**Sanjiv Bhardwaj and etc Petitioners v.
Hasmukhlal Rambhai Patel and another
Respondents**

**Criminal P.C. (2 of 1974), S.482 -
Exercise of inherent powers under S.482 -
Offence of cheating - Dishonest intention -
Advertisement giving special offer to tourists
in Hotel - Complainant induced to make
payments in advance - Hotel**

@page-CriLJ1893

**accommodation not afforded - Inference
of dishonest intention could be drawn -
Magistrate on taking into consideration
averments in complaint issuing bailable
warrants - Magistrate could not be said to
have exercised power wrongly. Penal Code (45
of 1860), S.420 -**

An advertisement was published in a daily newspaper for giving special offer to the tourists in Goa for Hotel Oberoi and in pursuance of the said advertisement the complainant went to the accused at the Regional Office of the Hotel. The accused explained to the complainant all the details and agreed that it was the advertisement in respect of their Hotel and he also assured of all the facilities and accordingly he induced the complainant to pay up the amount and the complainant on account of the aforesaid promise/assurance paid the amount. The complainant was also given confirmation letter in respect of the accommodation in the said Hotel and in the said confirmation letter status of reservation was mentioned as "confirmed". The said confirmation letter was a printed one and it was in respect of six persons to be

accommodated in the Hotel. The date of arrival of the complainant and his party was mentioned in the said letter as 14-11-1985 and the date of departure was mentioned as 17-11-1985. It was also signed by the accused. When the complainant arrived in Goa and went to the Hotel he was refused accommodation. In spite of repeated requests the accused refused to see the receipt as also the confirmation letter.

Held, the conduct of the accused prima facie appeared to be consistent with the dishonest and/or fraudulent intention on their part to cheat the complainant. The Magistrate taking into consideration averments in the plaint and passing orders for issue of bailable warrants against the accused, could not be said to have exercised the powers wrongly.

(Paras 17 18 22)

Cases Referred

Chronological Paras

1982 Cri LJ 2260 (Gauh)	8
1974 Cri LJ 352 : AIR 1974 SC 301	7
1972 Cri LJ 1243 : AIR 1973 SC 326	6
1970 Cri LJ 707 : AIR 1970 SC 549	5

**K.S. Nanavati with B.C. Patel, for Petitioners;
A.J. Patel, and M.I. Patel, for Respondents; M.D.
Pandya, Public Prosecutor (for No. 2) for the
State.**

Judgement

1. ORDER :-The aforesaid two Criminal Misc. Applications have been filed under S.482 of the Criminal Procedure Code for quashing and setting aside the order passed by the learned Metropolitan Magistrate, Court No. 5, Ahmedabad, in Criminal Case No. 168/86, issuing process against the petitioner in both the aforesaid cases.

2. It may be mentioned that the respondent No. 1 in both the cases have filed the aforesaid criminal case by filing a complaint against the petitioners for the offences under S.420, 420 read with Sec. 34, 420 read with 114 and 120B read with 420 of IPC as well as for the offences under S.418, 418 read with 34, 418 read with 114 and 120B of IPC. The learned Magistrate has passed the said order after recording the statement on oath of the complainant on 17-2-86 for issuing bailable warrants of the amount of Rs. 1,000/- for the offences under S.418, 420 read with Sec. 34 of the IPC against the petitioners.

3. It is contended on behalf of the petitioners that assuming the allegations made in the complaint to be correct the offence of cheating is not made out and that there are no allegations with regard to the required dishonest or fraudulent intention on the part of the present petitioners. It is further contended on behalf of the petitioners that mere failure to fulfil the promise subsequently would at the most be failure to perform the contract or it would be a breach of the contract, but it is not the offence of cheating either under Sec. 418 or Sec. 420 of the IPC.

4. It is also contended on behalf of the petitioners that there are no allegations on the point of agreement and in absence of such averment or allegation the offence of conspiracy to cheat cannot be constituted and the learned Magistrate has, therefore,

@page-CriLJ1894

rightly not issued the process for the alleged offence under Sec. 120B read with Sec. 420 of the IPC.

