

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.12762 OF 2017

ORDER:

This criminal petition is filed by the petitioners/accused Nos.1 to 4 under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.358 of 2015 on the file of the IX Metropolitan Magistrate, Kukatpally at Miyapur, registered for the offence punishable under Sections 403, 406 and 420 of Indian Penal Code (for short "I.P.C.").

Respondent No.2 filed a private complaint on the file of IX Metropolitan Magistrate, Kukatpally at Miyapur for the offences punishable under Sections 403, 406 and 420 of I.P.C. alleging that the petitioner No.2 is his wife and the petitioner No.2 is his mother-in-law. Due to differences between them, respondent No.2 filed M.C.No.3798 of 2012 on the file of the Judge, Family Court, Bangalore for grant of divorce and the same was transferred to Mumbai as per the orders of the Apex Court. The petitioner No.1 started living separately with her parents. On coming to know about the initiation of divorce proceedings, both the petitioners trespassed into his leased apartment and started living there, but he did not disturb their stay. During their stay in the leased apartment, the petitioners sold some of the household articles through Quikr and OLX. Respondent No.2 also filed a suit O.S.No.12 of 2013 on the file of the Judge, Family Court, L.B.Nagar, Ranga Reddy District. The Judge, Family Court appointed Advocate-Commissioner to note down the valuables that are available in the house. Accordingly, the Advocate-Commissioner visited the premises and noted down the valuables

available in the flat and submitted report to the Court. After submitting report also, the petitioners sold some of the articles. The respondent No.2 again sought for appointment of Advocate – Commissioner and got the valuables missed in the house are listed. Later, the petitioners vacated the premises. Thus, the petitioners committed criminal breach of trust and misappropriated the property belonging to the respondent No.2 and cheated the respondent No.2 with dishonest intention to part with property or valuable security.

The Magistrate while exercising power under Section 156 (3) of Cr.P.C. referred the case to the police concerned to investigate into the same and file final report. On reference, police registered a case in Crime No.610 of 2014 for the offence punishable under Sections 403, 406 and 420 of I.P.C. and issued F.I.R. On the basis of the F.I.R., Sub-Inspector of Police, Madhapur, Cyberabad examined L.Ws.1 to 5, recorded their statements under Section 161 (3) of Cr.P.C. and having concluded that there is material to proceed against the petitioners filed charge sheet before the Magistrate for the offences punishable under Sections 403, 406 and 420 of I.P.C.

The basic attribution made against the petitioners in the charge sheet is as follows:

“The items that were noted as being there in the flat on 23.04.2013 the Advocate Commissioner’s report were thereafter taken away by A-1 and A-2 when they vacated the flat approximately towards the end of April, 2013.”

As per the allegations made in the charge sheet the petitioners taken away respondent No.2’s personal items i.e. Digital Camera, Swatch wrist watch, Ray Ban Sun Glasses, Laptop,

External Hard Drive, Kenwood Iron, Cash, Business Books, Text Books and other books, Wedding gold and diamond ring and Silver Jewellery and Silver Pooja items, that were present in the flat when the respondent No.2 last left the flat on 26.11.2012. Based on the two reports of Advocate-Commissioner, S.I. of Police concluded that the petitioners committed offence punishable under Sections 403, 406 and 420 of I.P.C.

Both the parties filed additional material papers during hearing.

Sri S.S.R. Murthy, learned counsel for the petitioners, mainly contended that none of the allegations made in the charge sheet even if accepted on its face value do not constitute an offence punishable under Section 403, 406 and 420 of I.P.C. and that the charge sheet was filed only at the instance of respondent No.2/ complainant. Therefore, continuation of proceedings against the petitioners herein is nothing but abuse of process of the Court and it amounts to subjecting them to harassment and forcing them to appear before the Court on every date of adjournment. In support of his contentions, he relied on the judgment of this Court rendered in "**M.P.Tej Babu v. State of Telangana**¹". On the strength of the principle laid down in the said judgment, learned counsel for the petitioners requested to quash the proceedings against the petitioners.

Sri D.Purnachandra Reddy, learned counsel for the respondent No.2 contended that specific overt acts attributed to the petitioners are suffice to constitute offence punishable under

¹ 2017 (1) ALD (Crl.) 677

Sections 403, 406 and 420 of I.P.C. and the two reports of Advocate-commissioner are suffice to accept the contention of the respondent No.2 that the petitioners committed the offence punishable under Section 403, 406 and 420 of I.P.C. since there is no possibility for another person to enter into the house and it was not case of the petitioners that somebody stolen or taken away the property available in the premises. He further contended that when the allegations made in the charge sheet, if accepted on its face value constitutes offence punishable under Sections 403, 406 and 420 of I.P.C., the Court cannot exercise inherent jurisdiction and quash the proceedings by exercising power under Section 482 of Cr.P.C.

