IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.13 OF 2017.

Shri Babruwan Kinalkar,
60 years of age, s/o Janardhan Kinalkar, r/o. H. No. 363, Chinch Bhatwadi, Mayem, Bicholim-Goa. ...... Petitioner.

Versus

1. State, Through Officer in Charge, Porvorim Police Station.
2. Kadamba Transport Corporation Limited, Through Managing Director, Corner Wing, Paraiso De Goa, Alto Porvorim, Goa. ...... Respondents.

Shri Ashwin D. Bhobe, Advocate for the petitioner.
Shri Pravin Faldessai, Additional Public Prosecutor for the respondent no.1.
Shri Shivan Desai, Advocate for the respondent no.2.

Coram:-F. M. REIS,
NUTAN D. SARDESSAI,JJ.

Reserved on:- 30th January,2017.
Pronounced on :-29th March, 2017.

JUDGMENT (Per Nutan D. Sardessai, J)

Heard Shri Ashwin D. Bhobe, learned Advocate for the petitioner, Shri Pravin Faldessai, learned Additional Public Prosecutor for the respondent no.1 and Shri Shivan Desai, learned Advocate for the respondent no.2.

2. Rule. Heard forthwith with the consent of the learned Counsels appearing for the parties.

3. The learned Addl. Public Prosecutor and learned Advocate waive notice on behalf of the respective respondents.

4. It was the case of the petitioner that the respondent no.1 filed the chargesheet bearing No.128/2001 against him under Section 173 of Code of Criminal Procedure, 1973 ("CrPC" for short) before the Judicial Magistrate, First Class Mapusa alleging an offence under Section 409 IPC and registered as the Criminal Case no.CC199/S/04/C. The proceedings were allotted on transfer to the Chief Judicial Magistrate, Panaji and registered as the Criminal Case No. IPC/94/2011/A. The case of the respondents no.2 proceeded on the basis that the petitioner while working as an L.D.C. at their KTC Depot at Porvorim in the Accounts Section had

misappropriated the amount giving rise to the complaint at the instance of the respondents no.2 on 11.10.2001 that the respondent no.1 in the course of his duty of collection of cash from the Conductors and preparation of the Daily Cash Collection Report based on the Conductors Way Bill Abstract had misappropriated amounts.

5. He had pleaded not guilty to the substance of accusation and as such was ordered to face trial. During the course of the trial four witnesses were examined on behalf of the respondents no.1. The respondents no.2 had simultaneously commenced the disciplinary proceedings against him. He had put in 31 years of service with the respondents no.2 and was denying and disputing the allegations made against him by the respondents. Pendency of the proceedings was causing mental, physical as well as financial torture to the petitioner and as such without prejudice and in order to resolve the matter and to have peace of mind, he had requested the respondents no.2 to consider the closure of the proceedings on the payment of the amount claimed by them as against him. The respondents no.2 were pleased to consider his request and permitted him

to deposit an amount of ₹2,500/- (Rupees Two thousand five hundred only) pursuant to which the disciplinary proceedings were closed against him vide the order 18.10.2016.

6. The criminal proceedings commenced by the respondents no.2 against him were essentially in respect of the amount allegedly misappropriated by him and thereby causing loss to the respondents no.2. However on payment of the amount to the respondents no.2 and on closure of the disciplinary proceedings, the grievance of the respondents no.2 would essentially not survive against him. He had therefore challenged the chargesheet and the criminal case filed against him pending on the file of the Chief Judicial Magistrate, North Goa, Panaji. The petitioner sought to quash and set aside the chargesheet on the ground that the allegations made in the complaint filed by the respondents no.2 were incorrect and in any event unsubstantiated in law and did not disclose any commission of the offence and therefore no cognizance of the complaint was required to be taken by the respondents no.1. Criminal prosecution was sought to be commenced by the respondents no.1 on the basis of the complaint filed by the respondents no.2. The so called

allegations in the complaint even if taken at the face value and/or uncontroverted allegations in the complaint even if considered did not disclose the commission of the offence and as such there was no scope for the registration of the FIR against him nor the allegations warranted the initiation of any criminal action against him.

