IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.R 1543 of 2022

Birendra Paswan
Vs.
The State of West Bengal & Anr.

For the Petitioners:	Mr. Sandipan Ganguly, Sr. Adv., Mr. Sabyasachi Banerjee, Adv., Mr. Ayan Bhattacharjee, Adv., Mr. Aniruddha Bhattacharjee, Ms. Ritu Das, Adv., Mr. Nirmalya Chatterjee. Adv.
For the Opposite party No.2:	Mr. Kallol Mondal, Adv., Mr. Krishan Ray, Adv., Mr. Souvik Das, Adv., Mr. Ayan Mondal, Adv., Mr. Samsher Ansari, Adv.
For the State:	Mr. Ranabir Roy Chowdhury, Adv., Mr. Sandip Chakrabarty, Adv.

Heard on: 2 March, 2023.
Judgment on: 15 March, 2023.

BIBEK CHAUDHURI, J. : –

1. Orders dated 28th April and 30th April, 2022 passed by the learned Additional Chief Judicial Magistrate, Barrackpore in GR Case NO.3375 of 2022 arising out of Dakshineswar Police Station Case No.3 of 2022 dated 19th April, 2022 under Sections 467/468/470/471/420/406/ 506/34/409 (subsequently added) of the Indian Penal Code at the

instance of the accused (hereinbelow described as the petitioner) in the instant case.

2. Brief facts of the case leading the petitioner to move the instant revision is as follows:-

3. The petitioner carries on business of scrap iron materials under the name and style of M/s Maa Lakshmi Industries. One Md. Khalid Quareshi is a proprietor of M/s Super India Enterprises. On 14th January, 2022 an agreement was executed by and between the parties to the effect that M/s Maa Lakshmi Industries would take part in a tender process conducted by NISCO Authority and if M/s Maa Lakshmi Industries is successful in the tender process it would sell the scrap products to M/s Super India Enterprises. As per the aforesaid agreement the petitioner received four numbers of demand draft of various amounts from M/s Super India Enterprises total being Rs.4 crores. It was also agreed that the process of sale would complete within a period of ten months from the date of starting the dismantling of items as per the delivery order of the NISCO. Subsequently, M/s Super India Enterprises expressed its unwillingness to continue with the said agreement and requested the petitioner to refund the said sum of Rs.1 crore in favour of Super India. The petitioner as per the agreement and subsequent mutual conversation refunded a sum of Rs.75 lakhs to M/s Super India on 25th January, 2022. Subsequently, the said Md. Khalid Quareshi, proprietor of M/s Super India and one Salim Quareshi illegally demanded further sum of Rs.50 lakhs and also threatened the petitioner and tried to extort the said amount. Against

such wrongful act on the part of the above named two persons petitioner filed an application under Section 156(3) of the Cr.P.C before the learned Additional Chief Judicial Magistrate at Barrackpore and on the basis of the said application a criminal case under Section 384/379/307 of the IPC was registered against the Quareshis. Subsequent to the institution of the aforesaid case, the opposite party No.2 as representative of M/s Super India lodged a complaint against the petitioner on 19th April, 2022 at Dakshineswar Police Station on the basis of which an FIR Case No.3 of 2022 corresponding to GR Case No.3375 of 2022 under Sections 467/468/470/471/420/406/506/34 of the IPC was registered against the petitioner. That on 26th April, 2022 the petitioners surrendered before the learned Jurisdictional Magistrate and prayed for bail by an order dated 26th April, 2022 the learned Additional Chief Judicial Magistrate Barrackpore enlarged the petitioner on interim bail.

4. It is alleged by the petitioner that on 28th April, 2022 the Investigating Officer filed an application for adding charge under Section 409 of the IPC. The opposite party No.2 on the other hand filed an application for cancellation of bail of the petitioner. The petitioner was not served with the copies of the said applications and behind his back, the learned Magistrate added charge under Section 409 of the IPC against the petitioner.

5. By an order dated 28th April, 2022 the learned Magistrate added the charge under Section 409 of the IPC. He further held that Section 409 IPC attracts graver offence in terms of the guideline of the Hon’ble Supreme

Court and then the petitioner was directed to surrender before the learned Magistrate for fresh bail on 30th April, 2022.

6. On 30th April, 2022 the petitioner did not surrender. The surety filed an application expressing his inability to produce the petitioner. The learned Magistrate after hearing the learned Public Prosecutor and the learned Advocate for the accused/petitioner cancelled the interim bail granted to the petitioner on 26th April, 2022 and issued warrant of arrest against him.

