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32 C. 935=9 C. W. N. 364 =1 C, L. J. 216=2 Cr. L. J. 215.

Shyam Lal is a non-occupancy raiyat of the disputed land, and the first party, without ousting him according to law, have tried to settle the lands with some of his under-raiyats. This they are not entitled to do. They must not, therefore, interfere with him in the cultivation of the land in his *khas jote* or the collection of the rent from the under-tenants. Mr. Bray and Babu Sew Shankar Sahai have not appeared to-day. I myself think it unlikely that they will commit a breach of the peace. I shall not make the order against them absolute. I shall fix the 16th January for hearing any objection they may urge personally or by pleader. Meantime I shall make the notice absolute against the other members of the second party."

A Rule was issued to the District Magistrate and to the opposite party to show cause why so much of the order as directs the petitioner not to interfere with the first party as to cultivation of the land in his *khas jote* or the collection of rent from the under-tenants should not be set aside, or why such other order as to this Court might seem fit should not be made. The Magistrate of the District has submitted that the order is bad on various grounds; **[940]** the only one to which we need refer being that it did not disclose why immediate prevention was necessary so that a proceeding under s. 144 rather than under s. 145 of the Criminal Procedure Code should be taken.

The order has been attacked on various grounds. It is unnecessary to discuss these in detail, for we think it must be set aside on the one ground that it does not appear from the proceedings that the Joint Magistrate was of opinion that immediate prevention or speedy remedy was necessary, and the order made does not state the material facts of the case as required by the section.

Before a Magistrate can take action under s. 144 he must be of opinion that immeditate prevention or speedy remedy is necessary, and when he has made up his mind that it is so, he must state the material facts in the order. This he has not done.

In showing cause against the Rule, Shyam Lal, the first party, filed an affidavit; but even there it is not denied that the crops had been cut peaceably and had all been removed before the order of the 6th January was made, nor was it denied that his tenure was terminable at the option of the landlord.

The Rule is made absolute.

Rule absolute.

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32 C. 941 (=9 C. W. N. 1006=2 Cr. L. J. 764.)

[941] CRIMINAL REVISION.

Before Mr. Justice Pargiter and Mr. Justice Woodroffe.

KHODA BUX *v.* BAKEYA MUNDARI.*

[31st May and 1st June, 1905.]

Cheating—Deception—False representation—Conduct—Penal Code (Act XLV of 1860) s. 415.

To constitute the offence of cheating under s. 415 of the Penal Code, it is not necessary that the deception should be by express words, but it may be by conduct, or implied in the nature of the transaction itself.

* Criminal Revision No. 249 of 1905, against the order passed by W. Maude, Deputy Commissioner of Ranchi, dated Feb. 18, 1905.

Queen v. *Sheodurshun Dass* (1) referred to.

[Fol. 13 Cr. L. J. 456=15 I. C. 88. Ref. 2 C. L. J. 524 ; 59 I. C. 921=1921 Pat. 12= 22 Cr. L. J. 169: Dist. 15 C. L. J. 515=15 I. C. 656.]

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RULE granted to Khoda Bux, the accused.

The facts are as follows:—On the 16th of January, 1905, the complainant, Bakeya Mundari, went to the accused, Khoda Bux, and paid him Rs. 59 in satisfaction of a *zurpeshgi* mortgage for Rs. 60 (Khoda Bux owing the complainant one rupee as *zurpeshgi* rent). The money was handed over to Khoda Bux by one Kristo Udoy, the Municipal sub-overseer, whom the complainant (an ignorant and illiterate Kol) took with him to witness the payment. Kristo deposed that at the time of handing over the money he asked Khoda Bux if the amount was right in full satisfaction of the *zurpeshgi* debt, and the latter replied that it was so.

Khoda Bux, after receiving the payment, handed over to Kristo an unregistered bond dated 30th October, 1900, alleged to have been executed by the complainant and eight others for a sum of Rs. 32 repayable with interest at the rate of 75 per cent. per annum, instead of returning the *zurpeshgi* deed. Kristo thereupon said that it was not the document for which the payment [942] was made; and the complainant also denied that he had ever executed that document.

Khoda Bux admitted the receipt of Rs. 60, but denied that this sum was paid in discharge of the *zurpeshgi* debt, and alleged that Kristo at the time of making the payment addressed him (Khoda Bux) in the following terms: "*Paona le lijay, kagaj de dijay*" (take the money due and give back the document); and he (Khoda Bux) thereupon set-off the payment against the debt secured by the unregistered money bond and returned the same to Kristo.