5. In support of the above contentions the learned Advocates appearing for the petitioners have cited before us the judgment of the Supreme Court in the case of *Lennart Schussler v. Director of Enforcement*, AIR 1970 SC 549 : (1970 Cri

LJ 707) wherein it is held that for the offence of conspiracy there should be an agreement between two or more persons to do or cause to be done an illegal act or legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. It further held in the said case that there must be a meeting of minds in doing of the illegal act or the doing of a legal act by illegal means.

6. The learned Advocates for the petitioners have also cited the judgement in the case of the *State of Kerala v. A. Parsad Pillai*, 1972 Cri LJ 1243 : (AIR 1973 SC 326) wherein the Supreme Court has held that for holding 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. Such a dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfil the promise.

7. While examining as to whether the offence of Sec. 420 of IPC is made out or not, in the case of *Hari Prasad Chamaria v. Bishun Kumar Surekha*, AIR 1974 SC 301 : (1974 Cri LJ 352), the Supreme Court has observed as under :

"...There was nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with the money nor did the complaint indicate that the respondents had induced the appellant to pay them the amount parted with...."

In the facts and circumstances of the said case the Supreme Court has held that mere fact that they did not abide by their commitment as to starting of the business in complainant's name as agreed would not fasten them with criminal liability, and accordingly dismissed the appeal filed by the original complainant against the order of the

Patna High Court allowing the petition under Sec. 561(A) of the Code of Criminal Procedure (old).

8. The judgement in the case of Ramautar Choukhany v. Hari Ram Todi, 1982 Cri LJ 2266 (Gauh) was also cited. That was a case under Sec. 482 of the Criminal Procedure Code wherein while considering as to whether the essential requisites for the offence of cheating are made out, it is observed by the Gauhati High Court that deception is the quintessence of the offence. Deception must be caused by the accused to generate inducement in the mind of the complainant which must be caused by express words or by conduct. The false representation must relate to certain future event. It must be deceptive in nature and character and the accused must know it to be fake or false at the time of making it. A mere failure to honour a promise does not by itself constitute the offence of cheating.

9. In the said case with regard to the extent to which inherent powers under Sec. 482 of the Cr. P.C. to be exercised by the High Court, it is observed that Section 482 is designed to achieve a salutary public purpose. Criminal proceedings should not be permitted to be degenerated into a weapon of harassment or revenge. Apart from upholding the cause of justice among the contending parties Section 482 ensures speedy trial and thereby upholds social interest. The cases which must fail on the basis of the available material need be terminated to grant relief to the accused. In terminating the life of such cases the anxieties, worries and sufferances of the contending parties are removed. The society is benefited. Considerations justifying the exercise of inherent power should not be encased within the strait-jacket of a rigid formula as justifications for the exercise of that power to securing the ends of justice necessarily vary from case to case. Therefore where the allegations in the complaint and

the initial deposition of the complainant even if they are taken at their face value and accepted in their entirety do not constitute the offence alleged against the accused, the proceedings against the accused must be quashed under Section 482.

10. Considering the aforesaid decisions as supplying proper guidelines in the matter, let us see the allegations made in the present complaint to find out as to whether they make out the offence under Sections 418, 420 or 120B read with Sec. 420 of the IPC.

11. Undisputedly there was an advertisement appeared in the daily newspaper published in Ahmedabad for giving special offer to the tourists in Goa for Hotel Oberoi, Goa. As per the said advertisement per head an amount of Rs. 1250/- was to be paid for stay in the said Hotel for three days and three nights. In addition to that they were to give additional facilities as mentioned in the advertisement. The said advertisement was published round about the Diwali days in the year 1985. On reading the said advertisement the present respondent No. 1 in both the applications, who is the original complainant with his two friends namely, Ashinbhai and Shaileshbhai were attracted and they decided to go on tour to Goa.

