Banwarilal And Anr. vs The State on 25 November, 1955

Equivalent citations: AIR1956ALL341, 1956CRILJ664, AIR 1956 ALLAHABAD 341

JUDGMENT

Desai, J.

1. This is an appeal by Banwari Lal and Mahendra Nath, who are brothers, from a Judgment of the Additional Sessions Judge of Agra convicting them under Section 420/34 and 379/34 I. P. O. For the offence under Section 420/34 I. P. C. each of them has been sentenced to two years' rigorous imprisonment and a fine of Rs. 25,000/- (in default of payment of fine to undergo one year's K.I.) and for the offence under Section 379/34 each of them has been sentenced to two years' B.I. and a fine of Rs. 25,000/- (in default of payment of fine to undergo nine months' R.I.) The sentences for the two offences are to run concurrently.

2. The appellants are residents of Khurja where they carry on Ghee business in the name of Ghamandilal Banwarilal. In 1946-1947 they carried on the business of Ghee grading under the name of Mahendra Nath & Co., in a building taken on rent from Mustajab Khan in Raja Ki Mandi in Agra. They had a Ghee grading centre and godowns in the ground-floor of ,the building and lived in the upper floor. They used to borrow money by pledging tins of Ghee with creditors.

In the period 14-9-1945 to 20-11-46 they borrowed about a lakh of rupees by pledging tins of Ghee in the godowns which are numbered 20, 24 and 48 from the Bharat Bank Ltd. There were 745 tins in godown No. 20,394 tins in godown No. 24 and 591 tins in godown No. 48; all the godowns being in the groundfloor of the Mustajab building.

3. In November 1946, the appellants approached the complainant firm Makhanlal Radheylal, which was owned by Raghunath Prasad, in Agra. Raghunath Prasad was studying in 1946 and the business was carried on by his brother, Amar Nath.

The appellants borrowed money from Makhanlal Radheylal in November 1946 and they repaid it on 6-11-46 leaving a negligible balance of Rs. 29/-. On 13-12-46 they approached Amarnath and borrowed from him Rs. 22,000 /- on the security of 394 tins in godown No. 24 which had already been pledged with Bharat Bank Ltd.,) after executing a document Ex. P. 6. It was agreed between the appellants & the firm that tins containing pure Ghee would be pledged as security that 75 per cent of the price of the tins would be advanced on the security and that the money would be repaid within twenty four hours of the demand.

4. The tins pledged previously in November 1946 were kept in the go-down of the firm in Jamuna Kinara Mohalla of Agra, but on 13-12-1946 the appellants persuaded the firm to agree to the tins pledged on that day and in future being kept in the appellants' own godowns in the Mustajab building.

It was agreed that the firm's locks would be put on the godowns but the appellants would remain responsible for their safety and custody. The appellants mentioned in the document Ex. P. 6 that the 394 tins contained pure Ghee. They did not inform the firm that the tins have been pledged with the Bharat Bank already; on the other hand, they claimed that they were the exclusive owners of the tins ("tanha Malik"). It appears that Amar Nath did not ask whether, and they did not say that, the tins had been pledged with any one previously.

5. On 21-12-46 the appellants borrowed Rs. 42,000/- more from the complainant-firm on the security of 776 tins contained in godown No. 20 after executing a document Ex. P.8, in which they mentioned that the tins contained 350 maunds of pure Ghee. This advance was made on the same terms as that of 13-12-46. On this occasion also the appellants did not inform the complainant firm that the tins had been pledged previously with the Bharat Bank; on the other Hand, they claimed to be the exclusive owners.

On 6-1-1947 they borrowed Rs. 34,000/- again from the complainant firm on the security of 576 tins kept in godown No. 48. The same were the conditions of this transaction also. The appellants executed a document Ex. P.9 mentioning that the tins contained 256 maunds of pure ghee. Not only they did not inform Amar Nath that the tins had been pledged with Bharat Bank Ltd., but also they claimed to be the exclusive owners.

6. The Bharat Bank Ltd., had put its own locks on the three godowns when accepting the security of the tins of Ghee. But it appears that the appellants surreptitiously and dishonestly removed the locks subsequently with the consequence that when the servants of the complainant firm went to see to tins in the godown they did not find any evidence suggesting that the tins had been pledged with the Bharat Bank, Ltd.