The Deputy Magistrate, who tried the accused, after recording the evidence for the prosecution framed the following charge against him:—

"That at about 3 P.M. on Monday, the 16th January, 1905, Kristo Udoy on behalf of complainant, Bakeya, paid you Rs. 60 at your place, alleging that the said payment was made by Bakeya in satisfaction of the *zurpeshgi*-mortgage debt due to you by Bakeya and that you received the said sum, but refused to return the *zurpeshgi*-mortgage deed to Bakeya, and thereby you committed an offence punishable under s. 417 of the Indian Penal Code and within my cognizance."

The accused pleaded not guilty to the charge, and examined several witnesses on his behalf to prove that Bakeya came to pay off the debt secured by the unregistered bond mentioned above.

The Deputy Magistrate found that the unregistered bond set up by the defence was a collusive document, for which no consideration had passed; that the accused having a dishonest motive fraudulently induced Bakeya to make the payment to the accused, which Bakeya would not have done had he known that the money paid by him would not be applied to the satisfaction of the *zurpeshgi*-mortgage debt; and he accordingly convicted the petitioner of "cheating" punishable under s. 417 of the Penal Code, and sentenced him to six months' rigorous imprisonment.

On appeal, the Deputy Commissioner of Ranchi upheld the conviction and sentence, observing as follows:—

". . . . . The sole question in this appeal is whether the accused, having taken the money, knowing full well that it was handed to him in satisfaction of the *zurpeshgi* and then not applying the money to the satisfaction of the *zurpeshgi*, was guilty of the offence of "cheating." It has been urged before me that no such offence was constituted, because the accused did not deceive the complainant

(1) (1871) 3 All. H. C. 17.

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or fraudulently induce him to deliver the money. It appears to me, however, [943] quite clear from the evidence that the complainant would never have handed over the money to the accused, unless he had distinctly understood, as the accused's answers to Kristo's questions gave him to understand, that the accused would apply the money to the satisfaction of the *zurpeshgi*-mortgage. . . . . ."

The accused then moved the High Court and obtained this Rule mainly on the ground that the facts as found by the Courts below did not warrant the conviction under s. 417 of the Penal Code.

Mr. *Jackson* (Babu *Atulya Charan Bose* with him) for the petitioner. The facts as found by the Courts below do not warrant a conviction under s. 417 of the Penal Code. The charge as framed by the trying Magistrate discloses no offence. There being no deception within the meaning of s. 415 of the Penal Code there can be no "cheating." When a debtor owing several distinct debts to one creditor makes a payment to him either with express intention or under circumstances implying that the payment should be applied to the discharge of some particular debt, a mere appropriation of the payment by the creditor to another debt does not constitute "cheating." There being no false representation by the accused in this case to dishonestly induce the complainant to make the payment, the offence of "cheating" is not made out: see *Hurjee Mull* v. *Imam Ali Sircar* (1) and Mayne's Criminal Law, 3rd edn., page 772.

The Deputy Legal Remembrancer (Mr. *Douglas White*) for the Crown. It has been found by both the Courts below that the payment was made expressly in discharge of the *zurpeshgi*-mortgage debt. The accused appropriated the money, and knowing that it was meant by the complainant to be applied to the *zurpeshgi* debt, deceitfully returned him the unregistered bond. His conduct shows that his intention was to fraudulently induce the complainant to make the payment, for he knew that, if he said that he would not apply the payment to the *zurpeshgi* debt, the complainant would not have made the payment—this, I submit, amounted to a false representation. The petitioner therefore is guilty of "cheating": see *The Queen* v. *Sheodurshun Dass* (2).

[944] PARGITER AND WOODROFFE, JJ.—In this case, in which we have taken time to consider, we have come to the conclusion that the judgment and conviction should stand.

The complainant is an illiterate cultivator, who, some 7 or 8 years ago, executed a *zurpeshgi* mortgage for a period of five years of his paddy land in favour of the accused to secure a sum of Rs. 60. On 16th January this year the complainant, in company with the Municipal Sub-overseer of Ranchi, whom he had the good sense to ask to go with him to witness the payment, went to the accused. The complainant handed to the overseer Rs. 59 stating that one rupee was due to him by the accused as *zurpeshgi* rent and that the payment of Rs. 59 would thus discharge the mortgage debt. On arrival at the accused's house, the overseer asked the accused whether what the complainant had told him was true; namely that the accused owed the complainant one rupee for rent on account of the *zurpeshgi* mortgage and whether Rs. 59 would, therefore, make up the debt. The accused said that he owed one rupee as rent for *zurpeshgi* land. The accused admits saying this in his statement to the Magistrate. It may here be observed that there is no question but that there was only one *zurpeshgi* mortgage executed by the complainant; namely that concerning which the overseer asked on his behalf and to which the accused referred. After this, the overseer made over Rs. 59 in cash to the accused saying at

(1) (1903) 8 C. W. N. 278. (2) (1871) 8 All. H. C. 17.

