

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 478 OF 2017

1. Santosh s/o. Adinath Ghalage .. Applicants
Age. 40 years, Occ. Service,
R/o. Plot No.22, Chhaya Nagar
Housing Society, CIDCO N-9,
Aurangabad.
2. Vidya w/o. Santosh Ghalage
@ d/o. Sandu Gawali
Age. 34 years, Occ. Head Mistress,
R/o. Plot No.22, Chhaya Nagar
Housing society, CIDCO N-9,
Aurangabad.

Versus

1. The State of Maharashtra .. Respondents
2. Bharat s/o. Laxman Kshirsagar
Age. 42 years, Occ. Business,
R/o. N-11, CIDCO, Aurangabad.

Mr.Rupesh A. Jaiswal h/f. Mr. N.S. Ghanekar, Advocate for the applicants.

Mr.S.B. Pulkundwar, A.P.P. for respondent No.1/State.

Mr.G.K. Kshirsagar, Advocate for respondent No.2.

**CORAM : S.S.SHINDE &
S.M.GAVHANE, JJ.**

**RESERVED ON : 28.07.2017
PRONOUNCED ON : 16.08.2017**

J U D G M E N T [PER : S.M. GAVHANE, J.] :-

1. The applicants, who are accused Nos.1 and 2 in Crime No.14 of 2017, registered with Ajintha Police Station, Aurangabad for the offence punishable under section 406 read with section 34 of the Indian Penal Code [for short "the IPC"], have filed this application under section 482 of the Code of Criminal Procedure, to quash and set aside the said crime.

2. The facts giving rise to this application are that the applicant No.1 is one of the members out of seven members of an institution, namely, Ajintha Learning Hub English School and applicant No.2 is the President and Head Mistress of the said institution. The informant – Bharat Laxman Kshirsagar (respondent No.2) is in transportation business and provides service of buses. In his report, on the basis of which aforesaid crime has been registered, it is alleged that there was oral agreement between him and the applicants in respect of providing bus services for the students of Ajintha

Learning Hub English School from the academic year 2013-2015. It is alleged that respondent No.2 has provided two buses bearing registration No.MH-20-W-9181 and MH-21-9986. But even after providing transportation service for the said academic years, the applicants did not pay Rs.12,10,000/- as remuneration (rent) towards the services.

3. According to the applicants, the school had their own bus – Tata Magic having registration No.MH-20-CT-7995 and Yogesh Jadhav was its driver. Respondent No.2 had provided his bus bearing No. MH-20-W-9181 only for short period from June, 2013 to February, 2014. Since the said bus was not in working condition, respondent No.2 took it back. The bus No.MH-21-9986 was never provided for transportation service to the applicants' school. The story of the respondent No.2 of not receiving any amount from the school for his services of bus and that said bus continued for a period of two years is improbable. At no point of time, respondent No.2

issued any notice to the applicants to pay his bill. In fact, for that year one SAB-Miller India, Waluj, Aurangabad provided transportation service and there was absolutely no question of providing bus services to the applicants' school. The dispute appears to be purely of civil nature.

4. Respondent No.2 has filed an affidavit-in-reply and in the affidavit it is stated that prima facie there is involvement of the applicants in committing offence under section 406 read with section 34 of the IPC. The crime registered against the applicants is under investigation. Therefore, at this stage, it is not possible to decide the case on merits. The applicants made oral agreement with respondent No.2. As per said agreement the applicants had hired two buses owned by the respondent No.2. Yogesh Jadhav and Gajanan Jadhav are the drivers on the said buses. The oral agreement was before witness – Damu Digambar Rothe. This respondent had requested the applicants to have written agreement,

but they deliberately avoided to make written agreement. This conduct of the applicants shows their mala fide intention and it amounts to criminal breach of trust. He stated that the application be rejected with costs.

5. We have heard learned Counsel appearing for the applicants, learned APP appearing for respondent No.1/State and learned Counsel appearing for respondent No.2. Learned Counsel appearing for the applicants submits that the allegations in the FIR do not disclose ingredients of offence punishable under section 406 of the IPC. The dispute between the applicants and respondent No.2 is of civil nature. Therefore, when the offence under section 406 of the IPC does not attract, on the basis of material collected by the Investigating Officer during investigation of crime registered against the applicants, the said crime is required to be quashed and set aside.

