

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 1892 of 2013

**Vidur Kapoor
Vs
State of West Bengal & Anr.**

For the Petitioner : Mr. Sourav Chatterjee
Mr. Pinak Kumar Mitra
Mr. Varun Kedia

For the O.P. No. 2 : Ms. Anyasha Das

For the State : Mr. Abhra Mukherjee
Mr. Dipankar Mahata

Heard on : 17.02.2023

Judgment on : 03.07.2023

Ananya Bandyopadhyay, J.:-

1. The instant criminal revisional application is filed to quash the proceedings being G.R. No. 1005 of 2009, arising out of Titagarh Police Case No. 122 dated 24.03.2009, under Sections 420/380/120B of the Indian Penal Code pending before the Learned Additional Chief Judicial Magistrate at Barrackpore.
2. The Petitioner is the Chairman of Erudite Educational Centre Private Limited, a Company incorporated under Companies Act 1956, having its registered office at 3B, Camac Street, P.S. Shakespeare Sarani, Kolkata – 700016 (hereinafter referred to as the 'Company'); which is engaged,

amongst other activities, in the business of providing training to students to compete MBA entrance examinations (like CAT, XAT, FMS, MAT, etc), communicative English and admission in foreign universities.

3. The Opposite Party No. 2 was appointed as a Franchisee of the Company on terms and conditions contained in the Franchisee Agreement dated December 20, 2006.
4. On or about March 2009, the Opposite Party No. 2 purportedly filed an application under Section 156(3) of Cr.P.C. against the petitioner in the Court of Learned Additional Chief Judicial Magistrate at Barrackpore.
5. The petitioner became aware of such proceedings being informed by the police officers of Shakespeare Sarani Police Station on March 22, 2012 that a warrant had been issued against the petitioner in Titagarh P.S. Case No. 122 of 2009. The petitioner on March 25, 2013 surrendered before the Learned Additional Chief Judicial Magistrate at Barrackpore and obtained bail. Charge Sheet was submitted against the petitioner on June 22, 2010.
6. In order to expand the operations of the company, the petitioner decided to appoint Franchisees to set up training centres at various places under the name and style of 'ERUDITE'. In October 2006, the Opposite Party No. 2 approached the petitioner and expressed his desire to obtain a franchisee of the company and to operate a training centre in Barrackpore area under the name and style of 'ERUDITE'.
7. Consequently the Opposite Party No. 2 and the petitioner through his company entered into a Franchisee agreement with the Opposite Party No. 2 dated December 20, 2006 whereby the Opposite Party No. 2 was

appointed as a Franchisee of the Company on terms and conditions contained therein.

8. The Learned Advocate for the petitioner submitted that the terms of the Franchisee Agreement depicted the Opposite Party No. 2 to advertise and promote the franchisee run by the Opposite Party No. 2 in order to meet the enrolment and revenue targets mutually agreed by the parties. During the three year terms of the agreement, the Opposite Party No. 2 was entitled to receive 70% of the fees collected from the students for the first two years, and 60% of the fees collected from the students for the third year. It was also agreed between the parties that the training centre would be run by the Opposite Party No. 2 under the guidance and supervision of the Company but as an independent contractor and not as an agent of the Company. It was further agreed between the parties that the Company would in no manner be responsible for any loss incurred by the Opposite Party No. 2 from such venture. The Opposite Party No. 2 had further agreed that he shall not claim any damages, cost, charges or expenses from the Company in respect of the liabilities arising out of the performance of the obligations under such agreement.
9. It was further submitted since the commencement of the training centre, the Opposite Party No. 2 was unable to promote activities of the centre. The Petitioner and the Company rendered every assistance to the Opposite Party No. 2 so as to meet the targets as agreed between the parties. However, in spite of all efforts by the Petitioner and the Company, the Opposite Party No. 2 failed to run the centre properly and the number of students plummeted gradually. Whereby Opposite Party

No. 2 was unable to meet his targets and generate revenues as promised by him.

