

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.04.2016

CORAM :

THE HONOURABLE MS. JUSTICE R.MALA

Crl.O.P.No.23639 of 2015

& M.P.No.1 of 2015

Date of Reserving the Judgment 29.03.2016	Date of Pronouncing the Judgment 07.04.2016
--	--

- 1.Sudhir Khanna
Ex-Executive Vice President
M/s.Kotak Mahindra Bank Ltd.,
21, Infiniti Park Zone 2, 4th Floor,
Opp. Western Express Highway
General A.K.Vaidya Marg, Malad (East), Mumbai - 97.
- 2.Sainath
Ex-Executive Vice President & Recovery Head
M/s.Kotak Mahindra Bank Ltd.,
21, Infiniti Park Zone 2, 4th Floor,
Opp. Western Express Highway
General A.K.Vaidya Marg, Malad (East), Mumbai - 97.
- 3.B.C.Ananthan
Ex-Vice President - South Recovery Head
M/s.Kotak Mahindra Bank Ltd.,
Saral Auto Loans, Chennai Branch
No.3, II Line Beach, Parrys Corner
Chennai - 600 001.
- 4.J.Narayanan
Manager
M/s.Kotak Mahindra Bank Ltd.,
Saral Auto Loans, Chennai Branch
No.3, II Line Beach, Parrys Corner
Chennai - 600 001.
- 5.Ezhilarasan
Vice President - South Recovery Head
M/s.Kotak Mahindra Bank Ltd.,
Saral Auto Loans, Chennai Branch
No.3, II Line Beach, Parrys Corner
Chennai - 600 001.

6.Mr.Uday Kotak
Managing Director
M/s.Kotak Mahindra Bank Ltd.,
36-38A, Nariman Bhavan
227, Nariman Point, Mumbai - 21.

.. Petitioners/Accused

Vs.

1.The State, Rep. By the Inspector of Police
B-1, North Beach Police Station
Rajaji Salai, Chennai - 600 001.

.. Respondent

2.Mr.R.Selvaraj
S/o.Mr.P.Rajasigamani
No.8/B, Dhandapani Street
T.Nagar, Chennai - 600 017.

.. Respondent/Defacto Complainant

Prayer:

Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for the records of the first respondent in FIR No.560 of 2015 dated 25.06.2015 and Quash the FIR No.560 of 2015 registered against the petitioners for an offence under Section 409 IPC, as being an abuse of process of law, untenable in facts and circumstances.

For Petitioners : Mr.I.Subramaniam, Senior Counsel
for M/s.Ramalingam & Associates

For Respondents : Mr.C.Emalias,
Addl. Public Prosecutor, for R1

Mr.Sundermohan, for R2

O R D E R
सत्यमेव जयते

The petitioners herein have come forward with the present Criminal Original Petition seeking to call for the records of the first respondent in FIR No.560 of 2015 dated 25.06.2015 and Quash the FIR No.560 of 2015 registered against the petitioners for an offence under Section 409 IPC, as being an abuse of process of law, untenable in facts and circumstances.

2. The learned Senior Counsel appearing for the petitioners would submit that the second respondent was having 18 loan accounts in the Kotak Mahindra Bank Limited, out of which one is a mortgage loan account, one is a business loan account and others are commercial vehicle loan accounts. It is an admitted fact that the second respondent herein had obtained a loan to

the tune of Rs.1,50,00,000/- under Account No.SA118003 and the said loan has been sanctioned on 27.07.2006. The second respondent had also deposited the title deeds in lieu of the said loan. While so, the second respondent had issued a letter dated 21.03.2007 expressing his intention to settle the entire amount due to the financial facilities of the agreement in SA118003 and pursuant to the same, the bank has issued a communication to the second respondent stating that the balance outstanding amount is Rs.1,70,00,000/-. Hence, the second respondent issued a Demand Draft to the tune of Rs.1,70,00,000/- for which the Bank has also issued a receipt.

3. The second respondent/defacto complainant had preferred a complaint before the Reserve Bank of India against the Kotak Mahindra Bank stating that the Bank owe a sum of Rs.28,26,294/- to him. Even though he had discharged the entire amount, the Bank had committed fraud and the Bank ought to have refunded a sum of Rs.28,26,294/-. The said application was dismissed and as against the same, the second respondent preferred a Writ Application in which the loan statement has been given and thereafter, he preferred the present complaint. Even then, the case was not registered and hence, the second respondent filed a Crl.O.P for a direction and pursuant to the direction of this Court, a case has been registered for the offences punishable under Section 409 IPC.