Considering rival contentions and perusing the material on record, the point that arises for consideration is:

Whether the allegations made in the charge sheet coupled with the evidence collected during investigation by the investigating agency constitutes an offence punishable under Section 403, 406 and 420 of I.P.C. if not, whether the proceedings in C.C.No.358 of 2015 on the file of the IX Metropolitan Magistrate, Kukatpally at Miyapur against the petitioners are liable to be quashed?

P O I N T:

Before advertng to the controversy between the parties, it is apposite to examine the scope of Section 482 of Cr.P.C.

Section 482 of Cr.P.C. dealing with the saving of inherent powers of High Court, has to be exercised only within the framework of the said section which also clearly demarcates the sphere within which the said discretion contemplated under this section can be exercised. Nothing in the Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Time and again, the scope of powers of this Court under Section 482 of Cr.P.C. were highlighted by the Apex Court in long line of perspective pronouncements, which are as follows:

In “***R.P. Kapur v. State of Punjab***²”, the Apex Court laid down the following principles:

- (i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
- (ii) where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iii) where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and
- (iv) where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent power to prevent abuse of the process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is

² AIR 1960 SC 866

frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide, frivolous or vexatious. In that event there would be no justification for interference by the High Court as held by the Apex Court in ***“Mrs.Dhanalakshmi v. R.Prasanna Kumar³”***

In ***“State of Haryana v. Bhajan Lal⁴”*** the Apex Court considered in detail the powers of High Court under Section 482 and the power of the High Court to quash criminal proceedings or FIR. The Apex Court summarized the legal position by laying down the following guidelines to be followed by High Courts in exercise of their inherent powers to quash a criminal complaint:

- (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 FIR do not disclose a cognizable offence, justifying an investigation by police

³ AIR 1990 SC 494

⁴ 1992 Supp (1) SCC 335

officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the allegations made in the FIR 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 FIR 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.

In view of guideline No.3, when the allegations made in the charge sheet do not constitute commission of cognizable offence, the Court can exercise power under Section 482 of Cr.P.C. to quash the proceedings.

In the present case, as seen from the contents of the charge sheet narrated above, the petitioner No.1 is the wife of respondent No.2 and the petitioner No.2 is the mother-in-law of the respondent No.2 and there were disputes between them, as a result of which divorce petition and suits are also filed against one another and they are pending for adjudication. The prime allegation made against the petitioners is that they entered into the leased flat in the apartment of respondent No.2 and sold some of the valuable items by Quikr and OLX and produced certain documents to prove the advertisement in the two websites. Learned Counsel for the petitioners relied on two reports of Advocate – Commissioner.

One of the offences allegedly committed by the petitioners is punishable under Section 403 of I.P.C., which deals with punishment for dishonest misappropriation of property. Section 403 of I.P.C. reads as follows:

“403. Dishonest misappropriation of property:- Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend two years, or with fine, or with both.”

As per the explanation thereto, a dishonest misappropriation for a time only is a misappropriation within the meaning of the Section.

Further, explanation No.2 to Section 403 of I.P.C. says that a person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the

offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

To constitute an offence punishable under Section 403 of I.P.C. there must be dishonest misappropriation of movable property. Here, the allegations made against the petitioners is that the respondent No.2 obtained premises on lease for his stay, but these petitioners allegedly entered into the premises, sold the movable property through Quikr and OLX.

The material collected during investigation and produced along with the petition clearly shows that the petitioners entered into the leased premises of respondent No.2 and sold certain items of movable property. When the leased flat belongs to the respondent No.2, he is deemed to be the owner of the articles found in the house, they are

- a. Samsung 1.5 Ton Split AC with stand and stabilizer.
- b. LG 2 Ton Split AC with stand and stabilizer.
- c. Samsung Fully Automatic Top Loading Washing Machine with stand and cover.
- d. Samsung 455 Litres, Refrigerator (steel grey)
- e. LG Microwave with Convection, grill steamer, Rotisseries, Multi Cook Tawa (steel grey).
- f. Sofa Set (3+2+1)
- g. Bean Bag Brown XXL.