The employees of the firm only counted the numbers of the tins on each occasion and checked seals of some of the tins to satisfy themselves that the tins contained 'Ag marks' Ghee. On none of the three occasions was any tin opened by the firm's employees and its contents checked. The firm's servants put the firm's locks on the three godowns and the keys were kept by Amar Nath.

7. Subsequently the appellants entered into further transaction with the firm and borrowed more money from it after pledging more tins of Ghee which were kept in the firm's godown in Jamuna Kinara. In February 1947 the firm pressed the appellants to repay the loans advanced to them from time to time, but the appellants evaded to repay them.

8. On 24-5-1947 Amar Nath discovered some Ghee flowing out of the tins in the godown of Jamuna Kinara. He went to the Mustajab building but could not find either of the appellants. He found the building locked from outside and learnt from the Chaukidar, who was posted there at the gate, that

the appellants had left the building and gone with all their goods to an unknown destination.

On receiving this information Amarnath and Raghunath became nervous and suspected foul play. The next day was a Sunday and on 26-5-1947 they got a complaint filed by their servant Jagan Prasad against the appellants.

9. On this complaint Shri Ganga Prasad Magistrate was deputed to inspect the various godowns in which the tins pledged with the firm were kept and examine their contents. As there were several godowns and the godowns contaned a large number of tins the checking was done by different Magistrates on different dates.

The result of the checking was that tins pledged with Bharat Bank Ltd. were found to have been re-pledged with the firm by the appellants and that most of the tins contained not pure ghee but mixtures of cement, sand, sawdust, etc. Some tins were found in a damaged condition and some were found quite empty.

At the request of the firm the Government of India deputed their Assistant Marketting Officer to examine the quality of whatever Ghee was found in the tins and the labels put on the tins. He examined the contents of the tins and their labels and found that the tins did not contain genuine 'Ag Marka' seals and did not contain pure Ghee.

10. The complaint filed by Jagan Prasad was not only in respect of the three transactions of 13-12-46, 21-12-46 and 6-1-47, which are the transactions in dispute in this appeal, but also in respect of subsequent transactions. Since one complaint could not be filed in respect of several transactions Jagan Singh filed fresh complaints on 24-6-1949, each complaint being in respect of one transaction.

In consequence the appellants were tried in three different cases for the three transactions in dispute. But on their application the Committing Magistrate amalgamated the three trials on the ground that they could be tried jointly for the three transactions.

11. The appellants were committed by this Magistrate to stand their trial in the Sessions Court on charges of Sections 420 and 379, I. P. C each charge being in respect of one transaction. The learned Sessions Judge amended the charge as follows:

12. He framed one charge under Section 420/34 to the effect that the appellants pledged 394, 776 and 566 tins on the three dates with the firm representing to it that they contained Ghee which they knew they did not contain and after dishonestly concealing from it the fact that they had already been pledged with the Bharat Bank Ltd.

He framed another charge in the alternative under Section 379/34, I. P. C. to the effect that they after pledging the tins of Ghee mentioned above wrongfully stole the Ghee kept in them on some dates between 13-12-46 and 28-5-47. He further framed a charge in the alternative under Section 408 to the effect that they, having been entrusted with the tins of Ghee mentioned above by the firm,

dishonestly misappropriated the Ghee contained in them.

13. The learned Sessions Judge held that the appellants committed, the offence of Section 420 by dishonestly concealing from the firm the fact that the tins had been pledged with the Bharat Bank, Ltd.; and inducing it to advance to them the sum of Rs. 98,000/-. He held that the tins contained pure ghee at the time when they were pledged with the firm and, therefore, the appellants did not commit the offence of cheating the firm by representing to it that the tins contained pure Ghee.

Consistently with this finding he held that after pledging the tins with the firm the appellants stole the Ghee contained in the tins and thereby committed the offence of Section 379, I. P. O. And finally he held that since the appellants committed the offence of Section 379, I. P. C., they could not be convicted of the offence under Section 405, I. P. C., in respect of the same Ghee. So he convicted the appellants under Sections 420 and 379 read with Section 34, I. P. C., and acquitted them of the offence under Section 406, I. P. O. 14-31. (After discussing the prosecution and the defense evidence their Lordships proceeded:) The charge under Section 420, I. P. C., was on two grounds; one, on the ground that the appellant promised that the tins pledged with the firm contained pure Ghee, and the other, that they dishonestly refrained from informing it that the tins had already been pledged with the Bank and in this way induced it to advance as much money as it would have advanced if the tins had not been pledged anywhere previously.