4. The learned Senior counsel appearing for the petitioners would putforth his argument in two folds:

1. A Demand Draft has been issued for discharging the loan amount of Rs.1,70,00,000/-
2. Out of Rs.1,70,00,000/-, after adjusting the amount towards the mortgage loan account, the balance amount has been adjusted towards the business loan account.

5. The learned Senior Counsel would submit that when a debt is paid on the general lien, the Creditor has every right to adjust the remaining amount in other loan, which the debtor is liable to pay. So, merely because the petitioners had adjusted some amount towards the business loan will not amount to criminal offence. To substantiate the said argument, he relied upon the decision reported in (1992) 2 Supreme Court Cases 330, Syndicate Bank v. Vijay Kumar and Others.

6. The other limb of argument purforth by the learned Senior counsel is that it is only a transaction between the bank and the customer and hence, it is only a civil dispute and it does not constitute a criminal offence. For the said reason, he relied upon the following decisions:

(a) (2006) 6 Supreme Court Cases 736, Indian Oil Corporation v. NEPC India Ltd and Others.

(b) (2000) 2 Supreme Court Cases 636, G.Sagar Suri and Another v. State of U.P. And Others.

7. The learned Senior Counsel would further contend that the case has been registered for the offences punishable under Section 409 IPC. But the ingredients of Section 409 IPC has not been made out as there is no entrustment. The second respondent has issued the Demand Draft for a sum of Rs.1,70,00,000/- only to discharge the loan and the same does not amount to entrustment. To substantiate the said contention, he relied upon the following decisions:

(a) (2015) 9 Supreme Court Cases 96, Robert John D'Souza and Others v. Stephen V.Gomes and Others.

(b) (2014) 10 Supreme Court Cases 663, Binod Kumar v. State of Bihar.

8. The learned Senior Counsel would further submit that A1 to A3 are the former Vice-Presidents', A4 is the Manager, A5 is the Vice-President and A6 is the Managing Director of the M/s.Kotak Mahindra Bank Ltd., and hence, they are not vicariously liable for prosecution. To substantiate the said contention, he relied upon the following decisions:

(a) (2010) 1 Supreme Court Cases (Cri) 164, R.Venkatkrishnan v. Central Bureau of Investigation.

(b) (2011) 1 Supreme Court Cases 74, Iridium India Telecom Ltd., v. Motorola Incorporated and Others.

(c) (2015) 4 Supreme Court Cases 609, Sunil Bharti Mittal v. Central Bureau of Investigation.

(d) CDJ 2012 SC 309, Anneta Hada and Others v. M/s.Godfather Travels and Tours Pvt. Ltd. and Another

9. The learned Senior Counsel also relied upon the unreported decision of the Andhra Pradesh High Court made in Criminal Petition No.7584/2015 penned by Hon'ble Dr.Justice B.Siva Sankara Rao, wherein the charge sheet against A3 for the offences punishable under Section 420 IPC was quashed.

10. The learned Senior Counsel also drawn my attention through paragraphs 9, 11 and 12 of the Complaint enclosed in the typed set of papers and submits that ingredients of neither Section 409 IPC nor Section 420 IPC has been made out. Further, he would state that the Statement of Account would reflect that

the balance amount of Rs.14,30,509/- has been adjusted on 27.12.2012.

Thus, the learned Senior counsel appearing for the petitioners prayed for quashing the proceedings on the ground that it does not constitute a criminal offence.

11. Resisting the same, the learned counsel appearing for the second respondent would submit that it is true that the creditor can adjust the excess amount to the other liability, provided that on the date of receipt of the Demand Draft for a sum of Rs.1,70,00,000/- from the debtor, the Bank should have intimated the debtor that there is excess amount after discharging the liability in the mortgage amount and the excess amount is adjusted towards other loan accounts of the debtor. However, in the instant case, no such intimation is given to the debtor viz., the second respondent/defacto complainant. Further, no statement of account was furnished to the second respondent.

12. The learned counsel would further submit that even though the second respondent was having 18 loan accounts, all the loans have been discharged in the year 2009 itself. So, it is evident that the excess amount has not been appropriated in any of the other accounts. Hence, the argument advanced by the learned Senior counsel appearing for the petitioners that the creditor is having every right to adjust the balance amount to the credit of the debtor in other loan accounts is not acceptable.