7. Above mentioned orders dated 28th April, 2022 and 30th April, 2022 are under challenge in the instant revision.

8. The opposite party No.2 filed an affidavit-in-opposition against the above mentioned revision controverting all material allegation made by the petitioner in the said revision. It is specifically submitted by the opposite party No.2 that petitioner had shown a purported correspondence dated 28th December, 2021 issued by the West Bengal Industrial Infrastructure Development Corporation (WBIIDC) which contained that M/s Maa Lakshmi Industries was supposedly successful H1 bidder in connection with a tender for sale of LOT 1 – plant and machineries, inventories, building and miscellaneous items on as his where is basis at NISCO land at Belur. The opposite party No.2 had no reason to believe such correspondence and M/s Super India executed an agreement on 19th January, 2022 with the petitioner. As the petitioner agreed to sell the plants and machineries of NISCO, the opposite party No.2 paid a sum of Rs.1 crore by four demand drafts in favour of the

petitioner. Subsequently, the opposite party No.2 had gathered that the said correspondence alleged to have been made by WBIIDC as shown by the petitioner was in fake document. Thus, it is clearly evident that the petitioner herein had a concrete *mens rea* to cheat the opposite party No.2 and his business associates right from the inception of business talk between them by producing a fake document and inducing the M/s Super India to part with a sum of Rs.1 crore. Therefore, the opposite party No.2 demanded return of the said amount but the petitioner paid a sum of Rs.75 lakhs and misappropriated a sum of Rs.25 lakhs. The petitioner has filed an affidavit-in-reply wherein he reiterated his case made out in the application for revision. It is specifically pleaded by the petitioner that the tender of sale of plant and machinery of NISCO, Belur was not floated by WBIIDC but it was floated by MSTC and WBIIDC had nothing to do with the tender which is the subject matter of the present proceeding. The said fact is specifically recorded in the agreement dated 14th January, 2022. It is contended by the petitioner that the opposite party No.2 has manufactured some documents in order to claim falsely that the tender was floated by WBIIDC. The petitioner also denied the allegation made by the opposite party No.2 that the money receipt was a forged document.

9. Mr. Sandipan Ganguly, ,learned Counsel on behalf of the petitioner at the outset submits that he has not prayed for quashing of the criminal proceeding instituted against the petitioner. The scope of the instant revision is very short only to decide as to whether the learned Magistrate

was justified permitting the prosecution to add Section 409 IPC against the petitioner and secondly if Section 409 IPC is a graver offence.

10. Mr. Ganguly, has elaborated his submission taking me first to Section 405 of the IPC which defines ‘criminal breach of trust’. Section 405 of the IPC runs thus:-

> “**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”.

11. Section 409 of the IPC prescribes punishment for criminal breach of trust committed by a particular class of persons, viz, a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent. The learned Magistrate added Section 409 of the IPC considering that the petitioner is a “merchant”. However, relying The Law Lexicon written by Sumeet Malik at page 712, Mr. Ganguly submits that legal meaning of “merchant is one who traffics to remote countries”. It is submitted by Mr. Ganguly the petitioner deals with scrap ferrous and nonferrous iron materials. He is not a merchant within the meaning of Section 409 of the IPC.

12. Mr. Ganguly next relies on the case of **R.K Dalmia vs. Delhi Administration** reported in **AIR 1962 SC 1821** and taking me to paragraph 96 of the aforesaid report submits that in order to put a person

under the charge of Section 409 IPC, it is necessary that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or that dominion over that property in the way of his business as an agent. The expression “in the way of his business” means that the property is entrusted to him in the ordinary course of his duty or habitual occupation or provision or trade. He should get the entrustment or dominion in his capacity as agent or merchant. In other words, the requirements of this Section would be satisfied if the person is entrusted by another with property or with any dominion over the property in course of his duties as merchant. If he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of Section 409 of the IPC, if any breach of trust is committed by that person. Investigation of this case so far does not produce any prima facie evidence that the petitioner was entrusted with the property, viz, plants and machineries of NISCO in the way of his business. Therefore, the learned Magistrate committed gross illegality in adding Section 409 IPC in connection with the aforesaid case.