- h. Wooden Dining Table with glass top and 6 Chairs.
- i. King size bed with 2 side tables and full storage.
- j. Queen Size bed with one side table and full storage.
- k. King Bed Mattress (Kurlon)
- l. Queen Bed Mattress (Kurlon)

The petitioners offered those items for sale in Quikr and OLX and the report of the Commissioner in I.A.1756 of 2013 in I.A.No.1517 of 2013 in O.S.No.12 of 2013 and the earlier report of the Commissioner clearly establish that some of the movable items were missed in the flat. When the petitioners herein are in possession, either legal or illegal, they are bound to account for the movable property to the respondent No.2, who obtained the premises on lease and resided in the said flat before the petitioners entered into the premises. But the petitioners did not give any explanation though the burden lies on them to account for the movable items missed in the flat in view of Section 106 of Evidence Act. Therefore, the material on record *prima facie* establishes that the petitioners herein entered into the leased apartment of complainant and offered to sell the movables in Quikr and OLX, later they were not available when the Advocate Commissioner visited the premises for the 2nd time, in such case sale of the items and appropriating the amount realized would constitute an offence punishable under Section 403 of I.P.C. When the material on record *prima facie* disclosed commission of offence punishable under Section 403 of I.P.C., the proceedings against the petitioners for the offence punishable under Section 403 of I.P.C. cannot be quashed.

The other offence allegedly committed by the petitioner is punishable under Section 406 of I.P.C.

Section 406 of I.P.C. deals with the punishment for criminal breach of trust. The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or willfully 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, (ii) of any legal contract made, touching the discharge of such trust.

Thus, to constitute offence punishable under Section 406 of I.P.C., there must be entrustment of property for specific purpose and appropriation of the same for any other purpose or converts to their own use amounts to criminal breach of trust.

In the facts of the present case, there was no entrustment of property either movable or immovable, but the petitioners allegedly entered into the apartment, which was kept under lock and key of the respondent No.2, occupied and continued to stay till they vacated the apartment.

In “**Murari Lal Gupta v. Gopi Singh**⁵” the Apex Court while dealing with the similar case for the offence punishable under Section 406 and 420 of I.P.C. held as follows:

“The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the

⁵ (2006) 2 SCC (Cri) 430

Petitioner pursuant to which the Respondent parted with the money. It is not the case of the Respondent that the Petitioner does not have the property or that the Petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the Respondent. Merely because an agreement to sell was entered into which agreement the Petitioner failed to honour, it cannot be said that the Petitioner has cheated the Respondent. No case for prosecution Under Section 420 or Section 406 Indian Penal Code is made out even prima facie. The complaint filed by the Respondent and that too at Madhepura against the Petitioner, who is a resident of Delhi, seems to be an attempt to pressurize the Petitioner for coming to terms with the Respondent.”

Since the material on record does not disclose the entrustment of any item to the petitioners, and the petitioners allegedly sold them through Quikr or OLX, the allegations made in the charge sheet do not constitute an offence punishable under Section 406 of I.P.C., thereby the proceedings against the petitioners are liable to be quashed for the offence punishable under Section 406 of I.P.C.

The other offence allegedly committed by the petitioners is punishable under Section 420 of I.P.C.

Section 420 of I.P.C. deals with punishment for the offence of ‘cheating’.

Cheating is defined under Section 415 of I.P.C and it is as follows:

“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".

The essential ingredients to constitute the offence of cheating are:

- (i) There should be fraudulent or dishonest inducement of a person by deceiving him;
- (ii) (a) The person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) The person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and
- (iii) In cases covered by (ii) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

In **V.Y.Jose v. State of Gujarat**⁶ the Apex Court laid down following ingredients to constitute cheating.

“An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:

- (i) deception of a person either by making a false or misleading representation or by other action or omission;
- (ii) fraudulently or dishonestly inducing any person to deliver any property; or

⁶ (2009) 3 SCC 78

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

An offence of cheating may consist of two classes of cases:

- (1) where the complainant has been induced fraudulently or dishonestly. Such is not the case here;
- (2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he was not deceived or induced by the accused.”

In “**Hridya Rajan Pd. Verma and Ors. v. State of Bihar and another**”⁷ the Apex Court discussed about the offence of ‘cheating’. In the facts of the above judgment, a complaint was filed that the accused persons therein had deliberately and intentionally diverted and induced the respondent society and the complainant by suppressing certain facts and giving false and concocted information and assurances to the complainant so as to make him believe that the deal was a fair one and free from troubles. The further allegation was that the accused