13. The learned counsel would further submit that even in the counter filed in the Writ Petition, the Bank has specifically stated that a sum of Rs.1,61,59,627/- has been adjusted towards the mortgage loan and the balance amount has been adjusted towards some other account/business loan account. Further, it is not stated that since there is lien, the excess amount was adjusted towards other loan account. But their defence is that there was no excess amount.

14. During the pendency of W.P.No.21836/2012, a meeting was called for by the accused Bank and only during the course of the said meeting, the second respondent came to know that there an excess amount of Rs.14,30,509/- is with the bank. Only thereafter, the second respondent had preferred a complaint against the petitioners herein who are the employees of the Kotak Mahindra Bank Pvt Ltd.,

15. Since a case has not been registered by the respondent/police, the second respondent approached this Court by invoking Section 482 Cr.P.C in CrI.O.P.No.6547/2013, wherein the petitioners herein also filed intervening petition and filed their counter and raised the plea that they kept the amount as

lien for payment of amount due in other accounts. Since all the loan account has been closed in the year 2009, as per the direction of this court a case has been registered. It is appropriate to incorporate the relevant portion of the order:

"4. Though the learned Government Advocate would submit that an enquiry was conducted and it was closed on 30.06.2014, the copy of the closure report was not served on the petitioner. Since the petitioner is not aware of the details of the closure report, the same is set aside and the Assistant commissioner of Police, B-1 North Beach Police Station, Chennai is directed to conduct an enquiry afresh, enquiring both the petitioner and the proposed accused. If any cognizable offence is made out, then the said authority is directed to register a case as per the dictum laid down by the Honourable Apex Court report in 2014 (2) SCC Pg.1 (Lalitha Kumari v. State of Uttar Pradesh). The criminal original petition is disposed of accordingly. No costs."

16. Thus, in the above order, though it was specifically mentioned that enquiry was conducted and closed on 30.06.2014, this court had directed the respondent/police to register the case as per the dictum laid down in Lalitha Kumari case. Pursuant to the same, enquiry was conducted and thereafter, a case has been registered.

17. In the instant case, the principal offender is the bank and on behalf of the Bank, A3 had received the Demand Draft. Further, the role played by the petitioners have been averred in the complaint. Though the Bank has not been added as an accused, the petitioner's with whose aid the offence was committed was arrayed as an accused and the exact persons who are responsible for the commission of the offence can be decided during the course of the investigation. Further, only under Section 138 of the Negotiable Instruments Act and other special enactments, the vicarious liability can be fastened on third parties/partners, whereas in the cases preferred under the Criminal law, especially for the offences under IPC, the vicarious liability cannot be fastened on the third parties.

18. Thus, the learned counsel appearing for the second respondent fairly conceded that the principle of vicarious liability will not be applicable to the facts of the present case and the decisions relied on by the learned Senior counsel appearing for the petitioners in this regard is also not disputed.

19. The learned counsel appearing for the second respondent would submit that the petitioners had committed falsification of accounts and the same has reflected in the statement of accounts

furnished by Bank. Thus, only during the course of the investigation, those facts can be unearthed. So, the matter needs further investigation and it would be premature to quash the FIR at this stage.

Thus, the learned counsel appearing for the second respondent prayed for the dismissal of the petition.

20. In reply to the submissions made by the learned counsel for the second respondent, the learned Senior counsel appearing for the petitioners had drawn my attention to paragraphs 9 and 10 of the complaint and submit that there is no sufficient averment to rope the petitioners in the present case.

21. On the other hand, the learned Additional Public Prosecutor appearing for the first respondent would submit that on the request made by the second respondent/defacto complainant that he is willing to settle the entire amount due on his mortgage loan account, the bank authorities had wantonly calculated the balance amount due in the loan SA118003 as Rs.1,70,00,000/-. Further, the excess amount was returned only in the year 2012. So, the ingredients of entrustment has been clearly made out.

22. Further, the Bank authorities did not provide the proper statement of account on the initial request made by the second respondent. Only when the second respondent insisted for the second time, the Bank provided the correct statement of account and thereafter, the second respondent became aware of the excess amount paid by him towards the mortgage loan. The learned Additional Public Prosecutor would submit that only after the investigation, it can be decided as to whether the petitioners had really committed any offence and it is now premature to decide either way. Hence, he prayed for dismissal of the petition.

