IN THE COURT OF THE JUDICIAL FIRST CLASS MAGISTRATE, KUNNAMANGALAM

Present: Sri. Nissam A, B.Sc.,LL.B,
Judicial First Class Magistrate, Kunnamangalam

Dated this the 1st day of February 2022

C.C. 448/10

Complainant	:	State, Rep. by Sub Inspector of Police, Medical College Police Station, Crime No. 395/09. *(By Smt. Aruna A., APP Gr. I.)*
Accused	:	1. V. Surendran, S/o Appu, Aged 61/09, Suralakshmi Apartment, SBO Colony, Kavu Nagar, Nellikode. 2. Sivadasan, S/o Appu, Aged 59/09, Sisiram House, Mele Nadangalparambu, Nellikode. (By Adv. P. B. Sajith & Adv. P. Rajeev)
Offence	:	U/s. 406 & 420 r/w 34 IPC
Plea	:	Not guilty
Finding	:	Not guilty
Sentence or order	:	Accused Nos. 1 and 2 are acquitted u/s.248(1) Cr.P.C.

DESCRIPTION OF ACCUSED

Sl. No.	Name	Father's Name	Age	Religion	Occupation	Residence
1	V. Surendran	Appu	61/09	Hindu	Business	Nellikode
2	Sivadasan	Appu	59/09	Hindu	Retired	Nellikode

Date of

Occurrence	Complaint	Apprehension of accused	Released on bail	Commencement of trial	Close of trial	Sentence or order
20.07.07	25.05.10	04.09.10	04.09.10	02.03.20	25.01.22	01.02.22

JUDGMENT

This is a case charge sheeted by the Sub Inspector of Police, Medical College Police Station, Crime No. 395/09 for the offences punishable U/s. 406 & 420 r/w 34 of IPC

2. Prosecution case in brief is stated as follows :

Both accused, in furtherance of their common intention, took a lottery agency from the defacto complainant and after sometime, accused claimed that certain lottery tickets had won the prize and also received the prize amount. On enquiry, it is found that the prize claimed tickets were unsold tickets and hence being a distributor of said ticket, the defacto complainant was compelled to pay penalty and the prized amount to the Mega Distributor, to the tune of Rs. 7,08,920/- and hence it is alleged that the accused have committed the offences.

3. Originally this case was taken on file against 4 accused. Upon taking the cognizance, summons were issued to the accused. In response, all accused appeared. Thereafter, as per order in CMP 711/2011, this court discharged accused No.3 and 4. On appearance

of accused Nos. 1 and 2, copies of relevant prosecution records were furnished to them in compliance of Section 207 of Cr.PC.

4. After considering the police report, documents submitted along with that report and after hearing both sides, on being satisfied that there were grounds to proceed that accused committed the offences alleged, charge was framed against the accused. Charge was read over and explained to the accused for offences punishable U/s. 406 & 420 r/w 34 of IPC to which they pleaded not guilty and claimed to be tried.

5. In order to prove the prosecution case, PWs 1 to 5 were examined and Ext. P1 to P12 documents were marked. After closing prosecution evidence, since there were incriminating circumstances against the accused, they were examined u/s. 313(1) (b) of Cr.P.C. They denied all the incriminating circumstances. Then the accused were called upon to adduce evidence. No evidence was adduced on the side of defence.

6. Heard both sides.

7. The points that arise for consideration are :

(i) Whether the accused in furtherance of their common intention cheated the defacto complainant by claiming the prize amount against unsold lottery tickets published by the State of Kerala, Sikkim and Bhutan States and thereby committed offence punishable u/s. 420 r/w 34 IPC, as alleged by the prosecution?

(ii) Whether the accused in furtherance of their common intention misappropriated the amount and thereby committed offence punishable U/s.406 r/w 34 of IPC as alleged by the prosecution ?

(iii) If so, what shall be the order or sentence ?

8. **Point No.(i) and (ii)**: For avoiding the repetition and for brevity, these points are considered together. PW1 registered Ext. P1 FIR in pursuance of Ext. P2 FIS received from this court.

9. PW2 arrested 3rd and 4th accused and released them on bail, since they got anticipatory bail from the District Court. Thereafter, by preparing seizure mahazar, he took custody of their passports. Thereafter, he filed Ext. P3 report to add name and address particulars of the accused.

10. PW3 is an attesting witness to Ext. P4 and P5 seizure mahazars through which the passports from accused No.3 and 4 were taken into custody.

11. PW4 conducted the investigation of the case. He recorded the statements of the witnesses and took custody of computer statements accounts of lottery tickets through Ext. P6 seizure mahazar from M G Associates, Palakkad and the same was returned to them through kychit. Thereafter, by preparing Ext. P7 seizure mahazar statements of lottery slip from Kairali Lottery Office, Trivandrum was taken into custody and the same was released to

them on Ext. P7(a) kychit. Ext. P8 report was filed before the court to add name and address particulars of first and second accused. Then he filed Ext. P9 report to add Sec. 34 IPC in the FIR. After completing the investigation, he filed charge sheet against the accused.