7. A perusal of the impugned chargesheet, the contents of the statement as also the documents appended thereto apart from the deposition of the witnesses even if it was taken at the face value, did not constitute any offence muchless that under Section 409 IPC and therefore the impugned chargesheet was liable to be quashed and set aside. The records so produced would reveal that the allegation amounted to a civil dispute and not covered by the ingredients of the offence under Section 409 IPC. This Court and the Apex Court had constantly held that a matter on the face of it would be a civil in nature and ought not to be given a criminal flavour and the chargesheet and proceedings against him would be liable to be quashed and set aside. Moreover the resolution of the dispute between him and the respondents no.2 and the closure of the disciplinary proceedings would be

indicative of the fact that the chargesheet was initiated out of an act of vengeance. The chargesheet was unjust, illegal and arbitrary and therefore entitling him for a writ, order or direction to quash the impugned chargesheet and consequently dismiss the criminal case filed by the respondents no.1 against him under Section 409 IPC and the consequential reliefs.

8. Shri A. D. Bhobe, learned Counsel appearing on behalf of the petitioner contended that it was a fit case to quash the chargesheet and the proceedings against him in the backdrop of the fact that he had paid the amount allegedly misappropriated by him to the respondents no.2 consequent to which they had dropped the disciplinary proceedings against him and therefore nothing further survived in the matter and hence the criminal proceedings alongwith the chargesheet had to be quashed and set aside. He relied in **Vithal Kapusakar Vs. State of Goa and others (Criminal Writ Petition No.104 of 2014), Gian Singh Vs. State of Punjab and another, [(2012) 10 SCC 303], and Yogendra Yadav Vs. State of Jarkhand,[(2014) 9 SCC 653]** to support his contention.

9. Shri P. Faldessai, learned Addl. Public Prosecutor on behalf of the State opposed the quashing of the chargesheet and relied upon **Central Bureau of Investigation Vs. Jagjit Singh, [(2013)10 SCC 686]** while Shri Shivan Desai, learned Counsel appearing for the respondents no.2 left the matter to the discretion of this Court in the light of the deposit of the amount by the petitioner with the respondents no.2 and the dropping of the disciplinary proceedings against him.

10. **Vithal Kapuskar** (supra), sought for quashing and setting aside a chargesheet filed by the respondents no.1 and the criminal proceedings before the learned Chief Judicial Magistrate, Panaji for the alleged commission of the offence punishable under Sections 409, 420 and 120-B IPC against him and two others. It was alleged in the compliant filed on behalf of the respondents no.2 that the petitioner and 8 others had hatched a criminal conspiracy to cheat and in furtherance thereof furnished a property with defective title for mortgage and got sanctioned a term loan of ₹1,00,000/- on the basis of the recommendation of the accused no.2 and delivered ₹38,40,000/- to the accused no.1 by violating the Banking

Rules and sanctioned ₹6,39,000/- to the accused. It was submitted before the learned Single Judge by the learned Counsel appearing for the parties that the matter had been settled between them and that the respondents no.2 did not want to proceed with the case and an affidavit to that effect was filed on behalf of the respondents no.2. In that light, the learned Single Judge relying in the case of Gian Singh and Yogendra Yadav (supra), held that no purpose would be served by making the petitioner face the proceedings before the learned Chief Judicial Magistrate as the prosecution would be a waste of time and energy and consequently quashed the chargesheet and the criminal proceedings against him.

11. In **CBI** (supra), an FIR was lodged against the respondent as a Director of the Company and the officials of the Indian Overseas Bank (IOB) under Sections 120B, 420, 467, 468, 471, 472 IPC and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 on the allegations that the respondent had obtained a loan from his company against the security of forged/fabricated documents and the bank officials helped him in obtaining such loan. On account of the acts of omission on his part and of the bank

officials the entire term loan became unsecured and inoperative and the bank suffered a loss of ₹1.5 crores. A chargesheet was submitted on investigation under Sections 420, 471 IPC against the accused/respondent and the other who later on settled the dispute with IOB and paid the amount pursuant to an order passed by the Debts Recovery Tribunal(DRT). The respondent moved an application under Section 482 Cr.P.C. making a reference to an order passed by the DRT for quashing the criminal proceedings against him which was allowed by the High Court. However, setting aside the order of the High Court and giving directions to the trial Court for proceeding with the matter, the Hon'ble Apex Court held at paragraphs 14,15 and 16 thus:-

> 14. In the present case, the specific allegation made against the respondent-accused is that he obtained the loan on the basis of forged document with the aid of officers of the Bank. On investigation, having found the ingredients of cheating and dishonestly inducing delivery of property of the bank (Section 420 IPC) and dishonestly using as genuine a forged document (Section 471 IPC), charge sheet was submitted under Sections 420/471 IPC

against the accused persons.