23. Considered the rival submissions made by all the parties and perused the typed set of papers.

24. It is an admitted fact that the second respondent was having 18 loan accounts in the Kotak Mahindra Bank Ltd, out of which one is a mortgage loan account, one is a business loan account and other loans are for purchasing vehicles. It is also admitted that the second respondent received a letter dated 27.07.2006 from the Bank informing about the sanction of loan to the tune of Rs.1,50,00,000/- with conditions, against the property at New Door No.36, Old No.59, 1st Main Road, CIT Nagar, Chennai - 600 035. While so, on 21.03.2007, the second respondent expressed his desire to repay the entire loan amount. Consequent to the same, the Bank addressed a letter dated 22.03.2007 stating that pertaining to the loan agreement

No.SA118003, a sum of Rs.1,70,00,000/- is due. The relevant portion of the said communication enclosed in page 6 of the typed set of papers is extracted here under:

"Based on your request letter dated 21st March 2007, you intend to make a settlement to all amounts due to us under the financial facilities of above referred agreement.

We confirm that on receipt and realization of Rs.170.00 lakhs (Rupees One Hundred & Seventy Lakhs Only) on or before 26th March 2007, we will, within 10 days of time:

- a) Release out charge on the said properties and
- b) Issue a No due and account closure Certificate and handover the property documents to you."

25. Thereafter, the second respondent had settled the entire amount of Rs.170 lakhs through a Demand Draft and pursuant to the same, the Bank addressed a communication dated 28.03.2007 stating the list of documents that are handed over to the second respondent subsequent to the closure of Agreement No.SA118003 and on 29.03.2007, the Bank executed the registered discharge receipt of all the amount due and payable under the mortgage deed dated 03.08.2006. Further, the Bank had addressed a communication dated 11.04.2007 confirming the receipt of the entire loan amount. The relevant portion of the said communication enclosed in page 12 of the typed set of papers is extracted here under:

"This is to confirm that we have received full and final dues against the finance extended to you vide loan agreement no SA-118003 against one Business Loan - Non Transporter."

26. When that being so, on 1st August 2011, the second respondent addressed a communication to the bank requesting for statement of accounts pertaining to various loan account numbers including the Mortgage loan account in SA118003, for income tax purpose. Pursuant to the same, on 18.08.2011, the Bank furnished an incomplete statement which did not reflect the payment made by the second respondent. Hence, again by letter dated 12.01.2012, the second respondent requested the Bank to furnish the breakup details for the sum of Rs.170 lakhs paid by him towards loan account no.SA118003. As there was no reply, again on 31.01.2012, the second respondent addressed a communication to the bank asking them to reconcile their account in SA118003 and refund the excess amount paid by him. However, as there was no reply, he addressed another communication dated 21.02.2012 to

the Bank requesting them to furnish statement of account.

27. Since his request was not acceded to, the second respondent preferred a complaint before the Banking Ombudsman RBI seeking for statement of accounts and also for the refund of excess amount from the bank. However, the Banking Ombudsman rejected the complaint as not maintainable, as the same is time barred as per 9(3)(b) of the Banking Ombudsman Scheme. Thereafter, the second respondent filed a Writ Petition before this Court in W.P.No.21836/2012 challenging the order of dismissal passed by Reserve Bank of India and prayed for furnishing the entire statement of account pertaining to loan account SA118003 from the bank. In the counter filed by the Bank in the said Writ Petition, it has been specifically stated that a sum of Rs.1,61,59,627/- has been adjusted towards the mortgage loan and the balance amount has been adjusted towards some other account.

28. While so, during the pendency of the Writ Petition, a meeting was called for by the Bank wherein it was disclosed to the second respondent that the excess amount collected was booked as profit for the Bank. Thereafter, to the surprise of the second respondent, a sum of Rs.14,30,509/- was credited by the Bank to the account of the second respondent in Bank of India on 27.12.2012, which would prima facie show that the said sum of Rs.14,30,509/- has been temporarily misappropriated by the Bank.

29. The learned Senior counsel appearing on behalf of the petitioners would submit that there is no vicarious liability and to substantiate the same, he relied upon various decisions which was also rightly conceded by the learned counsel appearing for the second respondent that in the criminal law, especially for the offences under IPC, the concept of vicarious liability will not be applicable. So, there is no quarrel over the said issue.