In effect, there were two charges, each under Section 420, I. P. C., against the appellants. The learned Sessions Judge held that the charge based on the allegation that the tins contained not pure Ghee as was represented by the appellants but mixtures of sand, cement, etc., was not proved, because he thought that the tins, at the time of their being pledged with the firm, did contain pure Ghee.

That reasoning of the learned Sessions Judge is not supported by any evidence barring of the admissions contained in exhibits P.6, P.8 and P.9. The evidence on the record is that the contents of the tins were never examined by Shri Narain, Mohan Lal, etc.; they did not open a single tin.

Therefore, it cannot be said with certainty that the tins had not been tampered with prior to their being re-pledged with the firm. However, since the appellants have been acquitted of the charge under Section 420, I. P. C., on this ground we need not say anything more.

32. As regards the (other) charge under Section 420, I. P. C., on the ground that the appellants dishonestly concealed from the firm the fact that the tins had been pledged already with the Bank Is proved beyond the slightest doubt. The identity of the tins pledged with the firm and the Bank has been fully established. Then there is evidence to the effect that the appellants claimed to be the exclusive owners of the tins and they did not inform the firm that they have been pledged with the Bank. There is further the evidence that the appellants had represented that the Ghee contained in the tins was pure.

The learned Sessions Judge asked the appellants whether they represented to the firm that the tins were free from encumbrances and each of them replied that they had assured it that the tins

contained 'Ag Marks' Ghee and were not pledged anywhere else and that it was a fact.

It was argued by Sri Jagdish Sahai that the evidence of the prosecution witnesses was that the appellants claimed that they were the exclusive owners of the tins, that this claim was not inconsistent with the tins having been pledged previously with anyone, that there was no evidence that the appellants claimed that the tins were free from encumbrances, that consequently the learned Sessions Judge was not justified in asking the appellants if they made such a statement and that in the absence of any evidence the mere statement of the appellants in reply to the unjustified question (whether the appellants had assured the firm that the tins had not been pledged to anyone previously) could not be acted upon by the learned Sessions Judge. He also contended that no offence of cheating was committed by the appellants by merely refraining from informing the firm that the tins had been pledged with some one previously.

In connection with the answer given by the appellants to the learned Sessions Judge, it was also contended that the provisions of Section 342, Criminal P. C. infringe the provisions of Article 20, para 3, of the Constitution and are, therefore, unconstitutional.

33. We will take up the question of the constitutionality of Section 342 first. Under Article 20(3) of the Constitution "No person-accused of any offence shall be compelled to be a witness against himself'.

The gist of the provisions of Section 342 of the Code is that for the purpose of enabling the accused, to explain any circumstances appearing in the evidence against him, he may be put such questions by the Court as it considers necessary, that he is at liberty to refuse to answer any question or to give a false answer to any, that if he refuses to answer any question or gives a false answer to any, the Court may draw such inference as it thinks just, that the answers given may be taken into consideration in the inquiry or trial and may be put in evidence for or against him in any other inquiry or trial and that no oath shall be administered to him.

Thus the accused is put questions by the, Court simply to enable him to explain any circumstances appearing in the evidence against him; the object is to give him an opportunity to offer an explanation in defence of himself and not for the purpose of incriminating himself. Then he is not bound or compelled to answer any question or to answer any question truthfully. No oath is administered to him and he is not bound to speak the truth.

The answers given by him are not treated as evidence in that very inquiry or trial; they can only be taken into consideration. It is clear from these facts that Section 342 does not convert the accused into a witness and certainly does not compel him to be witness against himself in infringement of the constitutional guarantee.

Shri 'Jagdish Sahai's contention is that because the Court is given the right to draw an adverse inference against the accused from his refusal to answer, or from a false answer given to a question, it amounts to compelling him to be a witness against himself. It may be conceded that the right given to the Court to draw an adverse inference against the accused imposes some compulsion upon

him, but it is a far cry from saying that it compels him to be a witness against himself. His position is not at all altered from that of the accused to a witness.

Since no oath can be administered to him, he can never be said to be in the position of a witness. The essential requisite of a witness is that he makes a statement on oath; every person who makes a statement is not a witness. All that the right given to the Court to draw an adverse inference compels the accused to do is to make a statement or to make a true statement, but merely because he makes a statement or makes a true statement, it cannot be said that he is converted into a witness.