10. The Learned Advocate for the petitioner further submitted that as per the franchisee agreement, the Opposite Party No. 2 was under an obligation to pay 30% of the fees collected to the Company for the first two years. However, the Opposite Party in spite of collecting fees from the students, failed to pay the share of the Company to the Company. The Company made several demands to the Opposite Party No. 2 to clear the dues of the Company but the Opposite Party No. 2 failed to comply the same.
11. The Learned Advocate for the petitioner further submitted that during the month of February 2008, as the Opposite Party No. 2 was unable to manage the training centre and also not remitting the agreed share of revenue to the Company, it was mutually agreed between the parties that the Company was to take over management of the centre in order to manage the affairs efficiently. By an agreement dated March 1, 2008, it was, inter alia, agreed that the Company would manage the centre and take care of the operations, marketing, etc of the training centre and bear expenses for the same. As the company was taking over the responsibilities, it was agreed that the revenue of the Company would increase accordingly. It was also agreed between the parties that the Opposite Party No. 2 would not interfere in the affairs of the Company till he clears the previous dues on account of royalties payable to the Company.
12. The Learned Advocate for the petitioner further submitted that despite as agreed between the parties, the Opposite Party No. 2 continued to

interfere in the affairs of the company so as to disrupt the smooth running of the training centre and also threatened the Petitioner with consequences if the operation of the training centre was not returned to the Opposite Party No. 2. The Petitioner made several requests to the Opposite Party No. 2 to desist from such interference and to clear up his dues. However, despite such requests by the Petitioner, the Opposite Party No. 2 continued with his illegal activities, the Petitioner was finding it difficult to run the training centre and as a result, the Company was forced to discontinue the operations of the training centre.

13. The Learned Advocate for the petitioner further submitted that since the closure of the training centre, even though the Opposite Party No. 2 failed to clear up his dues resulting in losses to the Petitioner and the Company, the Petitioner decided not to take legal action against the Opposite Party No. 2.
14. The Learned Advocate for the petitioner further submitted that the Opposite Party No. 2 wrongfully, malafidely and with the intention of extracting money from the Petitioner, initiated false criminal proceeding against the Petitioner, which has now come to the knowledge of the Petitioner.
15. It was further contended that allowing an application under Section 156(3) Cr.P.C. by the Learned Additional Chief Judicial Magistrate at Barrackpore has resulted in wrongfully considering a civil dispute to be criminal in nature.
16. The allegations against the petitioner in the F.I.R do not amount to a criminal offence.

17. The allegation made in the F.I.R by the Opposite Party No. 2, if accepted in its entirety and believed to be true, the same fails to make out any offence under Sections 420/380/120B of the Indian Penal Code or for that matter any offence whatsoever. The petitioner has been persecuted without having any foundation both in law and fact.
18. There is no chance of prosecution proving any charges against the Petitioner particularly in the context that the Opposite Party No. 2 would not be able to prove any charges against the petitioner and that there is no chance of conviction and on that ground alone the instant criminal proceeding is liable to be quashed.
19. The Learned Advocate for the petitioner relied upon the following decisions:-

*In the case of **Sushil Sethi Vs. State of Arunachal Pradesh**¹, the Hon'ble Apex Court observed as follows:*

"8. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that this is a fit case to exercise powers under Section 482 CrPC and to quash the impugned criminal proceedings.

8.1. As observed hereinabove, the charge-sheet has been filed against the appellants for the offences under Section 420 read with Section 120-B IPC. However, it is required to be noted that there are no specific allegations and averments in the FIR and/or even in the charge-sheet that fraudulent and dishonest intention of the accused was from the very beginning of the transaction. It is also required to be noted that contract between M/s SPML Infra Limited and the Government was for supply and commissioning of the Nurang Hydel Power Project including three power generating units. The appellants purchased the turbines for the project from another manufacturer.

