IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 355 of 2016

Sahadev Prasad Agarwal & Anr.

-Vs-

The State of West Bengal & Anr.

For the petitioners:	Mr. Ayan Bhattacherjee, Adv.,
	Mr. Pawan Kumar Gupta, Adv.,
	Mr. Manish Shukla, Adv.,
	Mr. Aditya Tiwari, Adv.
For the State:	Mr. Prasun Kumar Datta, A.P.P
	Mrs. Sukanya Bhattacherjee, Adv.,
For opposite party No.2:	
	Mr. Imran Siddiqui, Adv.

Heard on: 24th June, 9th July, 13th July, 15th July and 19 July, 2021.
Judgment on: July 30, 2021.

BIBEK CHAUDHURI, J. : –

1. The petitioners being the accused persons of GR Case No.1524 of 2015 arising out of Hare Street P.S Case No.397 dated 3rd July, 2015 under Section 406/420/120B of the Indian Penal Code (hereinafter described as the IPC) presently pending before the court of the learned Chief Metropolitan Magistrate, Calcutta have invoked the jurisdiction of

this Court under Section 482 of the Code of Criminal Procedure praying for quashing of the above mentioned proceedings pending against them.

2. Followings are the undisputed factual circumstances which laid to the dispute between the petitioners and the opposite party No.2:

a) The petitioners are the partners of Shree Raj Steal Products having its office at 20 Mullick Street within P.S – Burrabazar, Kolkata- 700007.

b) The opposite party No.2 is a businessman dealing with sale and supply of iron and steel materials including CR Coil. The petitioners placed an order for supply of 60.52 M.T of C.R Coil with the opposite party No.2. The opposite party No.2 sold said materials at a consideration price of Rs.24,24,723/- only and supplied the materials to the petitioners. The petitioners also issued five cheques dated 10th June, 2013, 21st June, 2013, 11th July, 2013, 22nd July, 2013 and 30th July, 2013 of different amounts, total being the entire consideration price for 60.52 Mt. C.R Coil. The opposite party No.2 presented the said cheques to the banker for encashment but the said cheques were dishonoured and returned to him. Subsequently, the petitioners paid a sum of Rs.8 lakh to the opposite party No.2 and at present the outstanding dues payable by the petitioners in favour of opposite party No.2 is Rs.16,24,723. The opposite party No.2 requested the petitioners repeatedly to make payment of such outstanding dues, but the petitioners went on delaying all the said payment of the said sum of one pretext or the other.

c) It is also an undisputed fact that the opposite party No.2 filed a complaint under Section 138/141 of the Negotiable Instrument Act against the petitioners after the cheques being dishonoured. The said petition of complaint was however returned to the opposite party No.2 by the learned Metropolitan Magistrate vide order dated 31st March, 2015 relying upon decision of the Hon'ble Supreme Court in the case of **Dashrath Rupsingh Rathod vs. State of Maharashtra** for filing the same to the court having jurisdiction.

d) The opposite party No.2 however did not file the said complaint under Section 138/141 of the Negotiable Instrument Act before the court having jurisdiction. On the contrary he filed a petition of complaint under Section 156(3) of the Code of Criminal Procedure alleging, inter alia, that petitioners entered into a criminal conspiracy to misappropriate the outstanding dues payable to the opposite party No.2 and thereby committed cheating upon him.

3. The learned Chief Metropolitan Magistrate sent the said petition of complaint to the Officer-in-Charge of Hare Street P.S directing him to treat the same as FIR and start a specific case against the petitioners. Accordingly, Hare Street P.S Case No.397 dated 3rd July, 2015 under Section 406/420/120B of the IPC was registered against the petitioners.

4. The petitioners has challenged the legality and validity of Hare Street P.S Case No.396 dated 3rd July, 2015 corresponding to GR Case No.1524 of 2015 by filing the instant application under Section 482 of the Code of Criminal Procedure on 28th January, 2016 and prayed for quashment of the proceeding.