Further it cannot be said that he is converted into a witness against himself. Since he is at liberty to make a false statement, he is free to make a statement in favour of himself and, therefore, it cannot be said that he is compelled to be a witness against himself. If he falsely makes a statement in favour of himself and the falsehood is exposed to the Court, the Court may draw an adverse inference, but the inference cannot place him in a worse position than he would find himself in if he had made the correct statement.

In other words it is impossible for him, in order to avert the threat of an adverse inference, to make a statement which would place him in a worse position than in which he would be if he had made the true statement. Sri Jagdish Sahai referred us to an observation made by Durga Das Basu in his Commentary on Constitution of India. On page 111 of the Commentary, first edition, he suggests that the provision that the answers given by the accused may be taken into consideration in the inquiry or trial infringes the guarantee of Article 20(3). We are unable to accept this view of the learned commentator.

According to Section 3, Evidence Act, evidence means, and includes all statements which the Court permits or requires to be made before it by witnesses and all documents produced before it for inspection and a fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought to act upon it.

Therefore, a Court while deciding whether an offence is proved against the accused or not takes into consideration not only the evidence but also other matters. A statement made by the accused is not evidence because it is not made by a witness; but it is a matter which may be taken by the Court into consideration in order to decide whether it believes the fact to exist.

Section 342 of the Code provides that it may be taken into consideration by the Court. Therefore, the accused's statement is only a matter which can be taken into consideration and is not evidence. The guarantee provided by Article 20(3) is against the accused being compelled to give evidence and is not against his furnishing a matter which may be taken into consideration by the Court.

This distinction between evidence and other matter which may be taken into consideration by the Court, so well known to the Evidence Act and the Code of Criminal Procedure, has been ignored by the learned commentator. Moreover the basis of the learned commentator's view that the provisions of Section 342 are unconstitutional is entirely different from that of Shri Jagdish Sahai's arguments.

Shri Jagdish Sahai could not cite any authority in support of his contention that the right given to the Court to draw an adverse inference is equal to compelling the accused to be a witness against himself. We notice that Chitaley in his Commentary on Constitution, Volume I, pages 497-498, does not see any conflict between the provisions of Article 20(3) and those of Section 342.

34. Under Article 13 of the Constitution only that provision which infringes the freedom granted under Article 20(3) would be void. If the accused is compelled to be a witness against himself by virtue of the provisions conferring upon the Court the right to draw an adverse inference against him, that provision would be unconstitutional and not the remaining provisions of Section 342.

But it was argued by Sri Jagdish Sahai that on account of the threat of an adverse inference the appellants answered the question regarding their representations to the firm. It was suggested that if the provision conferring the right to draw an adverse inference had not been there, the appellants might have refused to answer the question.

But it does not follow that the answers given by the appellants must be ignored or that the remaining provisions of the Section under which the questions were put should be held to be unconstitutional. If the particular provisions were unconstitutional, it was open to the appellants to ignore it because it would be void and to refuse to answer the question or to give a false answer to it; if the Court thought of drawing an adverse inference against them from their refusal or from their giving false answers, they could plead that the provision (conferring the right to draw an adverse inference) was ultra vires.

But once they gave an answer to the question it was not open to them to contend that it should be ignored because the provisions under which they could be questioned at all were unconstitutional.

35. 'Wilson v. U.S.', (1892) 149 U.S. p. 60 (A) does not at all support the contention of Sri Jagdish Sahai. In England and America there is no such law as is contained in Section 342 of the Code; there the accused is not permitted to be examined except as a witness on oath. He has a right to offer himself as a witness on oath, but he cannot be compelled to be a witness and the Court cannot examine him without administering oath to him.

Therefore, the American and the English decisions would not help us in the present case. In the case of Wilson an Act of Congress permitted the accused in a criminal case to appear as a witness in his 'own behalf expressly declaring that his failure to be a witness would not create any presumption against him. If a Court permitted the state counsel to comment unfavourably to the accused upon his omission to be a witness on his own behalf, it would be against the Act of Congress itself and that is all that was decided in the case of Wilson.

The question of the constitutionality of a provision permitting the Court to draw an adverse inference from the accused's failure to examine himself as a, witness could not, and did not, arise and was not answered. The law in England is that though the state counsel cannot comment upon the failure of the accused to be a witness in his own behalf, it is open to the Court to draw an adverse inference from his failure.