¹ (2020) 3 SCC 240

The company used the said turbines in the power project. The contract was in the year 1993. Thereafter in the year 1996 the project was commissioned. In the year 1997, the Department of Power issued a certificate certifying satisfaction over the execution of the project. Even the defect liability period ended/expired in January 1998. In the year 2000, there was some defect found with respect to three turbines. Immediately, the turbines were replaced. The power project started functioning right from the very beginning – 1996 onwards. If the intention of the company/appellants was to cheat the Government of Arunachal Pradesh, they would not have replaced the turbines which were found to be defective. In any case, there are no specific allegations and averments in the complaint that the accused had fraudulent or dishonest intention at the time of entering into the contract. Therefore, applying the law laid down by this Court in the aforesaid decisions, it cannot be said that even a prima facie case for the offence under Section 420 IPC had been made out.

8.2. It is also required to be noted that the main allegations can be said to be against the company. The company has not been made a party. The allegations are restricted to the Managing Director and the Director of the company respectively. There are no specific allegations against the Managing Director or even the Director. There are no allegations to constitute the vicarious liability. In Maksud Saiyed v. State of Gujarat, it is observed and held by this Court that the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. It is further observed and held that the vicarious liability of the Managing Director and Director would arise provided any provision exists in the behalf in the statute. It is further observed that the statute indisputably must contain provision fixing such vicarious liabilities. It is further observed that even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which

would attract the provisions constituting vicarious liability. In the present case, there are no such specific allegations against the appellants being Managing Director or the Director of the company respectively. Under the circumstances also, the impugned criminal proceedings are required to be quashed and set aside.

8.3. At this stage, it is required to be noted that though the FIR was filed in the year 2000 and the charge-sheet was submitted/filed as far back as on 28-5-2004, the appellants were served with the summons only in the year 2017 i.e. after a period of approximately 13 years from the date of filing the charge-sheet. Under the circumstances, the High Court has committed a grave error in not quashing and setting aside the impugned criminal proceedings and has erred in not exercising the jurisdiction vested in it under Section 482 CrPC.”

In the case of **Vaddarse Prabhakara Shetty Vs. Asochem Synthetics & Anr.**² this Court observed that:

“11. Accordingly, the application is allowed. The criminal proceeding being C-1870/06 under section 420, 409, 120-B of the I.P.C. now pending before/the learned Metropolitan Magistrate, 16th Court, Calcutta so far as the present petitioner is concerned is quashed. If on bail he shall be deemed to have been discharged from bail bond. Xerox certified copy of this order shall be given to the parties, if applied for, on usual undertakings.”

In the case of **K.V. Kamath Vs. Pradip Kr. Sureka & Ors.**³ this Court held as follows:

“4.Now, in the context as above, accused No. 4 M.V. Kamat has taken out this application under Section 482 of the Cr.PC for quashing of the proceeding as against him alone on the ground that the petitioner is the managing director and CEO of the Bank and principle of vicarious liability has no manner of application in respect of the offences under the Penal Code. The mere fact that the