5. It is submitted by Mr. Ayan Bhattacherjee, learned Advocate for the petitioners that the opposite party No.2 did not mention in the petition of complaint that he on the self same issue filed a complaint case under Section 138/141 of the Negotiable Instrument Act. The said complaint case was however returned to the complainant/opposite party No.2 with a direction to file the same before the court having jurisdiction on the basis of the judgment of the Hon'ble Supreme Court in **Dashrath Rupsingh Rathod**. The opposite party No.2 however, did not file the said complaint before the court of competent jurisdiction. He also did not mention the said fact in his subsequent complaint under Section 156(3) of the Code. According to Mr. Bhattacharjee, amounts to practising fraud upon the court. Secondly, it is submitted by him that the opposite party No.2 manufactured some new grounds of cheating and criminal misappropriation in the petition of complaint under Section 156(3) of the

Code. Admittedly, the petitioners never denied their obligation to make payment of dues to the opposite party No.2. It is also not disputed that the petitioners have already paid Rs.8 (eight) lakh to the opposite party No.2 and at present outstanding dues is Rs.16,24,723/- only. When the petitioners made part payment of their dues, question of deception and fraud does not arise.

6. Last but not the least, it is urged by the learned Advocate for the petitioner that the dispute between the parties is essentially civil in nature. The petitioners submitted an order for purchasing certain amount of materials from the opposite party No.2. He agreed to sale the said materials at a consideration price of Rs.24,24,723/-. The petitioners made part payment of the outstanding dues and if at all the allegations made by the opposite party is true the efficacious relief lies in filing a suit for recovery of outstanding dues. The petitioners have no criminal liability in the instant case and continuation of the criminal proceeding being GR Case No.1524 of 2015 is abuse of process of the court and should be quashed. In support of his contention Mr. Bhattacherjee refers to the following decisions of the Hon'ble Supreme Court :-

i) **Vir Prakash Sharma vs. Anil Kumar Agarwal : (2007) 7 SCC 373**.

ii) **G. Sagar Suri vs. State of U.P : (2000) 2 SCC 636**.

iii) **Anil Mahajan vs. Bhor Industries Ltd.:(2005) 10 SCC 228**.

iv) **Satishchandra Ratanlal Shah vs. State of Gujrat : (2019) 9 SCC 148**.

v) **Vinod Natesan vs. State of Kerala : (2019) 2 SCC 401**.

vi) **Murari Lal Gupta vs. Gopi Singh : (2005) 13 SCC 699**.

vii) **MedMeme LLC vs. iHorse BPO Solutions (P) Ltd.: (2018) 13 SCC 374**.

viii) **Hotline Teletubes and Components Ltd. vs. State of Bihar, (2005) 10 SCC 261**.

7. In **Vir Prakash Sharma** (supra) the parties entered into a contract for sale and purchase of welding rods. The appellant issued two cheques which were eventually dishonoured. The respondent filed a complaint before the court of the learned Special Judicial Magistrate, Rampur under Section 406/409/420/417 of the Indian Penal Code against the petitioners. The learned Magistrate took cognizance of offence against the appellant. The appellant filed an application before the High Court at Allahabad praying for quashing of the proceeding against him. The High Court rejected the said application which led the appellant to file Criminal Appeal No.980 of 2007 before the Hon'ble Supreme Court. The Hon'ble Supreme Court was pleased to hold that the dispute between the parties is essentially a civil dispute. Nonpayment or under payment of the price of the goods by itself does not amount to commission of an offence of cheating or criminal breach of trust.

8. In **G. Sagar Suri** (supra), similar question was raised. In the said case the appellants were roped in a case under Section 406/420 of the IPC. In the counter affidavit filed on behalf of the complainant, it was found that none of the appellants is a director of Ganga Automobile Ltd. The first appellant was, however the authorized signatory of the company and he had signed the cheques which were returned dishonoured. The record of the said case nowhere stated as to how the complainant company was duped. The complainant filed a complaint under Section 138 of the NI Act and the said complaint was pending. The Hon'ble Supreme Court held that there is no occasion for the complainant to prosecute the appellants under Sections 406/420 IPC and in its doing so it is clearly abuse of the process of law and prosecution against the appellant was quashed.

9. The Hon'ble Supreme Court in the case of **Anil Mahajan** (supra) lays down a fine line of distinction between cheating and breach of contract. It is observed by the Hon'ble Supreme Court that failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is when he made the promise cannot be presumed. A distinction has to be kept in mind between mere breach of conduct and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent contact is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the

transaction. The substance of the complaint is to be seen. Mere use of the expression 'cheating' in the complaint is of no consequence.

