

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 648 of 2020

Sri Dinesh Jain @ Dinesh Kasturchand Jain

Vs.

The State of West Bengal & Anr.

For the Petitioner : Mr. Debabrata Acharyya,
Mr. Sital Samanta.

For the State : Mr. Arijit Ganguly,
Mr. Sanjib Kr. Dan.

Heard on : 03.07.2023

Judgment on : 19.07.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding being Bhawanipore Police Station Case No.232 dated 03.06.2016 (C.G.R No.2974 of 2016) presently pending before the learned Chief Judicial Magistrate, South 24 Parganas at Alipore, alleging commission of offence punishable under Sections 406/420/120B of the Indian Penal Code.

2. The petitioner's case is that there was a commercial transaction between M/s. Diagold Jewels Pvt. Ltd., and M/s. Marvin Gems Pvt. Ltd. Both are registered under the Companies Act, 1956. M/s. Marvin Gems Pvt.

Ltd. is controlled by Mr. Raj Kumar Sobhagmal Jain. The aforesaid commercial transaction was also executed by Mr. Raj Kumar Sobhagmal Jain.

3. That after execution of the aforesaid commercial transaction dispute cropped up with regard to quality of the product.

4. On behalf of M/s. Diagold Jewels Pvt. Ltd. an application under Section 156(3) of the Code of Criminal Procedure was filed before the learned Chief Judicial Magistrate, Alipore, South 24 Parganas.

5. On the basis of the said application under Section 156(3) of Cr.P.C., the learned Magistrate was pleased to direct the Officer-in-Charge, Bhawanipore and Bhawanipore Police Station case No.232 dated 03.06.2016 was initiated.

6. Bhawanipore Police Station case No.232 was registered against four persons including the present petitioner for alleged commission of offence punishable under Sections 420/406/120B of the Indian Penal Code.

7. The allegation made in the aforesaid complaint is inter alia, to the effect that on and about October 5, 2015, the persons named as accuseds in the complaint allegedly came at the office of the complainant showing interest **for purchase** of various types of gold and diamond jewellery. It is also alleged that the persons named as (the accuseds) in the complaint agreed to the price of gold and making charges. It was agreed that the charges would be paid within a period of 60 days from the date of delivery of the said gold and diamond jewellery. There was an agreement to give post dated cheques for the said balance amount to the complainant.

8. The post dated cheques were presented on 28th December, 2015 for encashment but the cheques were returned with an endorsement 'funds insufficient'. **The opposite party no.2/complainant had already parted with the gold and diamond jewellery amounting to Rs.52,46,727/-.**

9. The complainant/opposite party no. 2 company suffered financial loss due to the representation and assurance of the accused persons named in the complaint. The complainant lodged a written complaint on June 25, 2016 with Bhawanipore Police Station. However, no FIR was registered. Therefore an application was filed before the learned Magistrate.

10. In the complaint, the complainant annexed tax invoices in respect of **the articles sold** and duly received by Mr. Raj Kumar Sobhagmal Jain on behalf of M/s. Marvin Gems Pvt. Ltd the accused in the case.

11. After completion of investigation the investigating agency submitted charge sheet alleging commission of offence punishable under Sections 420/406/120B of the Indian Penal Code.

12. The petitioner states that the entire transaction was executed in between two companies M/s. Diagold Jewels Pvt. Ltd. and M/s. Marvin Gems Pvt. Ltd. The petitioner does not have any control over M/s. Marvin Gems Private Limited.

13. The entire articles was handed over to Mr. Raj Kumar Sobhagmal Jain. Therefore, "entrustment" over the property by the complainant company was upon Mr. Raj Kumar Sobhagmal Jain.

14. There was no role of the present petitioner in respect of the alleged transaction. Hence, offences alleged are not made out against the present petitioner.

15. That there was no “initial deception” at the time of execution of the contract or in the process of execution of the transaction. Unless there is any deception at the inception, no offence comes within the definition of 'Cheating' in terms of the Indian Penal Code.

16. Mr. Debabrata Acharyya, learned counsel for the petitioner has submitted that there was no role of the present petitioner in respect of the alleged transaction. Hence, as offences alleged are not made out against the petitioner the proceedings against him are liable to be quashed.

