IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 443 of 2020

21 Auto India Pvt. Ltd. & Ors.

Vs.
Incred Financial Services Ltd.
(Erstwhile known as Visu Leasing & Finance Private Limited)

For the Petitioner	:	Mr. Anirban Dutta, Mr. Abir Chakraborty.
Heard on	:	05.06.2023
Judgment on	:	19.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing and/or setting aside of proceedings arising out of complaint case No.CS-6781/19 of 2019 dated 2/2/2019 under Sections 420/406/120B of the Indian Penal Code, presently pending before the learned 19th Metropolitan Magistrate, at Kolkata and all orders passed therein including order dated 2/2/19 whereby the learned Chief Metropolitan Magistrate, Kolkata was pleased to take cognizance of the impugned complaint and transfer the proceedings to the Court of the learned 19th Metropolitan Magistrate, at Kolkata for disposal and all orders therein.

2. The petitioners case is that the petitioner no.1 is a company registered under the relevant provisions of the Companies Act having its registered office at Mohili Village opposite BMC School, Andheri, Ghatkopar, Mumbai, Maharastra-400072 being represented by its authorised representative, Mr. Abhishek Kharkar vide board resolution dated 14th December, 2019 and the petitioner nos.2 and 3 are the persons responsible for the day to day affairs of the petitioner no.1.

3. The petitioners state that they have been implicated in the proceeding being Complaint Case no.CS-6781/19 of 2019 dated 2/2/2019 under Sections 420/406/120B of the Indian Penal Code, presently pending before the learned 19th Metropolitan Magistrate at Kolkata at the behest of the opposite party.

4. **The petitioner** is a company having business of Honda dealership established for sales and services of Honda Two Wheelers and has goodwill and repute in the market.

5. **The opposite party** is a financial institution offering loan facility against interest.

6. In the year 2017 the petitioner company was in need of money to expand its business and hearing about the facility provided by the opposite party the petitioners have approached the opposite party for a loan for the purpose of expanding its business and pursuant to such approach and after due documentation and verification **a loan agreement** being Agreement No.LNMUM19117-180009070 of the year 15th September, 2017 has been executed by and in between the parties and pursuant to such agreement the opposite party **sanctioned a loan of rupees 30 lacs** to the petitioners.

7. The petitioners have paid back Rs.26,75,587/- to the opposite party through different installments.

8. That despite payment of such substantial amount, the opposite party has continued pressurizing the petitioner for payment of rest of the amount with interest, with immediate effect and also threatened the petitioner that in default the opposite party will implicate the petitioner in false criminal cases.

9. **The incident which lead to the initiation of the impugned proceeding in brief is as follows:-**

> *"The complainant company, the opposite party herein, was approached by the petitioner for* ***a loan of rupees 30 lakhs*** *for business purpose and after due verification the opposite party has sanctioned such loan to the petitioner company after executing a loan agreement being Agreement No.LNMUM19117-180009070 of the year 2017 but the petitioners have failed to make payment of the full amount within time and as such an amount of* ***rupees 3,24,413 of the opposite party is due*** *from the petitioners which the petitioners have failed to pay and thereby committed an offence under Sections 420/406/120B of the Indian Penal Code."*

10. **Mr. Anirban Dutta learned counsel for the petitioners** has submitted that dishonest intention from the very inception is a sine qua non to attract Section 420 of the Indian Penal Code, but on a plain reading of the purported complaint, it becomes apparent that out of rupees 30 lacs, the petitioners have paid rupees 26,755,87 and only an amount of rupees 3,24,413 is due to the opposite party from the petitioners, which clearly negates the abovementioned proposition of dishonest intention from the very inception and clearly renders the said complaint legally untenable and otherwise bad in law.

11. The complaint is false, frivolous and concocted and has been filed on vague conjecture and sketchy evidences in order to harass and humiliate the petitioners in the eyes of the society.

12. That non-consideration of such statutory principle and settled legal proposition on the face of it has caused travesty of justice and has caused severe loss and damage to the petitioners.

13. That in absence of any prima facie case in the petition of complaint the same ought to have been dismissed by the learned Magistrate following the provisions of Section 203 of the Code of Criminal Procedure, 1973.