² 2009 SCC OnLine Cal 2744

³ 2009 SCC OnLine Cal 2504

petitioner is a managing director and CEO of the bank does not give rise to any reasoning that he was an accomplice to the alleged offence or that offence was committed by the other accused persons by hatching criminal conspiracy with him. Further, issuance of non-bailable warrant of arrest at the very first instance cannot be supported and is without any jurisdiction. Mr. Pradip Kr. Ghosh, learned Senior Advocate appearing for the petitioner submitted that the offences alleged are under section 384/392/120B/427/500/504 and 506 of the IPC. To find a person guilty of offences under these sections of the law the Court has to prima facie make an opinion at the very initial stage of entertaining the petition of complaint that the said petition of complaint does disclose at least prima facie that the petitioner has committed the offences alleged. The petition of complaint does not at all disclose that the petitioner was at all present at the scene of the crime. The petition of complaint itself indicates that a wrong vehicle was intercepted by the recovery agents and admitting the mistake the accused No. 1 directed for return of the vehicle. The alleged damaged of the vehicle, loss of the brief case containing Rs. 25,000/- and television set from the vehicle is a different matter for which the other accused persons can be made responsible. The petitioner was not present at the scene of the crime. He did not detect the vehicle; he did not assault the complainant. He did not cause damage to the vehicle nor did he use any defamatory word or criminal force or criminally intimidate the complainant. Even the petition of complaint does not show that so far as the petitioner is concerned, he participated in the commission of the offence. The petitioner is having his registered office at Allahabad and corporate office in Mumbai. He is not concerned with looking after each and every recovery case. It was not his concern to look out as to which vehicle was seized by which persons at which place on which day throughout the territory of India. A Chief Executive Officer and Managing Director of the bank normally takes his seat in the corporate office of the bank in Mumbai and he is solely occupied with the general policy of the bank. It is submitted that uncontroverted allegations in the petition of complaint, if taken up in their entirety and at the face value did not make out a prima facie case against the petitioner at all. So far as the petitioner is concerned, no specific role has been ascribed in the petition of complaint. Merely because the petitioner is holding a senior position in the corporate office it cannot be presumed that every act allegedly committed by the employees or agents of the ICICI Bank were done

under the instruction of the petitioner because it is trite law that the principle of vicarious liability does not apply in respect of the offences under the Penal Code, 1860. The learned Magistrate failed to pose unto himself the question whether the petition of complaint even if taken for granted at the face value to be correct in its entirety would lead to conclusion that petitioner was personally liable for the offence. Vicarious liability of the Managing Director would only arise if statute prescribes for that. It is further submitted that the learned Magistrate issued non-bailable warrant of arrest against the petitioner without application of judicial mind and moreover the complainant in the instant case has not made the petitioner an accused not in his individual capacity as would be evident from the cause title of the petition of complaint. A plain reading of the petition and the initial deposition would show that there is absolutely no iota of materials to connect the petitioner with the alleged offence. The petitioner's office is situated at Mumbai, while the incident took place in Calcutta. A person holding the post of managing director or Chief Executive Officer in Mumbai cannot be held to be responsible for whatever offences might have been committed by the employees of a large organization having branches all over the country. It is further submitted that this was really a case of forcible dispossession of property. It is not in dispute that there was instituted a civil suit and a receiver was appointed to take possession of the vehicle from a defaulter but unfortunately, there was an error in vehicle number which went unnoticed and that caused all the confusion and on the basis of mistaken identity of the vehicle the incident took place which no doubt is unfortunate.

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6. In *Maksud Saiyed (supra)* the Hon'ble Supreme Court held that the Penal Code does not contain any provision for extending vicarious liability on the part of the managing director of a company and the Magistrate should have examined whether the complaint made the director personally liable. The decision followed *S.M.S. Pharmaceutical Ltd. v. Neeta Bhalla*, 2007 (4) SCC 70 and *Swaraj Kumar Poddar*. Now section 138 of the N.I. Act in connection with a case where company is made an accused. The directors of the company who are said to be in-charge and responsible for day-to-day conduct of the affairs and business of the company are

vicariously liable under section 141 of the N.I. Act. It is not in dispute that in an offence under the Penal Code, 1860 vicarious liability cannot be extended. In Bank of Baroda, Ahmedabad (supra) the Supreme Court held that the Claims Tribunal was wrong in the conclusion that hypothecating bank can step into the shoes of the owner to foist the liability for payment of compensation on the bank. It was held that the hypothecating bank cannot be held vicarious liable to pay damage to the injured for the negligent act of the driver of the vehicle. This decision strictly does not apply to the facts of the case. The decision in Syndicate Bank (supra) rendered by Delhi High Court reaffirms the position that it is not open to the bank to take possession of the hypothecated property on its own. In Charanjit Singh Chouda which is frequently taken aid of has ruled that offence of theft is not maintainable where a hirer commits default in making instalments payment and financier takes possession of the property. Since it is not the subject-matter of our discussion as to whether taking re-possession of the vehicle was justified or not, these decisions are inapplicable. The subject-matter of the case is that by use of physical force a vehicle was taken re-possession of and it was a wrong vehicle that was taken. It is of course unfortunate that the bank by use of muscle force took re-possession of a wrong vehicle without ascertaining whether the owner of the vehicle really defaulted in payment of the EMI. It is also unfortunate and shocking that recovery agents of the bank or the recovery manager would use criminal force, assault and humiliate its own customer even when it was detected that the complainant was not a defaulter. However, the decision in S.K. Alagh (supra) deals with vicarious liability of a person in connection with an offence under the Penal Code. It was held that vicarious liability cannot be cast on the managing director for alleged commission of offence under section 405/406 of the Penal Code, 1860. The decision in Inder Mohan Goswami (supra) relates to a case of quashing of the FIR where it was held that when prosecution has