12. The defacto complainant was examined as PW5. He deposed that one day both accused approached him with a proposal to start a lottery business for the son of first accused Surendran and after discussion it is decided to get an agency to the accused. It was stipulated to issue details of sold and unsold tickets daily evening hours, without fail and as an advance consideration, accused No.1 gave Rs.1,00,000/- to PW5. For a considerable period of time, the business went without any problems but thereafter, the accused claimed lottery prize by stating that certain unsold tickets were sold and selected for prize. On enquiry, it is found that accused claimed prize using unsold tickets and hence being the distributor of the lottery agency conducted by the accused, the Mega Distributor directed to pay fine and also return the prize money by PW5. Hence he deposed that the accused cheated him.

13. The specific case of the prosecution is that Both accused, in furtherance of their common intention, took a lottery agency from the defacto complainant and after sometime, accused claimed that certain

lottery tickets had won the prize and also received the prize amount. On enquiry, it is found that the prize claimed tickets were unsold tickets and hence being a distributer of said ticket, the defacto complainant was compelled to pay penalty and the prized amount to the Mega Distributor, to the tune of Rs. 7,08,920/- and hence it is alleged that the accused have committed the offences.

14. This case was arising upon an FIR registered in the year 2009. In the year 2010 final report was filed and it was taken on file as C. C. 448/10. Thereafter, as per order in CMP 711/2011, this court discharged accused No.3 and 4. Hence only accused no. 1 and 2 only faced the trial. Though continued processes including coercive steps were issued to the witnesses, only four officials and PW5 could be produced by the prosecution and hence, they could only be examined before the court, as PW1 to PW5. All steps including under section 82 and 83 CrPC steps were taken against the other witnesses, but proven to be a futile exercise and hence this court decided to close the evidence without examining the other witnesses except PW1 to PW5.

15. A plain reading of the allegations levelled against the accused herein would go to show that no ingredients of an offence punishable u/s 406 IPC were levelled against them. Inorder to prove an offence punishable u/s 406 IPC, there should be a dishonest

misappropriation of property or conversion of the said entrusted property to his own use or dishonest usage or disposal the same in violation of the direction of any law prescribing the mode of such discharge. There is nothing before the court to show that the defacto complainant PW5 had entrusted anything to the accused for a purpose. As per the case of the PW5 itself, he had handed over the lotteries for the purpose of sale and he got the purchase value also. Though it is alleged that the accused misused the unsold ticket, it cannot be said that they misappropriated the tickets since the PW5 admittedly received the sale proceeds.

16. As per the evidence of PW1, both accused approached him inorder to start a lottery business for their son. As per the prosecution case itself, PW5 conducting a lottery distributor centre at Manjeri by name U. K. Lottery. Learned counsel for the accused vehemently questioned the existence of such a lottery agency, before the court. Though PW5 deposed that he had produced documents to show his license, nothing is seen produced before the court. As per the prosecution case, an agreement has been entered into between the first accused and PW5 after finalizing the discussions. The agreement was produced before the court and marked as Ext. P10. As per the agreement, the details of the unsold tickets and sold tickets separately has to be issued to PW5 on all evening without fail.

If the first accused failed to do so, and if any liability had incurred in the activity of the second party, the first party (PW5) has every right to proceed legally against the movable and immovable properties of the other party. Here, it is to be noted that Ext. P10 would go to show that the agreement was executed on 20.09.07. In the bottom of the stamp paper, it is stated that the stamp has been purchased by the second accused on 17.09.07. The evidence of PW5 would go to show that on 17.09.19,there has been only discussions and no agreement has been executed between them. It is important to note that Ext. P2 complaint was filed before the court on 22.06.09. But, interestingly, the existence of Ext. P10 document has not been incorporated in Ext.P2 complaint. Referring to this, learned counsel for the accused vehemently argued that Ext. P10 is a forged document only for the purpose of the case and hence it cannot be accepted to prove the defacto complainant's case. On going through Ext. P2, it can be seen that though an important document like Ext. P10 was possessed by the defacto complainant, PW5, he did not mention the same, execution of the same or the stipulations contained therein in Ext.P2 complaint. Non mentioning of such an important document in the complaint would only casts doubt in the mind of the court about the genuineness of the document.

17. As per the case of the prosecution, the activity of the

accused parted the property of the defacto complainant and hence the accused committed the offences, as alleged. It is to be noted that absolutely no evidence with respect to second accused is produced before the court to show his involvement in the alleged crime. Of course, against first accused, he produced Ext. P10 document, but in case of second accused no evidence is produced before the court. As I have already stated, it is alleged that the activity of the accused parted an amount of Rs.7,08,920/- of the defacto complainant. Here, it is to be noted that as per Sec.415 of IPC, with a dishonest intention, accused should approach the defacto complainant and made believe him to had some activity which should resulted in parting of the property of the defacto complainant. As far as the case in hand is concerned, it can be seen that there have been no problems at the initial period of time that is for about 2 years and thereafter problems started. The final report filed against the accused by the Investigation Officer before the court itself shows that the accused had breached the contract and hence committed the offence. It is the settled principle of law that a breach of contract never attracts an offence punishable u/s 420 IPC, unless and until it is proved that an agreement was executed with a dishonest intention. The evidence of PW5 itself would go to show that he has neither been made believed by the accused with a deceitful mind for entering into the transaction.

