IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.R 1873 of 2022
With
CRAN 1 of 2022
With
CRAN 2 of 2022

Bhoruka Classic Finance Private Limited & Ors.
Vs.
The State of West Bengal & Anr.

For the Petitioners:	Mr. Ayan Bhattacharya, Adv., Ms. Ritu Das, Adv., Mr. Sangikirto Roy Chowdhuri, Adv., Ms. Sharmistha China, Adv.
For the Respondent No.2:	Mr. Shreyas Jain, Adv., Mr. Moimuddin Mondal, Adv.
For the State:	Mr. Madhusudan Sur, A.P.P., Mr. Dipankar Paramanick, Adv.

Heard on: 14 March, 2023.
Judgment on: 23 March, 2023.

BIBEK CHAUDHURI, J. : –

1. The instant revision has been preferred challenging the proceeding being Bowbazar Police Station Case No.372 dated 13th November, 2020 under Sections 406/409/415/417/420/422/463/468/471/120B/34 of the IPC. The petitioners/accused persons have prayed for quashing of the above mentioned proceeding corresponding to G.R Case No.1051 of 2020 pending before the learned Additional Chief Metropolitan Magistrate-II at Calcutta.

2. Brief fact leading to the filing of the instant revision is as follows:-

3. The opposite party No.2 as complainant filed an application under Section 156(3) of the Code of Criminal Procedure before the learned Additional Chief Metropolitan Magistrate-II, Calcutta (hereinafter stated as the learned Magistrate) alleging, inter alia, that the complainant is a non-banking financial institution. The accused No.1 borrowed a sum of Rs.2.5 crores only as loan. The accused No.2 being one of the Directors of the accused No.1 company stood as guarantor of the said loan. The said loan was taken to originate further loan on condition that an exclusive charge of 110% of the loan outstanding will be maintained on the asset of accused No.1. However, when the accused defaulted in payment of loan, complainant made an inquiry and found out the fraud done by the accused persons as they did not use the said fund for the purpose for which it was taken. The loan amount was disbursed on 27th August, 2017 and the accused No.2 had siphoned the money from accused No.1 to his personal account and closed repayment of his property loan on 31st October, 2017. The accused persons have created charge again and again on the same asset of accused No.1 which was charged to the complainant without prior permission of the complainant company. The charge was also not created as per the terms of the agreement. Accused No.2 along with accused No.3-5 represents themselves to be the directors of accused No.1 company. In the month of June, 2017, petitioner No.1 obtained loan for the aforesaid financial assistance amounting to Rs.2.5 crores. In order to obtain loan the accused No.2 created certain forged documents and

used the same as genuine. As the accused persons failed to use the loan amount for the purpose for which it was taken, they committed breach of the loan agreement and criminal breach of trust and misappropriation of the funds. The accused persons did not create a charge amounting to 110% of the loan amount as decided in the agreement. They also failed to make repayment of the loan amount as per the agreement. As they failed to secure the loan of the complainant company as per the terms and conditions of the loan agreement, the intention of the accused persons to cheat the complainant company was apparent from the inception of the transaction. They committed offence of criminal breach of trust, cheating with forged document and caused wrongful loss to the complainant for the amount of Rs.85,43,044/- as per the ledger maintained by the complainant company as on 31st August, 2020 and thereby committed offence punishable under Section 406/409/415/417/420/422/424/463/468/471/120B/34 of the IPC.

4. The learned Magistrate transmitted the said complaint to the Officer-in-Charge of Bowbazar Police Station with a direction to treat the same as FIR and register a specific case against the accused persons. Accordingly, Bowbazar Police Station Case No.372 dated 13th November, 2020 was registered. On completion of investigation police submitted charge-sheet against the accused persons under the aforesaid penal provisions.

5. The petitioners have approached this Court with a prayer to quash the said criminal proceeding instituted against them.

6. It is submitted by Mr. Ayan Bhattachaya, learned Advocate for the petitioners that petition of complaint essentially contains two allegations against the accused persons. First, the accused persons failed to use the loan amount for the purpose for which it was taken. Secondly, it was contended by the complainant that they failed to secure the loan amount by creating charge of 110% of loan amount. Thirdly, it was alleged that the accused No.2 forged certain documents in order to obtain loan from the defacto complainant/opposite party No.2 herein.

7. Mr. Bhattacharya next submits that out of the entire loan amount of Rs.2.5 crores, at present there is outstanding of Rs.85,43,044/- which means that the accused persons had already paid Rs.1 crore and 15 lakhs approximately towards the principal amount. It is submitted by Mr. Bhattacharya that even considering the allegations and averments made in the FIR and the case on behalf of the defacto complainant, it cannot be said that the ingredients of Section 406 and 420 are at all satisfied. The dispute between the parties at the most can be said to be in the nature of civil dispute and it is tried to be converted into a criminal dispute. Therefore, continuing with the criminal proceedings against the accused will be an abuse of process of law and the criminal proceedings ought to be quashed. Merely because the accused might not have paid the amount due and by itself cannot be said to be a cheating and/or having committed offence under Sections 406 and 420 IPC as alleged. In support of his contention Mr. Bhattacharya refers to a decision of the Hon'ble

Supreme Court in **Vinod Natesan vs. State of Kerala & Ors.** reported in **(2019) 2 SCC 401**.