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the time that that amount and one rupee due for rent were paid to the accused in discharge of the debt secured by the *zurpeshgi* mortgage. The accused in his statement says that the overseer said "Take the money and give back the document." The accused took the money, but did not make over the *zurpeshgi* deed, but a simple unregistered bond for Rs. 32 said to have been executed by the complainant and several other persons. The overseer on looking at it said that it was not the document. The complainant also denied that he had executed the document. The accused was then pressed for the return of the *zurpeshgi* deed, but he refused to hand it back. The complainant threw himself at his feet, but on the accused still refusing to make over the document, he was asked at any rate to return the money; this he also refused to do.

[945] The case for the defence, and evidence has been given to that effect, is that the complainant and eight others did execute the document, which was returned to him; that he went with the overseer for the purpose of paying off that document; that both the overseer and the complainant were quite satisfied with the transaction and that the story that the complainant fell at the feet of the accused is an invention.

We may say at once that we entirely disbelieve the case for the defence that there was any other debt due by the complainant than that on the *zurpeshgi* mortgage, and that the payment was made in respect of the alleged unregistered bond, which was stated to have been executed on the 30th October 1900 for a sum of Rs. 32 carrying interest at the rate of 75 per cent. The case is therefore to be decided upon the basis that there was but one debt, namely, that on the *zurpeshgi* mortgage, that that debt was paid by the complainant and that the accused has not on such payment made over the mortgage deed or possession of the lands secured thereby.

As to the dishonesty of the part taken by the accused, we have no manner of doubt. The question is whether his conduct amounted to an offence, and in particular to the offence, with which he has been charged, namely cheating.

A Rule was granted to show cause why the conviction and sentence should not be set aside on the ground that neither on the facts proved nor on the facts found was any offence committed. In addition to these grounds the learned counsel for the accused has taken objection to the charge.

There is, we think, no doubt that it is open to such objection; but inasmuch as it sufficiently gives notice of the transaction in respect of which the offence is charged and no objection was at any time taken to it during the trial, and no rule was applied for or granted on this ground, we do not think it necessary to further consider it.

The main question, which has been argued, is that no offence of cheating has been proved; and that point has narrowed itself to this, namely, that there was no deception within the meaning of section 415 of the Indian Penal Code. As to this, we have in the first place to observe that the section does not in any manner, and for obvious reasons, limit the mode in which the deception **[946]** may take place, nor is it necessary that the deception should be by express words, but it may be by conduct or implied in the nature of the transaction itself.

In the present case what we find is this. The debt which the complainant wished to pay off was the *zurpeshgi* debt, the discharge of which would free his land, which was encumbered with it. Even if the bond debt existed, which we find is not the case, there is not the least reason

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for supposing that the conplainant had any intention to pay off the debt, which was a simple debt, and for which, according to the accused, he was only liable together with eight other persons. The accused knew perfectly well, having been expressly so informed, that the money was offered to him in payment of the *zurpeshgi* debt. It is remarkable that though he suggests that the money was tendered in respect of the alleged simple bond debt, no evidence was given as to the amount due on that debt and no conversation of any kind is alleged to have taken place on that point. As we have said, he knew that the money had been offered in payment of the *zurpeshgi* debt and that the money would not have been paid to him except on the understanding that it was to go in discharge of such debt and that the document, which secured it, was to be returned. Knowing these, he by his conduct led the complainant to believe that he was prepared to accept the money upon the terms on which it was offered: namely, that it should go to the discharge of the mortgage debt and that on such payment the document would be returned. In the belief induced by the accused's conduct, the money was paid. The accused then refused to acknowledge it as a payment or to return the mortgage deed and set up a pretended debt of the complainant to which he said the payment was assigned. The accused was careful not to say anything about this bond debt, before they paid the money, for the reasons, as it appears to us, that he knew that, if he did say anything, the money would not have been paid. On the contrary, his answer to the overseer's questions, his silence as to the alleged bond debt, his acceptance of the money paid, as it was, with the statement that it was given for the mortgage debt, amounted, in our opinion, to a representation by the accused—a representation which his subsequent conduct shows that he did not intend to give effect to, viz., that he would [947] accept the money in payment of the mortgage debt for which it was offered and that he would return the document, which he had been asked to return.