10. **Satishchandra Ratanlal Shah's** case (supra) came up before the Hon'ble Supreme Court against an order of refusal of quashment of complaint by the High Court. The facts giving rise to the appeal before the Hon'ble Supreme Court is that respondent No.1 is a money lending company of which respondent No.2 is the director. The appellant approached respondent No.2 for a loan. The respondent No.2 sanctioned the said loan on condition that the appellant would repay the same with interest within one year. However the appellant did not repay the said loan. On the contrary he threatened the respondent No.2 with dire consequence. The Hon'ble Supreme Court held that mere breach of promise, agreement or contract does not ipso facto, constitute an offence of the criminal breach of trust within the meaning of Section 405 of the IPC without their being a clear case of entrustment. Moreover, some inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is the mens rea which is the crux of the offence.

11. In the case of **Vinod Natesan** (supra) the Hon'ble Supreme Court has taken the same view that since the dispute between the parties arose out of failure or breach of an agreement, the same at the most can be said to be the civil dispute and there is no ingredient of offence under Section 406 and 420 of the IPC.

12. In subsequent decisions referred to by the learned Counsel for the petitioners, the Hon'ble Supreme Court lays down the law as to whether an offence under Section 406 and Section 420 of the IPC can be said to be committed in case of a breach of contract without any ingredient in the FIR or complaint as to the fraudulent and dishonest intention to deceive the complainant by the accused persons. It is consistently held by the Apex Court that no criminal case shall lie, the dispute being essentially civil in nature arising out breach of contract.

13. Learned Advocate for the private opposite parte No.2 has filed a written note of argument in the instant case. At the outset it is stated on behalf of the opposite party No.2 that during the pendency of the instant revisioinal application, police submitted final report of conclusion of investigation on 26th June, 2016 on the ground that the dispute between the parties was essentially civil in nature. Challenging the said final report. The opposite party no.2 preferred a *narazi* petition whereupon a direction was passed for further investigation of this case. Subsequently, police submitted charge-sheet against the petitioners on 27th November, 2019 under Section 406/420/120B of the Indian Penal Code. During investigation of the case. It was brought to the notice of the Investigating Officer that the opposite party No.2 had filed a complaint under Section 138/141 of the Negotiable Instrument Act. The trial court returned the complaint to file the same before a court of competent jurisdiction. But the opposite party did not file the said complaint to a court having jurisdiction to try the case under the Negotiable Instrument Act. It is

stated in the written argument that there is no impediment or bar in filing a complaint under Section 406/420 of the IPC without filing a complaint under Section 138/141 of the Negotiable Instrument Act. Both the penal provisions operate in different fields. Therefore the FIR under Section 406/420 of the IPC cannot be quashed on the ground of non filing of complaint under Section 138/141 of the Negotiable Instrument Act. The opposite party No.2 did not mention in his petition of complaint which was treated as FIR that previously he filed a complaint under Section 138/141 of the Negotiable Instrument Act. Such omission cannot be described as willful suppression of fact and commission of fraud upon the court.

14. It is further stated in the written notes of argument on behalf of the opposite party No.2 that admittedly the petitioners offered to purchase C.R Coil weighing about 62.52 M.T at a consideration price of Rs.24,24,723/-. The opposite party No.2 accepted such offer and delivered goods to the petitioners. The petitioners issued five numbers of cheques to make payment of the said amount. All the said cheques were dishonoured. So, from the very beginning the petitioners knew that they did not have sufficient money in the account to honour the cheques. In spite of the said fact being known to the petitioners they issued the cheques only to deceive the opposite party No.2. Therefore, dishonest and fraudulent intentions of the petitioners are apparent from the very beginning of the transaction. In view of such circumstances, the FIR filed

by the opposite party No.2 against the petitioners or the charge-sheet file by the Investigating Officer cannot be quashed at this stage.

15. It is further stated on behalf of the opposite party No.2 that in the instant case ingredients of offence under Section 420 and 406 of the IPC are prima facie established on filing of the charge-sheet. The allegation of the defacto complainant/opposite party No.2 shall only to be proved on the basis of evidence led by the witnesses during trial of the case. Even if the opposite party has civil remedy, a criminal case cannot be quashed on this ground. As a matter of fact, both Criminal Law and Civil Law can be perused in diverse situations. They are not mutually exclusive but clearly coextensive and essentially differ in their contents and consequences. In support of his contention, the learned Advocate for the opposite party No.2 refers to a decision of the Hon'ble Supreme Court in **M/s Indian Oil Corporation vs. M/s NEPC India Ltd & Ors : AIR 2006 SC 2780** wherein it was held that where the civil remedy is availed of any dispute arising from a breach of contract, remedy under the criminal law is not barred if the allegation disclosed a criminal offence.