14. **In spite of due service there is no representation on behalf of the opposite party.**

15. Pleadings in the petition of complaint include, that the complainant is a company within the meaning of The Companies Act, 1956 and is engaged in the business of financing.

16. The accused persons approached the complainant and induced them that he/she is in need of financial assistance and further induced the complainant that he/she will repay the loan amount in time without any default. Thereafter, being satisfied about the background, credit worthiness and other factors, i.e. proof of identity, residence and sound sources of income and upon believing the representations to be true and genuine, the complainant was pleased to sanction a Loan VIDE AGREEMENT NO.LNMUM19117-180009070 in favour of the accused person upon the unambiguous assurance and/or promises made by the accused person to fulfill all terms and conditions of the agreement as well as punctual repayment of the loan.

17. It is submitted by the complainant that being entrusted with huge sum of Rs.3,24,413/- by way of said (balance amount) loan, by the complainant, the accused person having dominion over the same, dishonestly used, as well as misappropriated the same, which is public money. Now retaining the said amount of public money illegally and wrongfully with malafide intention and dishonest intention from the very inception, the accused persons have committed breach of trust in respect of the complainant Company, a huge amount of money, valued Rs.3,24,413/- till 28.01.2019.

18. **Admittedly, the loan amount was Rs.30,00,000/-(Rupees Thirty Lakhs). The complaint has been filed for nonpayment of the balance amount of Rs.3,24,413/- (Three lakhs twenty four thousand four hundred and thirteen). The outstanding balance amount is admitted by the petitioners. The offences alleged are under Sections 406/420/120B of the Indian Penal Code.**

19. Considering the nature of dispute between the parties based on a loan agreement in due course of business of the complainant, the following judgment of the Supreme Court is relied upon:-

(a) **In M/s. Indian Oil Corporation vs. M/S Nepc India Ltd. & Ors., Appeal (crl.) 834 of 2002 decided on 20.07.2006, the Court considered the following point among the two points decided.**

> ***8.*** *The High Court by common judgment dated 23.3.2001 allowed both the petitions and quashed the two complaints. It accepted the second ground urged by the Respondents herein, but rejected the first ground. The said order of the High Court is under challenge in these appeals. On the rival*

contentions urged, the following points arise for consideration :

(i) Whether existence or availment of civil remedy in respect of disputes arising from breach of contract, bars remedy under criminal law?

(ii) Whether the allegations in the complaint, if accepted on face value, constitute any offence under sections 378, 403, 405, 415 or 425 IPC ?

Re : Point No. (i) :

9. *The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few - Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre [1988 (1) SCC 692], State of Haryana vs. Bhajanlal [1992 Supp (1) SCC 335], Rupan Deol Bajaj vs. Kanwar Pal Singh Gill [1995 (6) SCC 194], Central Bureau of Investigation v. Duncans Agro Industries Ltd., [1996 (5) SCC 591], State of Bihar vs. Rajendra Agrawalla [1996 (8) SCC 164], Rajesh Bajaj v. State NCT of Delhi, [1999 (3) SCC 259], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [2000 (3) SCC 269], Hridaya Ranjan Prasad Verma v. State of Bihar [2000 (4) SCC 168], M. Krishnan vs Vijay Kumar [2001 (8) SCC 645], and Zandu Phamaceutical Works Ltd. v. Mohd. Sharaful Haque [2005 (1) SCC 122]. The principles, relevant to our purpose are :*

(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/ malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) ***A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.***

10. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases*. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/ creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could* *somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement.* ***Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :***

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

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.

Now in the lines of the judgment under reference let us see if the allegations in the complaint in the present case, if accepted on face value, constitute any office under Sections 406/418/420/120B IPC.

20. **Section 406 of the Indian Penal Code, lays down:-**

*"**406. Punishment for criminal breach of trust.—**Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

***Ingredients of offence.—** The essential ingredients of the offence under Sec. 406 are as follows:-*

(1) Mens rea is essential ingredient of offence.
(2) There must be an entrustment, there must be misappropriation or conversion to one's own use, or use in violation of a legal direction or of any legal contract.
(3) The accused was entrusted with the property or domain over it.
(4) He dishonestly misappropriated or converted to his own use such property;
(5) He dishonestly used or disposed of that property or willfully suffered any other person to do so in failure of-
(a)Any direction of law prescribing the mode in which such trust is to be discharged, or
(b)Any legal contract made touching upon the discharge of such trust."