We are clearly of opinion that it was in the belief that the accused would return the mortgage deed, a belief induced by the accused's conduct, that the money was paid by the complainant. That such conduct was dishonest we have no doubt. As a result, the accused now has the complainant's money and land and has refused to return the mortgage deed in respect of which, as he well knew, the money was paid and refused to return either the money or the land under colour of a false claim which he avoided to put forward before the payment by the complainant for the reason that he knew, if he had done so, the money would not have been paid. In our opinion the accused intended to, and did, cheat the complainant.

In the case of *Queen* v. *Sheodurshun Dass* (1) to which we have been referred by the learned Deputy Legal Remembrancer, there appears to have been, as pointed out by the learned counsel for the petitioner, an express statement that the accused would return the note, which they claimed subsequently to retain for another debt which, as here, they alleged due to them by the complainant. By reason of such express statement the offence was the more obvious. As we have however held it is not necessary for the commission of the offence that the false representation should be expressly stated in so many words; it is sufficient if, as here, the representation made may be inferred, and was intended by the accused to be inferred, from his words and conduct.

(1) (1871) 3 All. H. C. 17.

The Rule will accordingly be discharged, and the accused, who is on bail, will surrender himself to the Magistrate to undergo the sentence that has been passed upon him.

Rule discharged.

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32 C. 948 (=9 C. W. N. 860=2 Cr. L. J. 550.)

32 C. 941=9 C. W. N. 1006 =2 Cr. L. J. 764.

[948] CRIMINAL REVISION.

Before Mr. Justice Pargiter and Mr. Justice Woodroffe.

BARKA CHANDRA DEY *v.* JANMEJOY DUTT.*
[30th May and 5th June, 1905.]

Security to keep the peace—Jurisdiction—Bond, cancellation of, before actual execution—Criminal Procedure Code (Act V of 1898) ss. 107, 125—Appeal—Revision.

S. 125 of the Criminal Procedure Code does not confer upon a District Magistrate either an appellate or revisional jurisdiction in respect of orders binding down persons to keep the peace made by Courts subordinate to his own, but it confers only an original jurisdiction.

After a bond to keep the peace has been executed, a District Magistrate may hold, for sufficient reasons, that it is no longer necessary and cancel it ; but he has no power to declare that it was never necessary.

There is no appeal from orders requiring security to keep the peace.

[Overruled. 34 Cal. 1=4 C. L. J. 428=11 C. W. N. 25=1 M. L. T. 368; **Ref.** 37 Mad. 125; 49 I. C. 781=17 A. L. J. 146=20 Cr. L. J. 221.]

RULE granted to Barka Chandra Dey and four others (first party), petitioners.

The petitioners were the tenants of the Hon'ble Nawab Khaja Salli mullah Bahadur of Dacca, and residents of certain villages within the jurisdiction of the Nawab's zemindary *katchery* of Baigunbari and the *tehsil* office at Rostampore.

On the 28th of April, 1904, the petitioners presented separate petitions to the District Magistrate of Dacca praying that twenty-four persons, officials and retainers of the Nawab, be bound down to keep the peace towards them and other tenants, on the allegations that a number of felled trees in the forest of Chowberia *Gurh* belonging to the Nawab having been destroyed by fire, the Tehsildar of the Rostampore *katchery* and other officials of the Nawab sent for a number of villagers, including the petitioners, and called upon them to disclose the names of the incendiaries ; that the villagers having failed to furnish the information, the Tehsildar and the officials imposed a fine of Rs. 18,000 on [949] the tenants of the surrounding villages by way of compensation and punishment ; and that several acts of oppression had been committed by the accused persons, because the villagers would not pay the fine.

The District Magistrate thereupon directed a Deputy Magistrate to hold an enquiry and report.

On the 11th of May, 1904, the Deputy Magistrate submitted his report, and on the 13th May the District Magistrate drew up proceedings under s. 107 of the Code of Criminal Procedure against the Nawab's men, and made over the case for trial to another Deputy Magistrate.

The defence set up before the trying Magistrate was that the allegations of the tenants were false, being the result of a conspiracy on the

* Criminal Revision No. 235 of 1905, against the order of J. T. Rankin, District Magistrate of Dacca, dated Dec. 23, 1904.