12. They, therefore, met Mukesh Kwatra who is the petitioner in Criminal Misc. Application No. 2166/87. He is the original accused No. 1 in the complaint. He was working as the Sales Manager in the Regional Office of the Oberoi Hotels Private Limited. The said office is situated near Gujarat Samachar Press, Ahmedabad. On 6th November 1985 the original complainant respondent No. 1 along with the said persons went to the office of the petitioner-original accused No. 1 with the amount of Rs. 7500/- in cash. The petitioner-original

accused No. 1 explained to them all the details and agreed that it was the advertisement in respect of their Hotel and assured that all the facilities mentioned in the advertisement would be provided with. Accordingly, the petitioner-accused No. 1 induced them that if they pay up the amount all the three families have not to worry and can reach their hotel at Goa where their reservation would be confirmed in advanced. On account of the aforesaid promise and/or assurance the complainant respondent was induced and he made payment of Rs. 7500/- in respect of which the accused No. 1 petitioner gave receipt bearing No. 181 after affixing a revenue stamp thereon and after putting his signature thereon. The said receipt is issued in the name of Mr. A. Patel and party i.e. the complainant and his family and his other two friends and their families and therein it was specifically mentioned as 'Winter Package'. There was also reference of air cargos. It is alleged in the complaint that the complainant- respondent was also given one printed confirmation letter/form wherein it is specifically mentioned that accommodation for all the six persons in the Hotel was confirmed. It is alleged that the said letter was given along with the said receipt after contacting the accused No. 2 i.e. the petitioner in Criminal Misc. Application No. 883/86. In the said confirmation letter the accused No. 7 has put his signature. It was also mentioned in the said letter that the date for reaching the Hotel was 14-11-1985 and the date of departure was 17-11-1985.

13. It is further alleged in the complaint that thereupon the complainant along with his two friends with their families started for Goa from Ahmedabad on 13-11-1985 and first they went to Bombay and from Bombay they went by air to Goa and reached there at 3.00 p.m. on 14-11-1985. Thereafter they met the accused No. 2 and showed him the receipt as also the confirmation letter of reservation. Thereupon the accused No. 2 told that there was no such

reservation for them. Again the complainant asked him to read the receipt as also letter and not to put them in difficulty. The accused No. 2 thereupon refused to hear anything, but the complainant entreated the accused No. 2 to take him to Hotel Oberoi in their bus and to examine the record to ascertain about the reservation of the complainant and his party. The accused No. 2 however, was not ready to do the same and

@page-CriLJ1896

he insulted them. However, they forcibly entered the bus and reached the Hotel. But the accused No. 2 drove them out of bus with the help of the security man of the hotel.

14. It is also alleged in the complaint that at the request of the complainant the accused No. 2 also made writing on the back side of the confirmation letter to the effect that the I said reservation was not confirmed and the party did not stay at the said Hotel Again the accused No. 2 with some hesitation also gave another writing to the same effect with his own signature on the letter head of the said Hotel.

15. It is also alleged in the complainant that the complainant also requested the accused No. 2 to inquire from the accused No. 1 by telex or telephone and find out the solution, but the accused No. 2 refused to do so. It is also alleged that it has come to the knowledge of the complainant and his party from the talk of the persons there that they are not giving accommodation to the persons whose reservation was confirmed in the hotel at the last moment and subsequently they are giving accommodation to others by charging more amount. It is also alleged that as the complainant and his party were induced for their accommodation in the Hotel at Goa by giving receipt of Rs. 7500/- as also confirmation letter by the accused No. 1.

16. As stated above, both the accused as per their previous consultation did not give accommodation in the Hotel to the complainant and his party and as a result of which they were put in lot of harassment and difficulties. Accordingly, it is alleged in the complaint that there was conspiracy hatched by both the petitioners-accused to cheat the complainant and his party and by abetting each other the petitioners have committed the aforesaid offences.

17. From the aforesaid allegations made in the complaint it is clear that undisputedly an advertisement was published in Ahmedabad daily newspaper for giving special offer to the tourists in Goa for Hotel Oberoi and in pursuance of the said advertisement the complainant went to the accused No. 1 at the Regional Office of the Hotel on 6-11-1985. The accused No. 1 explained to the complainant all the details and agreed that it was the advertisement in respect of their Hotel and he also assured of all the facilities and accordingly he induced the complainant to pay up the amount and the complainant on account of the aforesaid promise/assurance paid the amount of Rs. 7500/-.