21. **Section 405 of the Indian Penal Code, defines:-**

*"**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 of 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"."*

22. In ***M/s. Indian Oil Corporation vs. M/s Nepc India Ltd. & Ors. (Supra)*** the Supreme Court also held:-

***18.** In **Chelloor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore, Cochin** [AIR 1953 SC 478], this Court held :*

" to constitute an offence of criminal breach of trust, it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit."

[Emphasis supplied]

*In **Jaswantrai Manilal Akhaney v. State of Bombay** [AIR 1956 SC 575], this Court reiterated that the first ingredient to be proved in respect of a criminal breach of trust is 'entrustment'. It, however, clarified :*

".. But when S. 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event."

***19.** The question is whether there is 'entrustment' in an hypothecation? Hypothecation is a mode of creating a security without delivery of title or possession. Both ownership of the movable property and possession thereof, remain with the debtor. The creditor has an equitable charge over the property and is given a right to take possession and sell the hypothecated movables to recover his dues (note : we are not expressing any opinion on the question whether possession can be taken by the creditor, without or with recourse to a court of law). The creditor may also have the right to claim payment from the sale proceeds (if such proceeds are* *identifiable and available). The following definitions of the term 'hypothecation' in P. Ramanatha Aiyar's Advanced Law Lexicon (Third (2005) Edition, Vol.2, Pages 2179 and 2180) are relevant :*

"Hypothecation : It is the act of pledging an asset as security for borrowing, without parting with its possession or ownership. The borrower enters into an agreement with the lender to hand over the possession of the hypothecated asset whenever called upon to do so. The charge of hypothecation is then converted into that of a pledge and the lender enjoys the rights of a pledgee."

'Hypothecation' means a charge in or upon any movable property, existing in future, created by a borrower in favour of a secured creditor, without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on movable property. (Borrowed from section 2(n) of Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002)"

But there is no 'entrustment of the property' or 'entrustment of dominion over the property' by the hypothecatee (creditor) to the hypothecator (debtor) in an hypothecation. When possession has remained with the debtor/owner and when the creditor has neither ownership nor beneficial interest, obviously there cannot be any entrustment by the creditor.

***20.** The question directly arose for consideration in Central Bureau of Investigation v. Duncans Agro Industries Ltd., Calcutta [1996 (5) SCC 591]. It related to a complaint against the accused for offences of criminal breach of trust. It was alleged that a floating charge was created by the accused debtor on the goods by way of security under a deed of hypothecation, in favour of a bank to cover credit facility and that the said goods were disposed of by the debtor. It was contended that the disposal of the goods amounted to criminal breach of trust. Negativing the said contention, this Court after stating the principle as to when a complaint can be quashed at the threshold, held thus :*

".a serious dispute has been raised by the learned counsel as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression 'entrusted with property' or 'with any dominion over property' has been used in a wide sense in Section 405, I.P.C. Such expression includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted' appearing in Section 405, I.P.C. is not necessarily a term of law. It has wide and different implications in different contexts. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The expression 'trust' in Section 405, I.P.C. is a comprehensive expression and has been used to denote various kinds of relationship like the relationship of trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee………"

23. In the present case admittedly the balance amount of loan amounting to Rs.3,24,413/- has not been repaid.

24. The Supreme Court in ***Satishchandra Ratanlal Shah vs. State of Gujarat & Anr., Criminal Appeal No.9 of 2019(arising out of SPL (Crl.) No. 5223 of 2018), on 3 January, 2019,*** held that :-

*"**11.**Coming to the aspect of quashing of the charges, it is well settled that such exercise needs to be undertaken by the High Court in exceptional cases. It is also well settled that the framing of charges being initial stages in the trial process, the court therein cannot be the decision of quashing the charge on the basis of the quality or quantity of evidence rather the enquiry must be limited to a prima facie examination[refer to State of Bihar vs. Ramesh Singh, 1977 CrlLJ 1606].*

***12.**Having observed the background principles applicable herein, we need to consider the individual charges against the appellant. Turning to Section 405* *read with 406 of IPC, we observe that the dispute arises out of a loan transaction between the parties. It fails from the record that the respondent no.2 knew the appellant and the attendant circumstances before the lending the loan. Further, it is an admitted fact that in order to recover the aforesaid amount, the respondent no.2 had instituted a summary civil suit which is still pending adjudication. The law clearly recognizes a difference between simple payment/investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not, ipso facto, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment.*