36. We hold that no provision of Section 342 is unconstitutional.

37. The learned Sessions Judge was certainly not justified in asking the appellants whether they did not represent to the firm that the tins were free from encumbrance. His duty was to place the incriminating evidence before them; he should have asked them what they had to say about the evidence that they claimed to be the exclusive owners of the tins and that the did not inform the firm that the tins had been pledged previously with the bans.

It was argued by Sri J. R. Bhatt that under Section 342 the accused could be asked to explain the circumstances appearing in the evidence and that if from the evidence given by the firm it appeared that the appellants had claimed that the tins were free from encumbrances, the learned Sessions Judge could put the question to them.

We are impressed by this argument because we are satisfied that the answer voluntarily given by the appellants could be taken into consideration by the learned Sessions Judge notwithstanding any defect in the form of the question that was put to them. The appellants voluntarily admitted that they assumed the firm that the tins were not pledged with anyone previously.

They have not challenged the truth of their admission, and there is no reason to think it might not be true. Under Section 342 (3) of the Code it was open to the learned Sessions Judge to take into consideration this admission. Any answer given by the accused may be taken by the Court into consideration; it is immaterial in reply to what question the answer was given. Sri Jagdish Sahai argued that the Court should not use an answer given by the accused to fill up any gap in the prosecution case.

There are no restrictions on the power of the Court to take into consideration any answer given by the accused; the legislature has left the matter at its discretion. If the accused voluntarily gives an answer which does not strictly follow from the question put to him, the Court sees no reason to disbelieve the answer and it is a matter which can be taken into consideration for deciding- his guilt, it is fully justified in taking it into consideration.

There is no question of using the answer to fill a gap in the prosecution evidence for the simple reason that it is not a piece of evidence at all; as we said earlier, it is only a matter, other than evidence, which a Court is entitled to take into consideration. Some Courts have unnecessarily gone into the question whether an answer given by the accused under Section 342 is evidence or not; the question does not arise at all. It is not evidence but this is immaterial because it is taken into consideration as a matter and not as evidence.

Any answer, that the accused gives, provided i t is believed can be given same weight as any piece of evidence and can form the basis of conviction as much as any piece of evidence; see 'Emperor v. Abdul Gani-', AIR 1926 Bom 71 at p 76 (B) and -- 'Varand Pazal v. Emperor', AIR 1944 Sind 137, at p 140) (C). We respectfully agree with the following observations of Mackney J. in -- 'Narayan Chattyar v. Emperor', AIR 1935 Rang 509 at p. 510 (D): --

> "No doubt the provision in Section 342, Criminal P. C., do not entitle a Magistrate or a Judge to question an accused person so as to get from him an admission of facts which are not proved in the evidence.
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> Nevertheless if an accused person does in fact make such an admission, and it is clear that he has not been intimidated and' that the admission was made with a full understanding of what he was saying, I am at a loss to understand why it should not be taken into account against him in the same way as any other confession made before a Magistrate can be so taken."

Referring to the oft-quoted dictum that a gap in the evidence cannot be filled up by any statement made by the accused under Section 342, he remarked that no reason has been given why a gap in the evidence cannot be filled up in that manner. His observations quoted above were accepted in the case of Varand (C). In -- 'Hate Singh v. State of Madhya Bharat', AIR 1953 SC 468 (E), it was held by the Supreme Court that an answer given by the accused under Section 342 can be used for proving his guilt as much as evidence given by a prosecution witness. In 'Holia Budhoo v. Emperor', AIR 1949 Nag 163 (P) Sen & Sarwate JJ. observed at page 166 with reference to the provisions of Section 342: --

> "These provisions do not however make the mere statements of the accused an affirmative evidence in the case. What they mean is that the Court should not shut out the statements of the accused from its view when considering the effect of the evidence adduced on behalf of the prosecution but such statements must be taken into consideration along with the evidence of the prosecution to see if in conjunction with them there can be any reasonable explanation of the prosecution evidence which may be consistent with the innocence of the accused."

If the learned Judges meant to lay down that an offence can be held to be proved only if there is evidence, we respectfully differ from them. We have already referred to the provisions of Section 3, Evi. Act, which lay down how a Court can hold an offence to be proved. An offence can be proved from matters which the Court is competent to take into consideration and not necessarily from evidence only.

38. The statements of the appellants that they represented to the firm that the tins had not been pledged with anyone previously could be taken into consideration by the learned Sessions Judge and he exercised his discretion properly in taking them into consideration.