30. The only point to be decided is whether the petitioners herein had committed offence under Section 409 IPC?

The learned Senior counsel appearing for the petitioners would contend that the Bank has every authority to adjust the balance amount towards other loan accounts in which the debtor is liable to pay. At this juncture, it would be appropriate to consider the decision relied on by the learned Senior Counsel reported in (1992) 2 Supreme Court Cases 330, Syndicate Bank v. Vijay Kumar and Others, wherein it was held that apart from any specific security, the banker can look to his general lien as a protection against loss on loan or overdraft or other credit facility. The general lien of bankers is part of law merchant and judicially recognised as such.

31. There is no quarrel over the proposition laid down in the above decision. However, it is premature to decide whether the Bank has obtained consent from the second respondent to adjust the balance amount towards other loan account. Furthermore, if really the Bank had adjusted the excess amount towards the other loan accounts, then what prompted the Bank to credit a sum of Rs.14,30,509/- to the account of the second respondent in Bank of India on 27.12.2012 had to be looked into only during the course of the investigation.

32. The next point raised by the learned Senior Counsel appearing for the petitioners is that the case is Civil in nature and it is between the Bank and the Debtor. To substantiate the same, he relied on the following decisions:

(a) In the decision reported in (2006) 6 Supreme Court Cases 736, Indian Oil Corporation v. NEPC India Ltd and Others, it was held that any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. It is appropriate to incorporate paragraphs 13, 21 and 23 of the said decision:

"13.While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed:

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised

to prevent abuse of the process of any court or otherwise to secure the ends of justice."

21. We will next consider whether the allegations in the complaint make out a case of criminal breach of trust under section 405 which is extracted below:

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

23. In Chelloor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore, Cochin [AIR 1953 SC 478], this Court held:

"to constitute an offence of criminal breach of trust, it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit."

(b) In the decision reported in (2000) 2 Supreme Court Cases 636, G.Sagar Suri and Another v. State of U.P. And Others, it was held that jurisdiction under Section 482 of the code has to be exercised with a great care and in exercise of its jurisdiction, the High Court should not examine the matter superficially. It is appropriate to incorporate paragraphs 8 and 14 of the said decision:

"8. Jurisdiction under Section 482 of the Code has to be exercised with a great care. In exercise of its

jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code, Jurisdiction- under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

14. We agree with the submission of the appellants that the whole attempt of the complainant is evidently to rope in all the members of the family particularly who are the parents of the Managing Director of Ganga Automobile Ltd. in the instant criminal case without regard to their role or participation in the alleged offences with a sole purpose of getting the loan due to the Finance Company by browbeating and tyrannizing the appellants of criminal prosecution. A criminal complaint under Section 138 of the Negotiable instruments Act is already pending against the appellants and other accused. They would suffer the consequences if offence under Section 138 is proved against them. In any case there is no occasion for the complainant to prosecute the appellants under Sections 406/420 IPC and in his doing so it is clearly an abuse of the process of law and prosecution against the appellants for those offences is liable to be quashed, which we do."

33. But the above decisions are not applicable to the facts of the present case because the case has been registered only on 05.06.2015 and the investigation is at an earlier stage. Further, the matter does not amount to a civil dispute because the second respondent had obtained a loan and when he offered to discharge the same, the Bank authorities had given a letter stating a sum of Rs.1,70,00,000/- is due to be paid. Consequently, the second respondent issued a Demand Draft for the said amount to be credited in favour of his loan account. In such circumstances, there is entrustment. However, when the second respondent had sought for the statement of accounts, the Bank authorities had not furnished the correct statement and to the surprise of the second respondent, the Bank credited a sum of Rs.14,30,509/- to the account of the second respondent on 27.12.2012, which would clearly reveal that correct statement of account has not been provided.

34. Even in the counter filed in the Writ Petition the Bank has specifically stated that a sum of Rs.1,61,59,627/- has been adjusted towards the mortgage loan and the balance amount has been adjusted towards some other account. However, during the pendency of the Writ Petition, a sum of Rs.14,30,509/- stated to be the excess amount was returned to the second respondent. In such circumstances, I am of the view that the excess amount has been wantonly withheld by the Bank authorities without assigning any reason. So, the matter cannot be merely termed as a civil dispute. Hence, the above decisions relied on by the learned Senior counsel appearing for the petitioner will not come to the rescue of the petitioners.

35. The next argument put forth by the learned Senior Counsel is that the ingredients of Section 406 IPC viz., 'entrustment' has not been made out. At this juncture, it would be appropriate to consider the decisions relied on by the learned Senior Counsel in this regard.