16. Having heard the learned Advocates for the parties and on careful perusal written notes of argument submitted on behalf of the opposite party No.2, one uncontroverted factual situation comes to the surface. The opposite party No.2 supplied C.R Coil amounting to Rs.24,24,723/- to the petitioners. Petitioners made part payment of the consideration price amounting to Rs.8 lakh. Thus, a sum of Rs.1624723/- is lying due. In **Indian Oil Corporation vs. Nepc India Ltd.** (supra) relied on by the

learned Advocate for the opposite party No.2, it was held by the Hon'ble Supreme Court that the distinction between breach of contract and the offence of cheating 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. In the instant case I do not find any material of involving the ingredients of Section 420 of the IPC. There is neither any allegation nor any evidence that the petitioners deceived the opposite party at the time of initial transaction or that they fraudulently or dishonestly induced the opposite party to deliver any property.

17. In the instant case the petitioners practically admitted their outstanding dues by filing the instant application. It is contended on behalf of the petitioners that they have no fraudulent or dishonest intention to induce the opposite party to deliver the goods, viz, C.R Coil and the petitioners have already paid a sum of Rs.8 (eight) lakh as part payment of the consideration money. Since there is no ingredient of

offence under Section 420 of the IPC against the petitioners from the very inception of transaction between the parties the dispute is essentially civil in nature.

18. Now comes to the issue on applicability of Section 482 of the Code. Section 482 runs thus:-

> **482. Saving of inherent powers of High Court**.-Nothing in this 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.

19. It is no longer a res integra that the power under Section 482 of the Code must be exercised sparingly, with circumspection and in rarest of rare cases. Exercise of inherent power under Section 482 of the Code is not the rule but the exception. The exception is applicable only when it is brought to the notice of the court that grave miscarriage of justice would be committed if the trial is allowed to proceed where the accused would be harassed unnecessarily. The High Court can exercise its inherent power in the following cases:-

a) To give effect to an order under the Code.

b) To prevent abuse of the process of the Court and

c) To otherwise secure the ends of justice.

20. In **State of Haryana & Ors. vs. Ch. Bhajan Lal & Ors**, **1992 SCC (Cri.) 426** the Hon'ble Supreme Court laid down the categories of cases where the High Court may, in exercise of powers under Section 226 of the Constitution of India or under Section 482 of the Code, interfere in a

proceeding to prevent abuse of process of the court or otherwise to secure ends of justice;

a) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR did not disclose a cognizable offence under Section 154 of the Code.

b) Where the uncontroverted 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.

c) 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.

d) Where the allegations made in the FIR or the complaint are 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.

e) Where there is an express legal bar contained 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 proceeding and/or where there is specific provision in the Code or the concerned act, providing efficacious relief for the grievance of the aggrieve party.

f) 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.

21. This court is not unmindful to note that there remains fine line of distinction between breach of contract and cheating. In case of cheating, it is the duty of the complainant to make out a case that from the very inception of establishment of commercial contractual relation between the parties, the accused had an intention to deceive fraudulently or dishonestly the complainant to induce him to deliver property. It is true that the complainant/opposite party No.2 failed to make out any such case in his petition of complaint. On the other hand, the petitioners paid part of consideration money to the opposite party No.2. Subsequently, the rest amount of Rs.16,24,723/- was not paid to the opposite party No.2.

22. This court has inherent power under Section 482 of the Code amongst other to prevent abuse of the process of the court and to otherwise secure ends of justice. Therefore, the court has the mandatory duty not only to prevent abuse of the process of the court but also to secure ends of justice. The High Court can very well quash the proceeding holding, inter alia, that the dispute between the parties is civil in nature

and giving liberty to the opposite party to move the Civil Court to recover the unpaid amount of consideration money.

23. Accordingly, the criminal proceeding being G.R Case No.1524 of 2015 arising out of Hare Street P.S Case No.397 dated 3rd July, 2015 under Section 420/406/120B of the Indian Penal Code pending against the petitioners is quashed under Section 482 of the Code. This order, however, does not restrict or disentitle the opposite party No.2 to take proper step in the appropriate Civil Court for recovery of money subject to the law of limitation.

(Bibek Chaudhuri, J.)