6. On the other hand, learned Counsel appearing for

the informant (respondent No.2) made submissions in the light of contentions in the affidavit-in-reply of the said respondent. He submits that merely because the dispute is of civil nature, is no ground to quash the crime registered against the applicants and though civil remedy is available, criminal Court cannot be prevented from taking cognizance of offence under section 406 of the IPC. In support of his submissions, learned Counsel appearing for respondent No.2 has relied upon the ratio laid down by this Court in the case of **Madhosingh and others Vs. Smt. Kamla Devi and others, 1992 Cri.L.J.1858,**

wherein in para 8, it is observed as under:-

"8. The object of the criminal law is to protect the innocent and punish the guilty. It is not the function of the criminal Court to do anything with the dispute relating to the property. It is the function of the civil courts to decide the disputes relating to the property. Where the dispute is of civil nature, a Magistrate ought not to deal with it. But, there is nothing in the law to prevent the criminal Court from taking cognizance of the offence provided the ingredients of the offence are made out on the face of the complaint. Merely because the person concerned is subject to civil liability, the criminal complaint is not to be dismissed even if the civil remedy is

tenable. In a case of Jaswantrao V. State of Bombay, AIR 1956 SC 575 : Their Lordships observed that

"The same set of facts may give rise both to civil liability and a criminal prosecution."

7. Learned APP appearing for the State supported the arguments advanced on behalf of respondent No.2.

8. We have carefully considered the submissions made on behalf of the parties and perused the affidavit-in-reply filed by respondent No.2 and the annexures to the petition including the FIR and statements of the witnesses. The FIR shows that respondent No.2-informant is doing transport business since last 15 years. He is having the vehicles for transporting the workers in the companies. At the time of lodging FIR, four vehicles were engaged by Pals Company and Fosters SAB-Miller Beer Company in MIDC, Aurnagabad for transporting the workers. In the year 2013, applicant No.1 started Ajintha Learning Hub English School, at Ajintha. He is president of the said school. His wife – applicant No.2 is Head Mistress of the said school. For the academic years 2013-2015,

he had given two vehicles i.e MH-20-W-9181 (Swaraj Mazda) and MH-21-9986 Bajaj Tempo Travellers 4S on hire for to-and-fro journey of the students in the villages in the limits of Ajintha. One Gajanan Maruti Jadhav, Yogesh Maruti Jadhav and Banwarilal Mahut were drivers of the said vehicles. The FIR further shows that in the year 2013-14 both the vehicles were engaged by Ajintha Learning Hub School and total rent of the said vehicles for the said year was Rs.7,70,000/-. In the year 2015, there was mechanical defect in one of the vehicles. It is alleged that total rent of the vehicles of the above said two years due to be paid to the informant was Rs.12,10,000/-, but no single rupee has been paid by the applicants to the respondent No.2, despite demand of the said rent by him and as such they have committed breach of trust. The FIR further depicts that respondent No.2 requested for legal action against the applicants to pay him above said amount of rent of the buses.

9. Here it is necessary to know meaning of criminal

breach of trust, given under section 405 of the IPC and it is reproduced thus :-

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 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”.

10. Thus it is clear from the above provision that to attract the offence of criminal breach of trust, punishable under section 406 of the IPC, following ingredients are required to be proved;

- (1) entrusting any person with property or with any dominion over property,
- (2) that person entrusted
 - (a) dishonestly misappropriating or converting to his own use that property; or
 - (b) Dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

11. In the present case as referred earlier, the FIR discloses that there was oral agreement between the applicants and respondent No.2. By the said agreement, applicant hired two buses of respondent No.2 for transporting the students from their village in the limits of Ajintha to their school for the period from 2013-2015 on rent and total amount of Rs.12,10,000/- towards rent was due to respondent No.2 and payable by the applicants and the applicants have not paid single rupee out of the said rent amount to respondent No.2. These allegations show that the applicants have committed breach of contract between them and respondent No.2. However, the above said allegations do not, prima facie, suggest that the respondent No.2 had entrusted the property i.e. his two buses to the applicants within the meaning of section 405 and 406 of the IPC. Similarly, the said allegations do not suggest that the applicants have dishonestly misappropriated or converted the said

property/vehicles to their own use or dishonestly used the said vehicles or disposed the said vehicles in violation of any direction of law prescribing the law in which such trust is to be discharged.