17. Mr. Arijit Ganguly, learned counsel for the State has placed the case diary and submitted that there is sufficient material on record to prove the offences alleged against the petitioner and as such the present case should be permitted to proceed towards trial.

18. In spite of due service there is no representation on behalf of the opposite party no.2.

19. From the petition of complaint annexed, the case of the complainant is:-

a) The accused No.1 is a company having its office B-5/1113, Gujjar Falia, Somnath Mahadev Sheri, Haripura, Mahidharpura, Surat-395003, Gujarat and also at 212, Prasad Chambers, Opera House, Charni Road, Mumbai 400004 and accused nos.2 to 4 are the Directors of accused no.1 and are responsible for the day to day affairs of the Company and accused no.5 is the wife of Mr. Rajkumar Sobhagmal Jain.

*b) That accused nos.2 to 5 came to the office of the complainant at 4, Lee Road Sumangal Apartment, 1st floor, Kolkata-700020 on or about 5th October, 2015 and showed their interest for **purchase of various types of Gold and Diamond Jewellery**. After several deliberations held between the accused nos.2 to 5 and the complainant, the complainant on the request of the accused nos. 2 to 5 agreed to sell and deliver to the*

accused persons various types of Gold and Diamond jewellery at agreed price only on receipt of price of Gold and making charges (balance amount) was payable by the accused persons within a period of 60 days from the date of delivery of the said Gold and Diamond jewellery.

c) All the accused persons agreed to give Post Dated Cheques for the said balance amount to the complainant and they further jointly assured and represented that the said Post Dated Cheques shall be positively honoured on presentation. All the accused persons assured the company that the amount mentioned in the Post Dated Cheques is the unaccounted bonafide liability of the accused persons.

d) Gold and Diamond Jewellery ordered by the accused nos.2 to 4 were sold and delivered by the complainant to the accused persons. The delivery of the said goods was taken by the accused nos.2 to 5. However, tax invoices were received by the accused no.2 on behalf of the accused no.1.

e) The aforesaid fact of dishonor of cheques was brought to the knowledge of the accused persons verbally by the complainant. The accused persons verbally assured the complainant that they shall pay the said amount within a week and since then the complainant has been running from pillar to post to contact the accused persons and they have been avoiding the complainant.

f) That all the representations and assurances were made by the Accused persons with an intention to cheat the complainant and misappropriate the valuable goods of the complainant amounting to Rs.52,46,727/-.

20. Admittedly there is no written business agreement between the parties. From **the letter dated 06.10.2015 at page 23**, it appears that the **transaction in this case was a sale and part payment had been made.** Cheques were issued towards the balance amount which have been dishonored.

21. Mr. Acharyya has submitted that, as this was a commercial transaction and a case of dishonor of cheque, the present criminal

proceeding is liable to be quashed. It is further submitted that the complainant without taking recourse to the provision of Section 138 of N.I Act has filed the criminal case, which is an abuse of the process of law/court.

22. Mr. Acharyya submits that the petitioner is in no way connected with this case and as such the proceeding is liable to be quashed in respect of the petitioner.

23. The Judgment of Supreme Court in ***Vir Prakash Sharma Vs. Anil Kumar Agarwal & Anr. (2007) 3 SCC (Cri) 370*** has been relied upon in support of the petitioner's case, where in, the Supreme Court held "that merely because the accused issued cheques which got dishonored the same by itself would not mean that he cheated.

It is also submitted that the court also held that nonpayment or underpayment of price of goods by itself does not amount to cheating or breach of trust.

Finally, the court held:-

"15. In law, only because he had issued cheques which were dishonoured, the same by itself would not mean that he had cheated the complainant. Assuming that such a statement had been made, the same, in our opinion, does not exhibit that there had been any intention on the part of the appellant herein to commit an offence under Section 417 of the Penal Code."

24. In the present case, the accused company being represented by the other accused persons including the petitioner, took the gold and diamond ornaments from the complainant company by way of sale. Part payment was made. Cheques for balance payment were dishonored. **Contention of the petitioner is that the complainant should proceed under Section 138 of**

N.I. Act and the present criminal case does not lie and is liable to be quashed.