⁷ AIR 2000 SC 2341

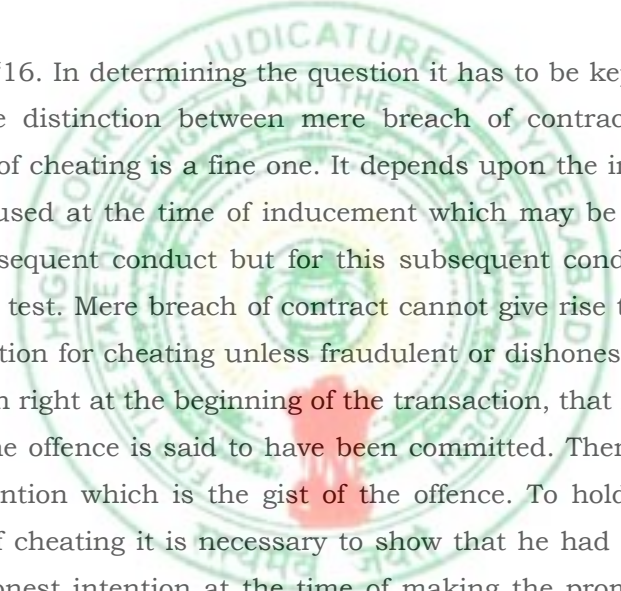
person did so with the intention to acquire wrongful gain for themselves and to cause wrongful loss to the Society and the complainant and they had induced the complainant to enter into negotiation and get advance consideration money to them. The two-Judge Bench referred to the judgment in “**State of Haryana v. Bhajan Lal**” (referred supra) wherein the Apex Court has enumerated certain categories of cases by way of illustration wherein the extraordinary power under Article 226 or the inherent powers Under Section 482 of the Code of Criminal Procedure could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. The Bench also referred to the decisions in “**Rupen Deol Bajaj (Mrs.) v. Kanwar Pal Singh Gill**”⁸, “**Rajesh Bajaj v. State NCT of Delhi**”⁹ and “**State of Kerala v. O.C. Kuttan**”¹⁰ wherein the principle laid down in Bhajan Lal (supra) was reiterated. The Court posed the question whether the case of the appellants therein came under any of the categories enumerated in Bhajan Lal (supra) and whether the allegations made in the FIR or the complaint if accepted in entirety did make out a case against the accused-Appellants therein. For the aforesaid purpose advertence was made to offences alleged against the appellants, the ingredients of the offences and the averments made in the complaint. The Court took the view that main offence alleged to have been committed by the appellants therein is cheating punishable Under Section 420 of the Indian Penal Code. Scanning the definition of 'cheating' the Court opined that

⁸ AIR 1996 SC 309

⁹ (1999) 3 SCC 259

¹⁰ AIR 1999 SC 1044

there are two separate classes of acts which the persons deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set-forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. Thereafter, the Bench proceeded to state as follows:



“16. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.”

After laying down the principle the Bench referred to the complaint and opined that reading the averments in the complaint in entirety and accepting the allegations to be true, the ingredients of intentional deception on the part of the accused right at the beginning of the negotiations for the transaction had neither been expressly stated nor indirectly suggested in the complaint. All that the respondent No.2 therein had alleged against the appellants therein was that they did not

disclose to him that one of their brothers had filed a partition suit which was pending. The requirement that the information was not disclosed by the appellants intentionally in order to make the respondent No.2 part with property was not alleged expressly or even impliedly in the complaint. Therefore, the core postulate of dishonest intention in order to deceive the complainant-respondent No. 2 was not made out even accepting all the averments in the complaint on their face value and, accordingly, ruled that in such a situation continuing the criminal proceeding against the accused would be an abuse of process of the Court.

In the absence of intentional deception on the part of the petitioners/accused at the beginning, they cannot be prosecuted for the offence punishable under Section 420 of I.P.C. since filing of complaint without *prima facie* material that the petitioners had dishonest intention at the beginning is abuse of process of Court. Hence, I find that the material on record do not constitute any offence punishable under section 420 of I.P.C. *prima facie*.

In view of the aforesaid discussion, the allegations made in the charge sheet coupled with the other evidence collected during investigation by the Sub-Inspector of Police disclosed the *prima facie* material to proceed against the petitioners for the offence punishable under Section 403 of I.P.C. but not for the offence punishable under Sections 406 and 420 of I.P.C.

Learned counsel for the petitioners contended that when the proceedings are initiated as a weapon of harassment, the Court

can exercise power under Section 482 of Cr.P.C. to quash the proceedings and relied on the judgment of this Court rendered in “**M.P.Tej Babu v. State of Telangana**” (referred supra), wherein this Court held as follows:

“When there is a remedy under any enactment, the Court cannot exercise its jurisdiction under Section 482 of Cr.P.C. But in the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction as held in “**State of Karnataka v. L.Muniswamy**”¹¹”

The law declared by this Court in the said judgment is not in dispute, but in the present case as the allegations made in the charge sheet disclosed commission of offence punishable under Section 403 of I.P.C. by the petitioners, to that extent the proceedings cannot be quashed while quashing the proceedings for the offences punishable under Section 406 and 420 of I.P.C.

In the result, the criminal petition is allowed in part. The proceedings against the petitioners/accused in C.C.No.358 of 2015

¹¹ AIR 1977 SC 1489

on the file of the IX Metropolitan Magistrate, Kukatpally at Miyapur registered for the offences punishable under Sections 406 and 420 of I.P.C. are hereby quashed while permitting the Magistrate concerned to proceed further against the petitioners for the offence punishable under Section 403 of I.P.C. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

26.09.2018
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