It is proved that the representation made by the appellants was false, because the tins are proved to have been pledged with the bank previously. The firm would not have advanced any money on the security of the tins already pledged with anyone; in any case it would not have advanced to the full extent of 75 p.c. of their market price as it actually did.

The appellants dishonestly induced the firm to believe that the tins had not been pledged previously and thereby induced it to advance so much money on their security. Thus they committed the

offence of Section 420, I. P. C.

39. Even if the answers given by the appellants were ignored for the reasons advanced by Sri Jagdish Sahai, the mere failure on the part of the appellants to disclose the fact of the prior pledging amounted to dishonestly inducing the firm to advance money to the extent of 75 p.c. of their market price.

Since the contract between the appellants and the firm was that money upto 75 per cent of the market price of the pledged goods would be advanced and since the market price of an article would be reduced on account of its being pledged previously; it was a most material fact to be brought by the appellants to the notice of the firm that the tins had been pledged previously; especially when it was a fact within their knowledge and could not be discovered by the firm. Had it been the case of immovable property, its mortgage would have been registered and the registration would have been notice to the public.

In 'Bishan Das v. Emperor', 2 All LJ p. 268 (G) and -- 'Karachi Municipality v. Bhojraj', AIR 1915 Sind 21 (H) it was laid down that no concealment of a fact is dishonest within the meaning of Section 415 Penal Code, unless there is a legal obligation to disclose it.

The requirement of the offence of cheating under Section 415 is that the accused must deceive a person and fraudulently or dishonestly induce him to do some act which he would not have done otherwise. If a person is deceived & fraudulently or dishonestly induced to do act, the accused is guilty of cheating and it is immaterial how he has deceived and induced him.

The explanation to Section 415 makes it clear that, dishonest concealment of fact is a deception within the meaning of the Section. It is to be noted that the concealment of fact that is said to be a deception is dishonest concealment and not illegal and deliberate concealment. If a statute requires a person to mention a fact and he conceals it, it is illegal, and not necessarily dishonest concealment of the fact.

This concealment may be deliberate or conscious or may be accidental or bona fide arising out of ignorance of law. Accidental or bona fide concealment even though it is illegal, may not be said to be deception, but according to the authorities mentioned above dishonest concealment is not deception unless it is illegal and deliberate. The language of the explanation is, however, different. It does not make deliberate and illegal concealment deception; instead it makes dishonest concealment deception.

It may be conceded that concealment of a fact is not quite the same thing as mere refraining from stating it and that something more than mere refraining from stating a fact is required to constitute concealment. But that something need not be a statutory provision compelling exposure of the fact; any other duty, such as arising out of the circumstances in which the parties are placed and the nature of the negotiations between them, is enough. Also any act, done, or precaution taken, to prevent the fact from being brought to the notice of the other party, is concealment even in the absence of a duty to state it.

If a person keeps an ornament in a box in his house, it may not amount to concealing it; but if he buries it under ground, he conceals it even though he is not required by any duty to expose its presence to the world. In our opinion the authorities go too far in laying down that the duty to state a fact must be a statutory duty; concealment can arise even in the absence of a statutory duty.

Every concealment does not, however, amount to deception; only dishonest concealment, amounts to deception according to the explanation. And just as there can be concealment without there being a duty to speak , (as for instance when a person does some act or takes some precaution to hide the fact), so also concealment can be dishonest even in the absence of a legal obligation to speak. Dishonesty has nothing to do with infringement of the law; it depends upon the state of mind at the time of the concealment or the intention behind it. If the intention is dishonest, the concealment is dishonest even in the absence of a duty to speak.

In the instant case there was dishonest concealment of a material fact in both the ways: the applicants not only did some positive acts by Way of precaution against the fact being known to Amar Nath, etc., but also the circumstance in which they and the firm were placed imposed a duty upon them to inform it of the fact.

The property was moveable, its hypothecation with the bank could not have been within the knowledge of the firm using ordinary diligence and the amount of the money to be advanced by it depended upon its market price which would be severely affected by the prior hypothecation; in these circumstances the appellants were under a duty to inform the firm that the tins had been pledged previously with the bank. They did not inform it and thereby practised deception.

We may also mention that the facts in the two cases cited above were materially different from those of the present case. There immovable properties were sold by the owners who concealed from the purchasers the fact of their encumbrances. Any purchaser using ordinary care could have known all the encumbrances by making an inquiry at the registration office. So there might have been justification for the owners' being held not guilty of deceiving the purchasers.