13. On the issue as to whether the learned Magistrate could cancel the interim bail granted in favour of the petitioner for his nonappearance, it is submitted by Mr. Ganguly that Section 437(5) impliedly confers power on the Magistrate to pass an order altering or amending or deleting the condition of bail earlier granted by him in any manner whatsoever. He does not have any power to recall or cancel order of bail and the issue of

warrant of arrest against him. Relying on **Abdul Basid @ Raju & Ors. vs. Mohd. Abdul Kadir Chaudhary & Anr.** reported in **(2014) 10 SCC 754,** it is submitted by Mr. Ganguly that in the aforesaid case before the Hon'ble Supreme Court, the respondent filed a petition before the High Court seeking cancellation of bail on the ground that the bail was obtained by the petitioner by gross misrepresentation, misleading the secret and indulging in fraud. Thus, the petition challenged the illegality of the ground of bail and required the bail order to be set aside on the ground of it being perverse in law. Such determination would entail eventually cancel of bail. The circumstances did not reflect any situation where the bail was misused by the petitioner/accused. The Hon'ble Supreme Court was of the view that the High Court could not have entertained the said petition and cancel the bail on the grounds of it being perverse in law. In paragraph 21 of the judgment, the Hon'ble Supreme Court observe in the following words:-

> "21. It is an accepted principle of law that when a matter has been finally disposed of by a Court, the Court is, in the absence of a direct statutory provision, functus officio and cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has been set aside or modified to that extent. It is also settled law that the judgment and order granting bail cannot be reviewed by the Court passing such judgment and order in absence of any express provision in the Code for the same. Section 362 of the Code operates as bar to any alteration or review of the cases disposed of by the Court. The singular exception to the said statutory bar is correction of clerical or arithmetical error by the Court."

14. Thus, it is submitted by Mr. Ganguly that the learned Magistrate also cannot review its own order granting interim bail in favour of petitioner on 26th April, 2022 and subsequently cancelling the order on 30th April, 2022.

15. Mr. Ganguly further submits that the learned Magistrate absolutely misconstrued the ratio of **Pradeep Ram vs. State of Jharkhand & Anr.** reported in **(2019) 17 SCC 326**.

16. Next limb of argument advance by Mr. Ganguly is that the learned Magistrate completely misdirected himself while holding that offence under Section 409 of the IPC is graver offence than offence under Section 406 of the IPC and therefore following Pradeep Ram (supra) decision interim bail of the petitioner was liable to be canceled. It is submitted by Mr. Ganguly that Section 409 of the IPC prescribes punishment with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and also fine. Section 467 of the IPC prescribes similar punishment for the offence of forgery of valuable security, will etc. In the instant case, Dakshineswar Police Station Case No.3 of 2022 was registered against the petitioner under Section 467 of the IPC along with other penal provisions. The learned Magistrate while releasing the accused on interim bail considered that the accused was charged with an offence under Section 467 of the IPC which prescribes punishment for imprisonment of life or imprisonment for a period which may extend to ten years and also with fine. Thus, introduction of Section 409 of the IPC did not constitute allegation of graver offence which was

the basic reason of cancellation of bail by the learned Magistrate. Thus, the order dated 30th April, 2022 is also erroneous and liable to be set aside.

17. Mr. Kallol Mondal, learned Advocate for the opposite party No.2, on the other hand, submits that the petitioner committed an offence of cheating since very inception of agreement executed between the parties. An impression was given to the opposite party No.2 that the auction of sale of plant and machinery of NISCO, Belur was conducted by the WBIIDC, but it was subsequently ascertained that no auction was held by WBIIDC and the petitioner dishonestly induced the opposite party No.2 to make an agreement with him for the purpose of cheating. On the basis of such agreement he also induced the opposite party No.2 to make payment of Rs.1 crore as earnest money. Therefore, the petitioner misappropriated the said money on the basis of a forged document manufactured by him.

18. In support of his contention Mr. Mondal refers to a decision of the Patna High Court in **Bihari Lal Kejriwal vs. Jogendra Prasad, 1981 SCC OnLine Pat 28**. In the said report it is observed by the Patna High Court that Section 409 provides punishment for criminal breach of trust by a merchant or agent. The accused was certainly a merchant or agent of the complainant. In view of the matter, Section 409 of the IPC also would be attracted to the facts of the case. Mr. Mondal also refers to the factual aspect of the above mentioned report where the complainant deals with cloth. The accused received cloth worth Rs.7,080.57/- on the understanding that he would make payment of the sale proceeds within

few months and if he fails to sell the cloth the sum would be returned to the complainant. Neither the cloth nor the money was returned.

19. The Patna High Court held that under such facts and circumstances Section 409 of the IPC would be attracted. On similar circumstances, Mr. Mondal refers to **Dharani Sugar Mills Unit-II vs. T.V Malia District Farmar Progressive Sangam** reported in **(2014) 3 MWN (Cr.) 501** delivered by the Madra High Court and a Delhi High Court decision in the case of **Prakash Gupta vs. State of Delhi** reported in **2017 SCC OnLine Del 9265**.

20. Thus, it is contended by Mr. Mondal that charge under Section 409 IPC was correctly added on the prayer of the Investigating Officer and there is no reason to interfere with the order passed by the court of the learned Magistrate.

