IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

APPELLATE SIDE

Present: The Hon'ble JUSTICE BIVAS PATTANAYAK

C.R.R. 668 of 2013

Mrs. Anjali Singh (Rai)

versus

State of West Bengal

For the Petitioner: **Mr.Prabir Kumar Mitra, Adv.**
Mr. Pinak Kumar Mitra, Adv.
Ms.Ariba Shahab, Adv.

For the State: **Mr.Arijit Ganguly, Adv.**
Mr. Sandip Chakraborty, Adv.
Mr. Sanjib Kumar Dan, Adv.

Heard on: 16.08.2022

Judgment on: 15.09.2022

BIVAS PATTANAYAK, J. : –

1.The present revisional application has been filed by the petitioner under Section 482 of the Code of Criminal Procedure for quashing of the proceeding in connection with GR Case no. 943 of 2009 (arising out of Chinsurah Police Station Case no. 205 of 2009 dated 27.08.2009) under Sections 406/420 of the Indian Penal Code pending before the learned Chief Judicial Magistrate, Chinsurah, Hooghly.

2.The brief fact of the case is as follows:-

(i)An open tender was floated by the Hooghly Mohsin College for the Retro-Conversion of Bibliographic records of its library and the petitioner was one of the bidders of the said tender.

(ii) The petitioner's enterprise namely *M/s AB Enterprise* was selected by the college authority to perform the job which was intimated to the petitioner vide letter dated 31.01.2009.

(iii) The petitioner's enterprise namely *M/s AB Enterprise* deposited a pay orderbeing no. 008362 dated 26.09.2009 amounting to Rs. 2 lakhs issued by United Bank of India, BRBB Road Branch, Kolkata-700001 in favour of Principal Hooghly Mohsin College, Chinsurah, as a security deposit in connection with library digitisation work.

(iv)As the petitioner failed to complete the work despite several telephonic and written reminders the aforesaid pay order was presented for clearing in the Chinsurah Treasury on 14.08.2009. However, the instrument was returned on 18.08.2009 with the noting that the instrument *'already has been cancelled'*.

(v) The college authority had no information of such cancellation and the same original instrument was still in the possession of the payee. Moreover, the pay order no. 008362 dated 26.06.2009 was credited unethically and fraudulently by the petitioner's enterprise in its own account being CC Account no. 17725.

(vi) On such basis the FIR came to be registered against the petitioner.

(vii) Upon completion of investigation, the Investigating Agency submitted charge sheet against the petitioner under Sections 406/420 of the Indian Penal Code.

3. Being aggrieved by and dissatisfied with the aforesaid proceeding the petitioner has preferred the present revisional application.

4. Mr. Prabir Kumar Mitra, learned advocate appearing on behalf of the petitioner submitted that the petitioner's enterprise was selected in the bid and upon completion of the work assigned to the enterprise a cheque amounting to Rs.5,97,600/- dated 30.03.2009 drawn on State Bank of India, Hooghly Branch was issued in favour of the petitioner's enterprise, meaning thereby that the work that was assigned to the enterprise was accordingly completed. Thus, the allegation that the work was incomplete does not stand to reason.

He further submitted that though there are allegations in the FIR that the petitioner failed to deposit the security amount but as per the notice of tender there was no such clause for depositing aforesaid amount of Rs. 2 lakhs to the authorities. He further drew the attention of the court that soon after lodgement of the case on 27.08.2009 the petitioner deposited another pay order being no.008593 dated 28.08.2009 which has been duly accepted by the college authorities observing that the previous pay order was cancelled erroneously by the bank. Moreover, the dispute, if any, by and between the parties relates to deposit of pay order in connection with assigned work of digitization and as such the ingredients of Sections 406/420 of the Indian Penal Code is not attracted in the facts and circumstances of the case.

He further submitted that in order to attract Section 420 and Section 406 of the Indian Penal Code there has to be an iota of materials showing the intention of the party from the very beginning to deceive the complainant and entrustment of any property by the complainant and its misappropriation by the accused. However, such aspects are totally missing in the averments made in the FIR. In support of his contention he relied on the decision of ***S.W Palanitkar versus State of Bihar***[1]**;** ***Hridaya Ranjan Prasad Verma and Others versus State of Bihar and Another.***[2] **;*International Advanced Research Centre for Powder Metallurgy and New Materials and Others versus Nimra Cerglass Technics Private limited and another***[3]**;** ***Uma Shankar Gopalika versus State of Bihar and another.***[4]**.**

In view of his above submission he prayed for quashing of the above proceeding.

5. Mr.Arijit Ganguly, learned advocate appearing on behalf of the State in reply to the contention raised on behalf of the petitioner submitted thatthe petitioner at first deposited a pay order in favour of the Principal, Hooghly

12002 SCC (Cri) 129

22000 SCC (Cri) 786

32016(1) SCC (Cri) 269

42006(2) SCC (Cri) 49

Mohsin College, Chinsurah as a security deposit and without informing the college authority the petitioner cancelled the pay order and credited the said amount in its account for which the FIR was registered at instance of the college authority. The statement of the bank employees precisely reveals that the petitioner in utter violation of the Banking Regulations cancelled the pay order and credited the amount in its own account. Furthermore upon completion of investigation and on the basis of the *prima facie* materials collected during the course of investigation, the Investigating Agency has submitted charge sheet against the petitioner under Sections 406/420 of the Indian Penal Code. In light of his aforesaid submission he prayed for dismissal of the revisional application.