13. *In this context, we may note that there is nothing either in the complaint or in any material before us, pointing to the fact that any property was entrusted to the appellant at all which he dishonestly converted for his own use so as to satisfy the ingredients of Section 405 punishable under Section 406 of IPC. Hence, learned Magistrate committed a serious error in issuing process against the appellant for the said offence. Unfortunately, the High Court also failed to correct this manifest error.*

14. *Now coming to the charge under Section 415 punishable under Section 420 of IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea.(See Hridaya Ranjan Prasad Verma v. State of Bihar (2000) 4 SCC 168). I the case before us, admittedly, the appellant was trapped in economic crisis and therefore, he had approached the respondent no.2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, the respondent no.2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere 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 this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are take on their face value, no such dishonest representation or inducement could be found or inferred.*

15. *Moreover, this Court in a number of cases has usually cautioned against criminalizing civil disputes,* *such as breach of contractual obligations[refer to Gian Singh v. State of Punjab, (2012) 10 SCC 303]. The legislature intended to criminalize only those breaches which are accompanied by fruadulent, dishonest or deceptive inducements, which resulted in involuntary and in-efficient transfers, under Section 415 of IPC.*

***16.** However, the High Court appears to have been carried away by the moral element involved in the breach of promise and made certain observations. Being a policy consideration, such suggestions need to be restricted. The aforementioned observations of the High Court were not only unnecessary for the adjudication of this matter, but the same could have been understood as casting some kind of aspersions on the accused. This clearly reflected a loaded dice situation against the appellant herein."*

25. **The major part of the loan has admittedly been repaid**. Out of Rs.30 lakhs, an amount of Rs.3,23,413/- has remained unpaid. This prima facie goes to show that there was no fraudulent/dishonest intention on the part of the petitioners. Thus, no criminal intention or breach of trust. As such the ingredients required to constitute an offence under Section 406 of Indian Penal Code is prima facie not present against the petitioners.

26. **Section 420 of the Indian Penal Code, lays down:-**

*"**420. Cheating and dishonestly inducing delivery of property.—**Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

***Ingredients of offence.—** The essential ingredients of the offence under Sec. 420 are as follows:-*

> *(1) There should be fraudulent or dishonest inducement of a person by deceiving him;*
>
> *(2) (a) The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or*
>
> *(b) the person so induced to do anything which he would not do or omit if he were not so deceived, and*
>
> *(c) in cases covered by second part of clause (a), the act or omission should be one which caused or was likely to cause damage or harm to the person induced in body, mind or property.*
>
> *The two essential ingredients of the offence under this section are –*
>
> *(A) Deceit, that is to say dishonest or fraudulent misrepresentation, and*
>
> *(B) Inducing the person deceived to part with property."*

27. **In the present case** there is no case against the petitioners that they **dishonestly induced the complainant to deliver any property**. **There was no such inducement** to deliver any property as required. There was admittedly a business transaction being a loan agreement. As such an essential ingredient required to constitute an offence under Section 420 IPC being prima facie not present, the offence alleged cannot be held to be proved against the petitioners/accused.

(Rekha Jain vs. The State of Karnataka & Anr., 2022 LiveLaw (SC) 468).

28. **There was clearly no (dishonest) inducement by the petitioners in this case. Initially the loan agreement was part of a business transaction. There was no dishonest intention at the beginning nor any intention to deceive.**

29. From the materials on record it is evident that the transaction between the parties is a commercial transaction/contractual dispute/civil dispute (loan agreement). Thus, the ingredients required to constitute offenses under Sections 406/420/120B of the Indian Penal Code are prima facie not present against the petitioners.

30. **The revisional application being CRR 443 of 2020 is thus, allowed.**

31. The proceedings arising out of complaint case No.CS-6781/19 of 2019 dated 2/2/2019 under Sections 420/406/120B of the Indian Penal Code, and all orders therein presently pending before the learned 19th Metropolitan Magistrate, is hereby quashed.

32. No order as to costs.

33. All connected applications stand disposed of.

34. Interim order, if any, stands vacated.

35. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

36. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)