21. Mr. Mondal also takes me to the definition of merchant in Black's Law Dictionary, 5th Edition. Where word merchant is defined as "One who is engaged in the purchase and sale of goods; a trafficker; a retailer, a trader. Term commonly refers to person who purchases goods at wholesale for resale at retail; i.e. person who operates a retail business (retailer).

> "A person who deals in goods of the kind of otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an

agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

"A man who traffics or carries on trade with foreign countries, or who exports and imports goods and sells them by wholesale. Merchants of this description are commonly known by the name of "shipping merchants."

22. Therefore, the petitioner is undoubtedly a merchant who purchased and sells scrape iron materials. In view of such circumstances Section 409 IPC is squarely applicable against the petitioner.

23. The learned Public Prosecutor in-charge submits that there is ample material in the case diary to come to a prima facie finding that the petitioner committed an act of cheating and dishonestly induced the opposite party No.2 to part with a sum of Rs.1 crore. Subsequently, when the opposite party No.2 wanted to rescind the contract and demanded his money, the petitioner paid Rs.75 lakhs and Rs.25 lakhs was misappropriated by him.

24. The learned P.P-in-Charge at the outset took me to the written complaint submitted by the opposite party No.2 it is specifically stated by the defacto complainant that the petitioner repeated that he has purchased an unit named NISCO, Belur from WBIIDC in support of his contention the petitioner also showed an auction contract award having reference NIT No.SBI/27811(2)/2021-2022 dated 28th December, 2021 in the name of M/s Maa Lakshmi Industries. The Investigating Officer verified the allegation with WBIIDC and came to know that such auction

was conducted by WBIIDC. Thus, it is prima facie found that letter No.NIT No.SBI/27811(2)/2021-2022 dated 28th December, 2021 is a forged document. At this stage of investigation this Court is fully satisfied with the help of a forged document purported to be a valuable security, the petitioner committed cheating and induced the opposite party No.2 to pay Rs.1 crore. Subsequently, he misappropriated a sum of Rs.25 lakhs. Therefore, prima facie case of criminal breach of trust has been made out by the prosecution. Now comes the question as to whether the learned Magistrate has acted within his jurisdiction by adding Section 409 IPC against the petitioner. It is contended by the learned Counsel for the petitioner that the petitioner is not a merchant on the basis of the definition of merchant in The Law of Lexicon edited by Sumeet Malik. On the other hand, the learned Advocate for the opposite party No.2 contains relying on Black's Law Dictionary that the petitioner is merchant. The word "merchant" in Section 409 IPC has not been used in any technical sense and the ordinary meaning in common parlance is to be assigned to that impression. Whatever may have been the origin in distant past, the ordinary meaning of merchant as contained in various dictionaries would be attributed and it can safely be held that a merchant is one who buys and sells commodities and carries a trade for profit, including retail business etc. though it may not include a manufacturer.

25. The petitioner carries on business of purchasing and selling scrape iron materials. Thus, he is held to be a "merchant" within the meaning of

Section 409 IPC and the learned Magistrate has not committed any error in adding Section 409 IPC against the accused.

26. Now, comes the question as to whether the learned Magistrate was justified in cancelling the order of interim bail granted in favour of the petitioner and issuing warrant of arrest against the accused/petitioner. This court is in conformity with the observation made by the learned Magistrate that Section 409 IPC is graver offence in comparison to Section 406, if gravity of offence is considered in terms of the severity of punishment. At the same time, this Court agrees with the submission made by the learned Counsel on behalf of the petitioner that the petitioner was facing investigation under the charge of Section 467 of the IPC from the very beginning which also prescribes imprisonment for life or imprisonment which may extend to ten years and also fine. Therefore, on the date of granting interim bail the petitioner was facing investigation of a criminal case which is punishable with the similar punishment as that of Section 409 IPC.

27. When the learned Magistrate considered that in spite of being charged under Section 467 IPC along with other penal provision the accused is entitled to interim bail. Subsequently, his prayer for bail ought not to have been cancelled issuing warrant of arrest against him vide order dated 30th April, 2022.

28. In view of the above discussion, I hold that there is no ground for interference with the order dated 28th April, 2022. However, the order

dated 30th April, 2022 is liable to be set aside. Accordingly the order dated 30th April, 2022 is set aside.

29. In terms of the order dated 28th April, 2022, the petitioner is directed to appear before the learned Magistrate within 7 days from the date of this order. It shall be open for the learned Magistrate to consider the application for bail, if filed by the accused, in accordance with law without being influenced on this order.

30. The instant revision is accordingly disposed of on contest with the above order.

31. The case diary be returned to the learned Public Prosecutor.

(Bibek Chaudhuri, J.)