6.Having heard the learned advocates of both the sides and before examining respective contentions on therelative merits it is apposite to notice the legal position.Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in the civil court but a breach of trust with *mens rea* gives rise to a criminal prosecution as well.The ingredients in order to constitute a criminal breach of trust are: (1) entrusting a person with property or with any dominion over property; (2) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; 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; (ii) of any legal contract made, touching the discharge of such trust. Further the ingredients to constitute offence of cheating are : (i) there should be fraudulent or dishonest inducement of a person by deceiving him; (ii) 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 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) the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation and property. 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 or which may be judged by its subsequent conduct but that 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 i.e 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 i.e when he made the promise cannot be presumed.***[See Hridaya Ranjan Prasad Verma (supra)].*** Thus, from the aforesaid ingredients it is seen that Section 415 of the Indian Penal Code has two parts. In the first part the person must dishonestly or fraudulently induce the complainant to deliver any property; in the second part the person who intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent and in the second part the inducement should be intentional.

7.Baring in mind the aforesaid proposition of law now I revert back to the fact of the case.Undisputedly an open tender was floated by the Hooghly Mohsin College Authority for Retro-Conversion of Bibliographic records of its library. The petitioner who participated in the said tender process was selected to perform the aforesaid job and accordingly work order was issued in favour of the petitioner's enterprise namely *M/s AB Enterprise*. It is also not in dispute that the college authority issued a cheque bearing no. 184200 dated 30.03.2009 amounting to Rs.5,97,600/- in favour of petitioner's enterprise namely *M/s AB Enterprise*. The dispute arose between the college authority and the enterprise with regard to the payment of a security deposit of Rs. 2 lakhs. The State produced certified copy notice inviting tender. By such quotation reputed vendors were asked to submit rates in sealed covers for undertaking the work for Retro-Conversion of Bibliographic records in the library of the college. Upon going through the said quotation there is no reflection that the bidder who would be selected to perform the job was supposed to deposit Rs. 2 lakhs as a security deposit. Be that as it may, the petitioner's enterprise on 26.06.2009 got a pay order issued in favour of the Principal, Hooghly Mohsin College, Chinsurah amounting to Rs. 2 lakhs being no. 008362. As per the statement made in the FIR as well as the statement of witnesses appearing in the case diary it is pertinent to note that the aforesaid pay order was cancelled by the petitioner without informing the college authority and the said amount was credited to the account of the petitioner's enterprise in its own account being CC Account no. 17725. The petitioner has annexed the letter issued by Principal, Hooghly Mohsin College under memo no.559/L-1 dated 28thAugust, 2009 whereby the cashier of the college was authorized to accept pay order no. 008593 dated 28.08.2009 amounting to Rs.2 lakhs issued at the instance of the petitioner's enterprise and same was accepted by the college authority on the subsequent date of lodgement of the FIR. It has been categorically stated in the aforesaid letter that the previous pay order was erroneously cancelled by the Bank. From the aforesaid enumerated facts it has fallen that there was no dishonest or fraudulent inducement by the petitioner to induce the complainant to deliver any property or intentionally induce the complainant to do or omit to do a thing. It is also noted that there are no iota of materials that the petitioner from the very beginning had the intention to deceive the complainant. Simpliciter there was a tender in which the petitioner's enterprise was selected and while performing the job assigned certain amount was supposed to be deposited to the college authority which was at first deposited and thereafter cancelled and subsequent to the lodgement of the FIR the said amount has been deposited and has been duly accepted by the college authority. In order to constitute an offence of cheating there has to be intention to deceive in existence at the time when the inducement is made. Mere failure to make payment or keep up promise subsequently cannot be presumed to be act leading to cheating. Further there is nothing either in the complaint and/or in the statement of witnesses that any property was entrusted to the petitioner or the petitioner had domain over any of the properties of the complainant which the petitioner dishonestly converted to her own use so as to satisfy the ingredients of Section 405 of IPC punishable under Section 406 of IPC. Accordingly,it is found that there are no such materials with regard to criminal breach of trust or of cheating. On such score I concur with the submissions made on behalf of the petitioner relying on the decision of the Hon'ble Supreme Court passed in ***S.W Palanitkar versus State of Bihar (supra)***.The aforesaid decision of the Hon'ble court has also been relied upon in its another decision passed in ***International Advanced Research Centre for Powder Metallurgy and New Materials (supra).*** The decision of Hon'ble Supreme Court passed in ***Uma Sankar Gopalika (supra)*** also reiterates that the intention to cheat must exist at the very inception.

8. The Hon'ble Supreme Court in ***G. Sagar Suri versus State of U.P*** reported in ***(2002) 2 SCC 636*** observed as follows:

> *"8.....It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of a 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 the 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 process of any court or otherwise to secure the ends of justice."*

As it is found that there are no ingredients of criminal offence hence the proceeding before the learned trial court needs to be intervened by invoking Section 482 of the Code.

9.Accordingly criminal revisional application being **CRR 668 of 2013** stands allowed on contest.The proceeding being GR Case no. 943 of 2009 (arising out of Chinsurah Police Station Case no. 205 of 2009 dated 27.08.2009) under Sections 406/420 of the Indian Penal Code pending before the learned Chief Judicial Magistrate, Chinsurah, Hooghly stands quashed.

11. All connected applications, if any, stand disposed of.

12. Interim orders, if any, stand vacated.

13. Let a copy of this order be sent to learned trial court for information.

14. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

(Bivas Pattanayak, J.)