18. As per the evidence of PW5, after enquiry, the Mega Distributor penalise him to pay the prize money and also to make the fine. Apart from the oral asseverations of PW5, nothing is produced before the court to show the above said adjudications of the Mega Distributor. So also, no scrap of paper is produced before the court to show that PW5 had paid the penalty and repaid the prize money using an unsold ticket. Though certain lottery tickets and computer print outs were produced before the court; nothing could be admitted in evidence since not in compliance with the provisions of India Evidence Act.

19. A simple reading of the evidences of PW5 would prove that ingredients of the offence punishable u/s 420 IPC have not been made out. On a bare reading of section 420 of IPC, it is clear that in order to attract an offence under section 420, there must invariably be cheating of a person by the accused person and thereby dishonestly induced such person 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. So, to complete the meaning of Section 420, knowledge about definition of cheating is also essential. Section 415 of IPC reads as follows:- " *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 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"._ Explanation. - A dishonest concealment of facts is deception within the meaning of this section." So, at the outset it is to be noted that in order to book the accused of an offence punishable u/s.420 of IPC there shall be some inducement offered by the accused and in consequence of such inducement the other party should do something and thereby should suffer loss something wrongfully. Further, it is to be noted that in order to constitute an offence of cheating the intention to deceive should be in existence 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. Evidently, the PW 5 has no case that he has been or was induced by the accused and in pursuance to that inducement they have been or were committed any act which resulted in wrongful loss to him or wrongful gain to accused or to others. In order to attract an offence punishable u/s 420 IPC, the dishonest intention of the accused is to cheat the defacto complainant is to be proved. The case of the prosecution itself shows that the dishonest intention of the accused, if any, is to collect the prize money of the prized lottery by stating that unsold tickets were sold out. So, it itself shows that the accused never wants to cheat the defacto complainant, but the transaction is with the lottery institution. The fact that, after the enquiry, unfortunately, the defacto complainant was liable to pay the penalty will not *ipsofacto* liable the accused to be punished for offence punishable u/s 420 IPC.

20. On going through the evidences adduced before the court, it can be seen that there is nothing before the court to show that the accused committed offences alleged against them.

21. Considering the facts and circumstances of the case, I am of the view that prosecution has failed to prove the charge leveled against the accused. Hence, these points are found against the prosecution.

22. **Point No.(iii)**:- In view of my findings on point Nos.(i) & (ii) , it is clear that prosecution has failed to prove the offences levelled against the accused beyond reasonable doubt. If so, no punishment would be imposed on them.

23. In the result, both accused are found not guilty of the offences punishable U/s. 406 & 420 r/w 34 of IPC and they are acquitted under section 248 (1) of the Code of Criminal Procedure.

They are set at liberty and the bail bonds executed by them stands cancelled.

Dictated to the confidential assistant transcribed and typed by her, corrected and pronounced by me in open Court this the 1st day of February, 2022).

Sd/-
Judicial First Class Magistrate,
Kunnamangalam

A P P E N D I X

Witnesses examined for prosecution :

PW1(CW11) : Kuttikrishnan, ASI of Police, Medical College P. S.
PW2(CW13) : Sunil Pulikkal, S. I. of Police, Medical College P. S.
PW3(CW10) : Raman C., HC 4773, Medical College polie station.
PW4(CW14) : Siju K. L., S. I of Police, Medical College P.S.
PW5(CW1) : K. Unnikrishnan

EXHIBITS MARKED FOR PROSECUTION

Exhibits	Date	Documents
P1	26.06.09	FIR, marked through PW 1 Kuttikrishnan, on 20.10.21
P2	22.06.09	Complaint, marked through PW 1 Kuttikrishnan, on 20.10.21
P3	27.05.10	Report to add name and address of accused, marked through PW 4 Siju K. L., on 17.12.21
P4	11.09.09	Seizure mahazar, marked through PW 3 Raman C, on 04.12.21

P5	11.09.09	Seizure mahazar, marked through PW 3 Raman C, on 04.12.21
P6	17.03.10	Seizure mahazar, marked through PW 4 Siju K. L., on 17.12.21
P7	03.12.09	Seizure mahazar, marked through PW 4 Siju K. L., on 17.12.21
P7(a)	03.12.09	Kychit, marked through PW 4 Siju K. L., on 17.12.21
P8	27.05.10	Report to add name and address of accused, marked through PW 4 Siju K. L., on 17.12.21
P9	27.05.10	Report to add section, marked through PW 4 Siju K. L., on 17.12.21
P10	20.09.07	Agreement, marked through PW 5 K. Unnikrishnan, on 07.01.21

Witnesses examined for the defence : Nil

Exhibits marked for the defence : Nil

MO's marked : Nil

Sd/-
Judicial First Class Magistrate,
Kunnamangalam.

/True Copy/

Judicial First Class Magistrate,
Kunnamangalam.