In 'Dori v. Emperor', AIR 1919 AH 217 (1)(I) a person was held guilty of cheating when he did not inform the buyer that the trees which he sold to him had been disposed of already by the previous owner. In that case there was no legal duty upon the owner of the trees to state the fact to the buyer, yet he was convicted of cheating.

40. The appellants did not merely refrain from mentioning the fact of the prior hypothecation; they fabricated evidence to prevent the firm's becoming aware of it. They surreptitiously removed the locks of the bank and kept the godowns open so that Sri Narain etc. might not know that the tins had been pledged with the bank.

In the face of these acts done by the appellants there could not be the slightest doubt that they concealed the fact. We, therefore, find that the appellants concealed from the firm the fact of the prior hypothecation of the tins. There can hardly be any doubt of their dishonest intention. They intended to borrow large sums of money from the complainant by making it believe that the tins

were worth their market price.

Apparently they had no intention to repay the money. They have not repaid a single pie so far. They themselves did not plead that their concealment was bona fide or accidental or had a reason other than dishonesty. On the other hand they falsely denied the concealment itself; they were forced to deny it because they could not offer any satisfactory and convincing explanation. So the concealment was dishonest and they are guilty of cheating and were rightly convicted under Section 415, I. P. C.

41. The learned Sessions Judge convicted the appellants under Section 379, I. P. C., (they should have been convicted under Section 380, I. P. C. because the theft was from a building), on the basis that the tins pledged with the firm contained pure ghee and that it was subsequently removed from them and they were filled with sand, saw-dust, etc. There is no direct evidence that the tins were filled with pure ghee on the dates of the three transactions, but the prosecution relies upon the admission contained in the documents P6, P8 and P9, executed by the appellants. It is mentioned in these documents that the tins contained pure ghee; in two of them even the quantity of the ghee is mentioned.

There is nothing to show that these admissions are false. The appellants on the other hand maintain that they correctly informed the firm that the tins contained pure ghee. The learned Sessions Judge cannot be said to have gone wrong in accepting the admissions of the appellants.

In May, 1947, ghee was found to be missing from the tins. No consent of the firm was obtained for the removal of the ghee from the tins. Therefore, an offence of theft has been committed and it was committed after the dates of the transactions, but it is not known who committed the theft.

There is no evidence against the appellants except the facts already mentioned. They were living in the same building, the godowns were in their possession, they had systematically tampered with tins of ghee by removing ghee from them and filling them with sand, saw-dust, etc. and they abandoned the building some time in March 1947.

There is also the fact that they had cheated the firm and borrowed large sums of money from it. These circumstances do create a grave suspicion that they were concerned in the theft, but we are not sure if they amount to proof. There are two appellants and unless we can say that both jointly stole ghee from, the tins, both cannot be convicted of theft in the absences of the circumstances attracting the applicability of Sections 34, 120B and 109, I. P. C. The evidence is not such as to enable us to say that both the appellants took part in removing ghee from the tins; it is quite likely that one or the other removed ghee from the tins. It is also likely that ghee was removed by servants of one or the other. It is not known which one removed ghee or got it removed.

Therefore, neither appellant can be convicted of theft. No charge under Sections 34, 120B or 109 was framed and the appellants had no notice that they had to meet such a case, nor is there any evidence proving beyond doubt that the case is governed by any of the Sections. Therefore, they cannot be convicted by applying any of these Sections. Further for the application of Section 34 a

criminal act must have been done by both the appellants; if they merely entered into a conspiracy and one of them stole ghee, the other would not be guilty by virtue of Section 34. In the circumstances we think that the appellants' convictions under Section 379, I. P. C., cannot be sustained.

42. We cannot consider the sentence imposed under Section 420 read with Section 34, I. P. C., as excessive. It was a systematic fraud practised by the appellants upon the firm for which they deserved deterrent sentence. Since they defrauded the firm of large sums of money, the learned Sessions Judge was justified in imposing heavy fines upon them.

43. In the result we maintain the appellants' conviction and sentence under Section 420 read with Section 34, I. P. C., but quash their conviction and sentence under Section 379, I.P. C. and acquit them of the offence of Section 379. If they have paid up the fine imposed under Section 379, it must be refunded to them. The appellants must surrender themselves to undergo their sentences.

44. There is no justification for our certifying this as a fit case for appeal to the Supreme Court.