8. Relying on **Satishchandra Ratanlal Shah vs. State of Gujarat & Anr.** reported in **(2019) 9 SCC 148**, it is submitted by Mr. Bhattacharya that the dispute between the parties arises out of a loan transaction. It falls from the record that an agreement was executed by and between the parties before lending the loan. The law clearly recognises a difference between simple payment/investment of money and entrustment of money or property. A mere breach of promise, agreement or contract does not, ipso facto, constitute offence of criminal breach of trust contained in Section 405 IPC without there being clear case of entrustment. In a loan transaction there is no entrustment of property between the lender and the borrower. In case of a loan transaction the borrower promises to repay the loan amount within certain period of time with interest. Violation of payment of loan amount by the borrower creates a civil obligation and for non-payment of loan amount a case under Section 406 of the IPC does not lie.

9. It is also urged by the learned Advocate for the petitioners that the complainant made a complaint to the effect that the loan amount was disbursed by the opposite party No.2 for the purpose of augmentation of loan from other financial institutions. But the accused persons did not use the said loan amount for the purpose of which it was taken. If such statement made by the complainant in the complaint is accepted, even then the ingredients of offence under Section 405 that he dishonestly

converted the amount for his own use are not prima facie established. There may be breach of contract but such breach of contract cannot be equated with cheating because in case of cheating the Investigating Agency must prove that there is fraudulent inducement and mens rea which are the crux of the offence. Even if all the facts in the complaint and materials are taken on their face value, no such dishonest representation or inducement could be found or inferred.

10. The learned Advocate for the opposite party No.2, on the other hand, has placed the Master Circular on Willful Defaulters dated 1st July, 2005 issued by Reserve Bank of India. The learned Advocate has referred to Clause 4.2 (1) & (ii) of the said circular. The said clause runs thus:-

> "**4.2** Accordingly, banks/FIs are advised, as under:
>
> **(i) Monitoring End-Use of Funds**
>
> In reference to Para 2.4 of this circular, it is advised that banks/FIs should closely monitor the end-use of funds and obtain certificates from borrowers certifying that the funds are utilised for the purpose for which they were obtained. In case of wrong certification by the borrowers, banks/FIs may consider appropriate legal proceedings, including criminal action wherever necessary, against the borrowers.
>
> **(ii) Criminal Action by Banks/FIs**
>
> It is essential to recognise that there is scope even under the existing legislations to initiate criminal action against willful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Indian Penal Code (IPC), 1860. Banks/FIs are, therefore, advised to seriously and promptly consider initiating criminal action against willful defaulters or wrong certification by

> borrowers, wherever considered necessary, based on the facts and circumstances of each case under the above provisions of the IPC to comply with our instructions and the recommendations of JPC.
>
> It should also be ensured that the penal provisions are used effectively and determinedly but after careful consideration and due caution. Towards this end, banks/FIs are advised to put in place a transparent mechanism, with the approval of their Board, for initiating criminal proceedings based on the facts of individual case."

11. Referring to the above mentioned circular, it is urged by the learned Advocate for the opposite party No.2 that the investigation is still at the nascent stage and any kind of interference over the investigation will prejudice the complainant and the cause of justice would be defeated. It is submitted on behalf of the opposite party No.2 further that a sum of Rs.2.5 crores were disbursed in favour of the petitioner No.1 on 22nd August, 2017 for a period of 36 months. It was agreed by and between the parties that the said amount had to be repaid under equally monthly installments of Rs.8,66,633/-. The petitioner No.2 Vikas Agarwal also given his personal guarantee to the loan sanctioned along with hypothecation deed. The petitioners stop paying EMI since October, 2019. Despite several reminders for repayments, they have not repaid the amount, even the security deposit cheque got bounced. Thereafter loan recall notice was sent to the petitioners recalling the entire loan and balance amount to be credited by the petitioners as on 11th October, 2019

is Rs.1,15,58,951/-. It is also contended on behalf of the opposite party No.2 that the petitioners obtained business loan to further originate loans as per the loan agreement. They were bound to inform the opposite party No.2 about the utilization of the facility proceeds post disbursement. But the petitioners had neither shared any statement nor utilized money in business expansion. During a preliminary investigation made on the ROC website, it came into notice that the petitioners instead of creating the charge of 110% of the total amount, only created the charge equivalent to the finance amount with the ROC against book debts and trade receivable.

12. The learned Advocate for the opposite party No.2 states that Section 415 defines "cheating". The Section consist of two distinct parts, each part dealing with one way of cheating:-

(i) The first part contemplates whereby deception practiced upon a person, the accused dishonestly or fraudulently induces that person to deliver property to any person, or to consent that any person shall retain any property.

