

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 802 of 2019

Medica Hospitals Pvt. Ltd.

vs.

The State of West Bengal & Anr.

For the Petitioner : Mr. Ayan Bhattacharya,
Mr. Anand Keshari,
Mr. Atish Ghosh,
Mr. Arindam Chandra.

Heard on : 07.06.2023

Judgment on : 22.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding in Case No.CN 11727 of 2017 under Section 406 of the Indian Penal Code, 1860 pending before the Court of the learned Metropolitan Magistrate, 18th Court at Calcutta including the Order of Cognizance (undated) and Order dated May 6, 2017 passed therein.

2. The petitioner's case is that the petitioner no.1 is a Company within the meaning of the Companies Act, 2013 and duly incorporated under the

provisions of the Companies Act, 1956 having its registered office at the address as mentioned in the cause title hereinabove.

3. On or about February 23, 2017 the opposite party no.2 herein filed a complaint before the Court of the learned Additional Chief Metropolitan Magistrate at Calcutta, alleging commission of offences under Section 406 of the Indian Penal Code, 1860 against the petitioner on the allegations that the “proprietor” of the petitioner approached the opposite party no.2 for expansion of the business of the opposite party no.2. On the assurance of the “proprietor” of the petitioner, the opposite party no.2 agreed to start the business with the petitioner and supplied some medicines on credit on the condition that after selling of those medicines, the petitioner would repay the amount to the opposite party no.2. However, no amount was paid by the petitioner and thereby the petitioner cheated the opposite party no.2 to the tune of Rs.4,13,182/-.

4. The learned Additional Chief Metropolitan Magistrate at Calcutta was pleased to take cognizance.

5. It is stated by the petitioner that the petitioner had a **long standing business relationship** with the opposite party no.2 and during the course of such business, **the petitioner had already effected payment to the opposite party nos. 2 to the tune of Rs.53,758,50.00/- which will be evident from the account ledgers and the business between the parties stood concluded upon payment of Rs.5,25,783/- vide cheque No.162507 dated 23.09.2015.**

6. The petitioner states that the alleged amount which has been shown as due, has been illegally and **wrongfully claimed** and is devoid of any

details and particulars. It has been conspicuously suppressed by the complainant that the purported due relates to the transaction for the period prior to 2015 and the same is a sham claim as, long prior to initiation of the instant complaint, the complainant issued illegal demand notices on 25.11.2015, 11.03.2016 and 12.05.2016 which from time to time has been dealt with appropriately denying the alleged claims as non est inter alia, on the ground that the claim purportedly **raised on account of interest** is beyond the terms of the purchase order as well as the business arrangement followed and practiced by the parties.

7. The claim raised by the complainant suppressing vital facts amounts to fraud practiced in gross abuse of process of law, to circumvent the law of limitation and pressurize the petitioner to succumb to the wrongful and illegal claim of the complainant by way of arm-twisting tactics.

8. The petitioner is in no way involved in the offences as wrongfully alleged, as it would be ex facie evident from the facts of the case that the instant case has been instituted to harass and prejudice the petitioner in abuse of process of law.

9. Vide letter dated November 25, 2015, the opposite party no.2 issued a statutory notice thereby demanding a sum of Rs.3,35,300.91 from the petitioner.

10. In response to such notice, vide email dated December 23, 2015, the petitioner had pointed out that the petitioner had already cleared the due amount to the opposite party no.2 by making payment on various dates lastly on September 23, 2012.

11. The opposite party no.2 had thereafter issued a legal notice dated March 11, 2016 which was replied to by the petitioner vide letter dated April 25, 2016 wherein the petitioner pointed out the frivolity of the claim of the opposite party no.2.

12. Suppressing the aforesaid letter, vide letter dated May 12, 2016 the opposite party no.2 issued a notice under Sections 433/434 of the Companies Act, 1956.

13. **Mr. Ayan Bhattacharya, learned counsel for the petitioner** has submitted that the petitioner is completely innocent and in no way connected with commission of any offence far less the offence alleged herein and he bears clean antecedent having no tint of blemish and the opposite party no.2 herein has initiated the instant proceedings which is palpably frivolous.

14. The undated order of cognizance shows complete non-application of mind. The order of process dated May 6, 2017 whereby the process was issued is also bad in law inter alia, on the ground of non-compliance of Section 202 of the Cr.P.C. and thus the total proceedings is liable to be quashed.

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

16. **From the copies of the ledger account attached to the petition of complaint, it appears that the parties had a business relationship for a period of more than one year. A transaction to the tune of Rs.53,758,50.00/- took place during the said period.**

17. From the evidence adduced under Section 200 of the Cr.P.C, it is evident that the present case for offence alleged under Section 406 of the IPC has been filed for a sum due of Rs.4,13,182/- allegedly due, which is denied. Admittedly the petitioners address is 127, Mukundapur, E.M. Bypass, Kolkata 700 099, District South 24 Parganas and thus outside the jurisdiction of the Trial Court in this case. **So prima facie it appears that the provision under Section 202 Cr.P.C. has not been complied.**

18. Admittedly, the major part has been repaid.

19. An amount of Rs. 53,758,50.00/- had already been paid by the petitioners during the petitioners business transaction with the complainant. The present complaint has been filed for non-payment of balance amount of Rs. 4,13,182/-. It is the case of the petitioners that the total dues between the parties has already been adjusted. There are no outstanding dues. The payment of Rs. 53,758,50.00/- is on record. The offence alleged is under Section 406 of the Indian Penal Code.

20. Considering the nature of dispute between the parties based on a business transaction, the following judgment of the Supreme Court is relied upon:-

(a) **In M/s. Indian Oil Corporation vs. M/S Npec 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 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 offence under Section 406 IPC.

21. 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.”

22. **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”.”

23. In **M/s. Indian Oil Corporation vs. M/s Npec 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....."

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 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.”

25. **In the present case** there is no materials against the petitioners to prima facie show that there was any dishonest misappropriation on their part in respect of any property entrusted to them. *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 (Satishchandra Ratanlal Shah vs. State of Gujarat & Anr., (Supra)).* There was admittedly a business transaction. Thus the essential ingredients required to constitute an offence under Section 406 IPC is prima facie not present.

26. **There was clearly no (dishonest) misappropriation or breach of trust by the petitioner in this case. The transactions were totally part of a business agreement.**

27. From the materials on record it is evident that the transaction between the parties is a commercial transaction/contractual dispute/civil dispute/business transaction. Thus, the ingredients required to constitute

an offence under Section 406 of the Indian Penal Code are prima facie not present against the petitioner.

28. **CRR 802 of 2019 is thus allowed.**

29. The proceedings of Case No.CN 11727 of 2017 under Section 406 of the Indian Penal Code, 1860 pending before the Court of the learned Metropolitan Magistrate, 18th Court at Calcutta including the Order of Cognizance (undated) and Order dated May 6, 2017 passed therein, is hereby quashed.

30. All connected applications stand disposed of.

31. Interim order, if any, stands vacated.

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

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

(Shampa Dutt (Paul), J.)