18. On the point of deception there are also allegations to the effect that on the payment being made by the complainant the receipt was given for the said amount wherein it was clearly mentioned to the effect that it was on account of 'Winter Package of Goa.' The complainant was also given confirmation letter in respect of the accommodation in the said Hotel and in the said confirmation letter status of reservation was mentioned as "confirmed". The said confirmation letter was a printed one and it was in respect of six persons to be accommodated in the hotel. The date of arrival of the complainant and his party was mentioned in the said letter as 4-11-1985 and the date of departure was mentioned as 17-11-1985. It was also signed by the accused No. 1. It is

significant to note that it is alleged in the complaint that the said letter of confirmation was given along with the receipt for the said amount after contacting the accused No. 2 on telephone and this was the deceit played on them. This prima facie indicates the dishonest and/or fraudulent intention on the part of both the accused-petitioners. The inference about the said dishonest intention can be drawn not only from the conduct of the accused No. 2 in not accommodating the complainant and his party in the Hotel, but also from his conduct that in spite of repeated requests for reading the receipt as also the confirmation letter, he refused to hear anything and even the request of the complainant to examine the record to ascertain the position about the reservation of the complainant and his party was also turned down. It is also alleged in the complaint that the complainant requested the accused

@page-CriLJ1897

No. 2 to inquire from the accused No. 1 by telex or telephone to find out a solution, but the accused No. 2 refused to do so. This conduct of the accused-petitioners prima facie appears to be consistent with the dishonest and/or fraudulent intention on their part to cheat the complainant and his party.

19. It is important to note that the receipt and the confirmation letter were given on 6-11-1985, the complainant and his party went to Bombay by Gujarat Mail on 13-11-1985 and on reaching Bombay they went by plane to Goa and they reached there at 3.00 p.m. on 14-11-1987 (1985 ?). If at all there was no dishonest intention on the part of the accused, the accused could have informed the complainant and/or their Agent Air Cargoes about the non-availability of the accommodation in the Hotel much earlier before the complainant and his party left for Bombay.

20. There are also allegations in the complaint to the effect that it has come to the knowledge of the complainant and his party that they are not giving accommodation to the persons whose reservation was confirmed in the Hotel at the last moment and subsequently they are giving accommodation to others by charging more amount. This allegation also drives towards the inference of dishonest intention on the part of both the accused.

21. On the point of allegation about conspiracy to cheat, it is clear from the allegations made in the complaint that the accused No. 1 issued the aforesaid receipt as well as confirmation letter to the complainant after contacting the accused No. 2 on telephone and thereafter the conduct of the accused No. 2 in treating the accused No. 1 and in not acceding any of the requests of the complainant, prima facie make out a case about the agreement of cheating and the conduct of the accused No. 2 in pursuance thereof. Thus, there are enough allegations on the point of false representation made by the accused relating to the accommodation to be given to the complainant and his party in Oberoi Hotel at Goa and they are deceptive in the nature and character, as stated above. Therefore, it cannot be said that the accused did not know it to be fake or false at the time of making the said representation. Under the circumstances I am of the opinion that this is not a case of mere failure to honour a promise which may not constitute the offence of cheating.

22. It may be mentioned that the learned Magistrate has also taken into consideration the averment on oath made in the complaint as also the statements of the complainant and has passed the order for issuingailable warrants as mentioned above, against the accused. Therefore, it cannot be said that the learned Magistrate has wrongly exercised the power and/or that it amounts to abuse of power.

23. It may be clarified that whatever observations are made by me in this judgement are made only with a view to finding out as to whether the offence is made out in the complaint and therefore, the learned Magistrate who tries the case has to proceed with the same strictly on merits and has to decide the same on the basis of the evidence on record, including that of the defence put up by the accused.

24. In view of the above discussion I am of the opinion that there are sufficient allegations in respect of offences of conspiracy to cheat and cheating against the accused Nos. 1 and 2 and therefore, they make out the offences alleged against them.

25. In that view of the matter I do not see any merit in the arguments advanced on behalf of the petitioners and therefore, the petitions deserve to be dismissed and are hereby dismissed. The interim relief granted earlier stands vacated. Rule discharged in both the matters. As the case is very old the learned Metropolitan Magistrate is directed to proceed further with the case and decide it as expeditiously as possible.

Petitions Dismissed .