(a) In the decision reported in (2015) 9 Supreme Court Cases 96, Robert John D'Souza and Others v. Stephen V.Gomes and Others, it was held that to constitute an offence punishable under Section 406 IPC, the essential ingredient is the 'entrustment' of the property. It would be appropriate to incorporate paragraphs 8 and 12 of the said decision:

"8. In view of the above facts, apparent on the record, we are of the view that the High Court and the courts below have committed grave error of law in ignoring the same. Needless to say that to constitute an offence punishable under Section 406 IPC, the essential ingredient is the "entrustment" of the property. The complaint filed by the complainant nowhere discloses that the land in question purchased in the year 1978 was entrusted to the Society for the benefit of others. It is only after entrustment is shown, it can be said that there was criminal breach of trust.

...

12. As far as offence of cheating is concerned, the same is defined in Section 415 IPC, for which the punishment is provided under Section 420 IPC. Section 415 reads as under:-

"415. Cheating. - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived,

and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

(b) In the decision reported in (2014) 10 Supreme Court Cases 663, Binod Kumar v. State of Bihar, it was held that since no case of criminal breach of trust or dishonest intention of inducement was made out and the essential ingredients of Sections 405 and 420 was missing, the appellants cannot be prosecuted under Section 406/120B of IPC. It would be appropriate to incorporate Paragraphs 14, 15 and 19 of the said decisions:

"14. At this stage, we are only concerned with the question whether the averments in the complaint taken at their face value make out the ingredients of criminal offence or not. Let us now examine whether the allegations made in the complaint when taken on their face value, are true and constitute the offence as defined under Section 406.

15. Section 405 IPC deals with criminal breach of trust. A careful reading of the Section 405 IPC shows that a criminal breach of trust involves the following ingredients:

- (a) a person should have been entrusted with property, or entrusted with dominion over property;
- (b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so;
- (c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

19. Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a short cut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the appellants under Sections 406/120B IPC, is liable to be quashed."

The above decisions are not applicable to the facts of the present case because in the above decisions, either the chargesheet has been filed or the case had ended in conviction.

But in the instant case, the investigation is at the early stage and the case has been registered only on 25.06.2015.

36. But the argument made by the learned counsel for the second respondent is that when the second respondent issued a Demand Draft for a sum of Rs.1,70,00,000/-, the same was accepted by the Bank authorities. However, as against a sum of Rs.28,26,294/- which was stated to be the excess amount, the Bank had refunded only a sum of Rs.14,30,509/- which would only show that entrustment was prima facie made out. However, it is premature to decide whether only the offence under Section 406 IPC is made out as the investigation is only at the early stage. Only when the investigation agency go through the entire papers and examine all the witnesses, it can be concluded whether the petitioners are liable to be prosecuted only under Section 409 IPC or any other penal provisions. It is also pertinent to note that the second respondent had claimed that there was falsification of records. So, it has to be unearthed only during the course of the investigation. In such circumstances, I am of the view that it is premature to decide that the ingredients of neither Section 409 IPC nor Section 420 IPC has been made out.

37. The Hon'ble Apex Court in its landmark judgment reported in 1992 SCC (Cr1) 426 (State of Haryana and others v. Bhajan Lal and others), had categorically described the circumstances under which an FIR can be quashed. It would be appropriate to incorporate para-102 of the said decision:

"102. In the backdrop of the interpretation of the various relevant provisions of the code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they

are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

But the facts of the present case does not attract any of the guidelines issued in the above decision for quashing the FIR.

38. Considering the above stated facts and circumstances, I am of the view that Section 409 IPC has been prima facie made

out. Further, the issue whether the petitioners are liable for prosecution under any other penal provisions and who are the persons to be held liable for prosecution can be decided only at the time of filing the final report and not at this stage.

39. For all the above reasons, the Criminal Original Petition deserves to be dismissed and accordingly, dismissed.
M.P. Closed.

pgp

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The Inspector of Police
B-1, North Beach Police Station
Rajaji Salai, Chennai - 600 001.

2.The Public Prosecutor, High Court, Chennai.

+ 2 ccs to M/s.Ramalingam & Associates, Advocate Sr 22317

+ 1 cc to Mr.Sundermohan, Advocate Sr 22418

KR/18/4/16

Cr1.O.P.No.23639 of 2015

सत्यमेव जयते
WEB COPY