25. The Supreme Court in ***Sangeetaben Mahendrabhai Patel vs State of Gujarat & Anr., in Criminal Appeal No. 645 of 2012, on 23 April, 2012***, held:-

“24. In view of the above, the law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or Section 300 Cr.P.C. or Section 71 IPC or Section 26 of General Clauses Act, ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not identity of the allegations but the identity of the ingredients of the offence. Motive for committing offence cannot be termed as ingredients of offences to determine the issue. The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge.

25. In *Radheshyam Kejriwal v. State of West Bengal & Anr.*, (2011) 3 SCC 581, while dealing with the proceedings under the provisions of Foreign Exchange Regulation Act, 1973, this Court quashed the proceedings (by a majority of 2:1) under Section 56 of the said Act because adjudication under Section 51 stood finalised. The Court held :

“The ratio which can be culled out from these decisions can broadly be stated as follows:

- (i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*
- (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*
- (iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*
- (iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;*

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.” The ratio of the aforesaid judgment is not applicable in this case for the reason that proceedings under Section 138 of N.I. Act are still sub judice as the appeal is pending and the matter has not attained finality.

27. *Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I. Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.*

28. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions.”

26. In the present case, no proceeding under Section 138 of the N.I. Act has been filed.

27. It is now to be seen whether the ingredients required to constitute the offences alleged under Sections 406/420/120B IPC are present in this case against the petitioner.

28. 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 Jiawaji 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 through 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."

29. 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 offence under Sections 406/420/120B of the Indian Penal Code, as alleged.

30. 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."*

31. 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"."

32. 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. Negating 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.....”

33. The Supreme Court in **Satishchandra Ratanlal Shah vs. The 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 CrLJ 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). In 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 taken 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 fraudulent, 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.*

17. *In our considered opinion, the High Court should have maintained judicial restraint and desisted from making such general observations at this stage of the criminal proceeding, as they may have had a bearing on the adjudication of the trial. Therefore, the observations*

made in paragraphs 42 and 43 of the impugned judgment stand expunged.”

34. In the present case there is prima facie materials to show that there was clearly an ‘entrustment’ of the jewellery against payment which failed. Thus there is an element of fraudulent/dishonest intention/dishonest misappropriation on the part of the petitioner and others.

35. Section 420 of the Indian Penal Code, defines:-

“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.”

36. In *Vijay Kumar Ghai vs The State of West Bengal, Criminal Appeal No. 463 of 2022 (arising out of SLP (Crl.) No. 10951 of 2019), on 22 March, 2022*, held:-

“42. Furthermore it has to be prima facie established that due to such alleged act of cheating the complainant (Respondent No. 2 herein) had suffered a wrongful loss and the same had resulted in wrongful gain for the accused(appellant herein). In absence of these elements, no proceeding is permissible in the eyes of law with regard to the commission of the offence punishable u/s 420 IPC.....”

37. In the present case the accused persons had been entrusted with the jewellery towards sale, against payment. Balance payment could not be realised due to dishonor of cheque. In spite of receiving the goods, full payment has not been made. The complainant has done his part of the sale. But balance payment of Rs.52,46,727/- remains unpaid by the accused persons till date. Thus wrongful loss was caused to the complainant and wrongful gain to the accused persons.

38. Thus, there is prima facie case to show that there was dishonest intention at the time of the transaction and also at the time of issuance of the cheques. The ingredients of dishonest inducement by deceiving to deliver property is also prima facie present along with ‘entrustment’.

39. Non-filing of proceedings under Section 138 of N.I Act does not by any means bar the criminal proceeding, as though the facts may overlap but the ingredients of offenses are entirely different (*Sangeetaben Mahendrabhai Patel vs State of Gujarat & Anr. (Supra)*).

40. The revisional application being CRR 648 of 2020 is thus dismissed.

41. No order as to costs.

42. All connected applications, if any, stands disposed of.

43. Interim order, if any, stands vacated.

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

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

(Shampa Dutt (Paul), J.)