15. The debt which was due to the Bank was recovered by the Bank pursuant to an order passed by Debts Recovery Tribunal. Therefore, it cannot be said that there is a compromise between the offender and the victim. The offences when committed in relation with Banking activities including offences under Sections 420/471 IPC have harmful effect on the public and threaten the well being of the society. These offences fall under the category of offences involving moral turpitude committed by public servants while working in that capacity. Prima facie, one may state that the bank is the victim in such cases but, in fact, the society in general, including customers of the Bank is the sufferer. In the present case, there was neither an allegation regarding any abuse of process of any Court nor anything on record to suggest that the offenders were entitled to secure the order in the ends of justice.

16. In the instant case, the High Court has not

considered the above factors while passing the impugned order. Hence, we are of the opinion that the High Court erred in addressing the issue in right perspective.

12. This judgment with respect is clearly distinguishable and cannot find applicability to the facts of the case at large in this petition, hence the respectful departure.

13. In **Yogendra Yadav** (supra), a two-Judge Bench of the Apex Court was seized with the question whether the Court can compound the offences punishable under Sections 326 and 307 IPC which are non-compoundable. In the brief facts, the appellants were the accused against whom offences were registered under Sections 341, 323, 324, 504 and 307 read with Section 34 of IPC. The chargesheet was filed after the investigation and while the cases were going on before the 2nd Additional Sessions Judge, Godda both the parties agreed to compromise the cases. A panchayat was held where with the intervention of the well-wishers a compromise was arrived at, signed by both the parties and an application was filed under Section 231(2) read with Section 311 CrPC for recalling the witnesses for further cross examination on the point of

compromise.

14. In **Yogendra Yadav** (supra) the learned 2nd Additional Sessions Judge on examining the records observed that the compromise was genuine but the offences under Sections 326 and 307 IPC were non-compoundable and accepted the application partly in respect of the offences under Sections 324, 341, 323 IPC and acquitted the accused only in respect of these charges while rejecting the relief in respect of the offences punishable under Sections 326 and 307 read with Section 34 IPC.

15. This order was challenged by the appellants before the High Court of Jharkhand which dismissed the challenge giving rise to the appeal before the Apex Court. The Apex Court considering its observations in **Gian Singh** (supra), held that they were applicable in the facts at large and in view thereof set aside the impugned order and quashed the proceedings on the file of the 2nd Additional Sessions Judge, Godda.

16. Coming to the facts of the present case, it is apparent that the petitioner was charged for the offence punishable under Section 409 IPC. It is equally undisputed

that after the chargesheet was filed against him, he had paid up the amounts allegedly claimed by the respondents no.2 who had consequently closed the disciplinary proceedings against him. The petitioner was therefore before this Court seeking quashment of the chargesheet and the proceedings against him on that basis qua the charge under Section 409 IPC which reads thus:-

> "Criminal breach of trust by public servant, or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

17. The petitioner was alleged to have misappropriated the amount in the course of his duty of collection of the cash from the Conductors and preparation of the Daily cash Collection Report based on the Conductors Way Bill Abstract.

He in order to get free from the financial torture apart from the physical and mental torture and to resolve the matter had sought for the closure of the proceedings with the respondents no.2 and who had acceded to his request and pursuant thereto had deposited all the alleged misappropriated amount and thereafter the disciplinary proceedings against him were closed giving due consideration also to the fact that he had completed his service tenure and was around 60 yeas of age around that time. It is another matter that the respondents no.1 had initiated criminal proceedings against him for the alleged offence under Section 409 IPC based on the complaint by the respondents no.2 and which had quashed the disciplinary proceedings against him arising out of the same transaction.

18. In any event, the offence alleged against him would not qualify as a heinous or serious crime as qualified in the judgment in **Gian Singh**(supra), and quite on the contrary and considering the factual matrix, it would amount to a civil dispute between him and the respondents no.2 which had attained a quietus on the repayment of the alleged misappropriated amount. Thus distinguishing the judgment in **CBI** (supra), and considering the ratio laid down in **Vithal**

Kapuskar, Gian Singh and Yogendra Yadav (supra), we are of the view that no purpose would be served by making the petitioner continue to face the proceedings in the Criminal case No.IPC/94/2011/A before the learned Chief Judicial Magistrate since the prosecution would become a lame prosecution and pursuing such lame prosecution would tantamount to a waste of time and energy.

19. In the result therefore, we pass the following:-

ORDER

(i) The Petition is allowed.

(ii) FIR No.128/2001, chargesheet and consequently the Criminal case no.IPC/94/2011/A against the petitioner is quashed and set aside.

(iii) The Petition stands disposed off in the aforesaid terms. Rule is made absolute accordingly.

NUTAN D. SARDESSAI J. **F. M. REIS, J.**

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