(ii) Second part, on the other hand, envisages whereby deception practiced upon a person the accused intentionally induced that person to do or not to do anything which he would not do or omit to do, if he were not so deceived, and which act or omission accused or is likely to cause damage or harm to that person in body, mind, reputation or property. In order to elaborate his submission, he takes me to illustration (f) of Section 415 which runs thus:-

> "(f) A Intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

13. In the instant case the petitioners intentionally deceived the opposite party No.2 to lend an amount of Rs.2.5 crores on certain conditions. On reasonable belief that the accused persons would repay the amount, the opposite party No.2 paid the said sum of Rs.2.5 crores as loan to the accused persons. The accused persons have no intention to repay the said amount. In order to deceive the opposite party No.2, it is urged by the learned Advocate, the accused persons forged certain documents and used the said documents as genuine. In order to obtain such loan, the loan amount was not used for the purpose for which it was taken. The accused persons violated the terms of the agreement. Therefore, the learned Magistrate did not commit any error in taking cognizance of offence against the accused persons.

14. Mr. Madhusudan Sur, learned P.P-in-Charge submits that the investigation of the case should not be quashed at this early stage. During investigation the Investigating Officer seized several documents wherefrom it is ascertained that accused No.1 Bhoruka Classic Finance Private Limited is a shell company. The Investigating Officer also seized series of

documents to establish that the accused Nos.2-6 prepared documents with dishonest intention to cheat the opposite party No.2. Therefore, investigation of this case should not be nipped in the bud.

15. Having heard the learned Counsels for the parties and on careful perusal of the written complaint and other materials on record submitted by both the parties I like to record at the outset that receipt of loan amounting to Rs.2.5 crores from the opposite party No.2 by the accused persons is not disputed. It is also not disputed that the petitioners altogether paid a sum of Rs.1.15 crore on repayment of loan and according to the petitioners a sum of Rs.85 lakhs is due to be paid to the opposite party No.2. According to the opposite party No.2 the petitioners are under obligation to pay more than Rs.1.15 crore towards principal and interest.

16. This is no longer *res integra* that non-payment or under payment of the price of goods by itself does not amount to commission of an offence of cheating or criminal breach of trust. In **Anil Mahajan vs. Bhur Industries Ltd & Ors** reported in **(2004) 10 SCC 228**, it was observed by the Hon'ble Supreme Court that failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest

intention is shown at the beginning of the transaction. The substance of complaint is to be seen. Mere use of expression "cheating" in the complaint is of no consequence. Thus, it is consistently held that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement. It may be judged by his subsequent conduct but for this, subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence to hold a person guilty of cheating, it is necessary to show that he had fraudulent and dishonest intention at the time of making promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning that is when he made the promise, cannot be presumed. The above observation is made by the Apex Court in **Hridaya Ranjan Prasad Verma & Ors. vs. State of Bihar and Anr.** reported in **(2000) 4 SCC 168** and subsequently followed in all the cases where the issue as to whether purported act of the parties amounts to breach of contract or an offence of cheating.

17. Coming to the instant case it is found that as per the order dated 2nd November, 2020 passed by the learned Additional Chief Metropolitan Magistrate-II, Calcutta the Investigating Officer of the case submitted a report before the trial court. In his report he clearly stated that:-

> "During inquiry it could also be learnt that the accused No.2 Vikash Agarwal, his mother Smt. Pushpa Agarwal and his wife Poonam Agarwal were the owners of Ved Prakash & Sons HUF and Vikash Agarwal & Sons HUF as well as the Directors of Bhoruka Classic Financial Pvt. Ltd which works behind the curtain."

18. Thus, it is prima facie found from the course of investigation that the petitioners declared themselves as Directors of Bhoruka Classic Finance Pvt. Ltd which is incorporated as a shell company of Ved Prakash & Sons HUF and Vikash Agarwal & Sons HUF.

19. The petitioners No.2-6 never disclosed existence of HUF and accused No.1 company as its sister concern. All documents for procurement of loan were produced in the name of accused No.1 company. The petitioner/accused No.2 acted as the principal director of the company and stood as a guarantor.

20. Thus, there is evidence collected during investigation that from the very inception of commercial transaction between the parties the petitioners induced the opposite party No.2 to part with the loan amount in favour of them. Therefore, the petitioners are liable to be prosecuted under Section 415/417/420 of the IPC.

21. Criminal breach of trust is defined in Section 405 of the IPC. The opposite party No.2 disbursed the loan amount for particular purpose stated in the agreement. Therefore, the loan amount was entrusted to the accused persons for a particular purpose but the accused persons used

the said loan amount in violation of the agreement and thereby failed to discharge the trust of the opposite party No.2. It is needless to say that the petitioners are merchants. Therefore, prima facie ingredients of offence under Section 406/409 of the IPC exists.

22. I have already recorded that the Investigating Officer collected documents which proves the complicity of the accused persons with regard to commission of offence under Section 468/471 of the IPC. The offence was committed in furtherance of criminal conspiracy and common intention. In view of the above discussion, I find that this is not a fit case where the criminal proceeding against the accused persons should be quashed at this stage.

23. In view of the above discussion, the instant revision is dismissed on contest.

(Bibek Chaudhuri, J.)