12. It is not the case of respondent No.2 that the applicants have sub-let his vehicles or transferred the same to anybody else so as to say that they have dishonestly used the said vehicles or disposed the said vehicles in violation of any direction of law prescribing the law in which such trust is to be discharged. Thus, the elements of dishonest intention which is necessary to constitute the offence of criminal breach of trust is prima facie not attracted on the basis of allegations in the FIR and statements of witnesses. Therefore, prima facie ingredients of offence punishable under section 406 of the IPC are not disclosed on the basis of FIR and material collected during the investigation. Therefore, the FIR against the applicants for the said offence is not sustainable and the same is liable to be quashed.

13. It appears from the allegations in the FIR and the statements of witnesses that there was breach of contract, which gives rise to Civil remedy to respondent No.2 for recovery of rent as well as damages. But instead, having recourse to Civil remedy, the respondent No.2 is trying to recover the rent of vehicles due from the applicants by filing prosecution against the applicant, which is not permissible.

14. As referred earlier in support of his submission that the Criminal Court is not prevented from taking cognizance of offence punishable under section 406 of the IPC against the applicant though civil remedy is available to the respondent No.2, learned Counsel appearing for respondent No.2 has relied upon ratio laid down in the case of Madhosingh & Ors. (Supra). The facts of the said case are that in the year 1976, a society acquired a piece of land and prepared layout. The complainant's husband was allotted plot in the above said

society admeasuring 60 x 60 sq.mtr. bearing plot No.13 in the lay out of the society vide letter dated 10.08.1976. According to the husband of the complainant, as said plot was not lucky number, he made request to the society for change of number and accordingly his request was considered and the said plot was re-numbered as plot No.12 and original plot number 12 was renumbered as plot No.13. The value of the plot was fixed at Rs.12,200/-. The husband of the complainant paid Rs.13,627=20. The complainant made allegation of foul play on the part of the accused. The complainant made a request to accused No.1, after death of her husband to execute the sale deed of plot No.12. When the accused No.1 failed to execute sale deed on one pretext or another, the complainant issued notice on 05.10.1988 to execute sale deed, but accused No.1 did not take any action. Again in the month of April, 1989, the complainant approached the accused No.1 for execution of sale deed. Accused No.1 handed over particulars of sale-deed, but the area of said plot has been shown as 1800 sq.ft. i.e. 18.28 x 9 sq.mtrs. in

place of 3600 sq.ft. And the value of the said plot was also shown as Rs.6200/- only, though complainant had paid Rs.13,627.50. The complainant was compelled to issue notice to the accused to execute sale-deed of plot No.12 admesuring 3600 sq.ft. The accused replied the said notice. As the complainant smelled foul play on the part of the accused, she lodged report to the Police Station Sadar Nagpur for the offence punishable under section 406 of the IPC. Thus, the facts of the above decision are different from the facts of the present case. Therefore, the ratio laid down in the said decision cannot be made applicable to this case to state that there can be criminal action against the applicants though Civil remedy is available to respondent No.2.

15. For the reasons discussed herein above, we hold that Crime No.14 of 2017 registered with Ajintha Police Station against the applicants for the offence punishable under section 406 read with section 34 of the IPC is not sustainable and the same is liable to be quashed.

Accordingly, the same is quashed and set aside. The Criminal Application is thus allowed.

16. Above observations are confined to adjudication of this application and in any manner they will not come in the way of the respondent No.2 in any other pending proceedings or the proceedings that may be filed by him in connection with the transaction in this matter.

[S.M.GAVHANE, J.]

[S.S.SHINDE, J.]