not made out any offence through the FIR continuation of the criminal proceeding was impermissible. The decision in *Pepsi Food Limited (supra)* also reiterates the same principle that when the complaint does not make out any case against a person he cannot be made to undergo the agony of a criminal trial. In *Pepsi Food Limited* it was held that summoning an accused in a criminal case is a serious matter and unless a *prima facie* case is made out issuance of process was unjustified. Mr. Ghosh relied on a decision in *Punjab National Bank v. Surendra Prasad Singh*, reported in 1993 Supp. (1) SCC 499, when the Hon'ble Supreme Court held that whether the complaint was lodged impleading the Chairman, the Managing Director of a bank there lies responsibility and duty on the magistracy to find out whether the concerned accused should be legally responsible for the offence charged with. In *A.L.E. Society v. Siddalingesh*, reported in 2002 92) SCC (Criminal) 455, the Hon'ble Supreme Court quashed a criminal proceeding on the ground that it was initiated maliciously and it would amount abuse of the process of the Court. Mr. Ghosh further referred to decision in *O.N. Goenka v. State of West Bengal*, reported in 2003 (3) CHN 304, in support of the submission that the description of the petitioner as representative of the company is clearly contrary to law and petitioner cannot by any process of law be compelled to represent the accused company in the instant proceeding. Mr. Ghosh further referred to decision in *R. Kalyani v. Janak C. Mehra*, reported in 2009 (1) SCC 516, in the line as *S.K. Alagh* where prosecution of managing director by invoking the doctrine of vicarious liability on account of offences under section 405/406 of the IPC was deprecated.

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8. Having thus placed the submissions of the learned Counsels for the parties it is now necessary to examine whether so far as the petitioner is concerned process should have been issued against

him. In a catena of decisions guidelines have been laid down by the Supreme Court as to when a process can be issued. Issue of process under section 204 of the Cr.PC is definitely the discretion of the Magistrate but such discretion has to be exercised judiciously in order that as a person rightly to be prosecuted is not left out and a person against whom process cannot be issued is not put to harassment by such issuance of process. The decisions *R.P. Kapoor v. State of Punjab*, reported in AIR 1960 SC 866 and *State of Haryana v. Bhajanlal* reported in 1992 Cr. LJ 527 (SC), are eloquent on this point. When on a reading of the petition of complaint or the FIR it appears that an offence cognizable has been committed by a person named therein then the Magistrate is obligated upon to summon the accused. It is only when a petition of complaint or the FIR is mala fide or the allegations are inherently improbable or when that taking cognizance of offence is barred by law issuance of process is impermissible. Further, when the allegations levelled against the accused do not constitute offence no process can be issued. Now the High Court while exercising jurisdiction under section 482 Cr.PC will consider the facts and circumstances of each case so far as to find out whether the magisterial action by issuance of process was justified or not. Exercise of such power would be permissible if it would appear to the Court that unless the power is exercised abused of the process of any Court could not be prevented.”

In ***Keki Hormusji Gharda and Ors. Vs. Mehervan Rustom Irani and Anr.***⁴, the Hon’ble Supreme Court observed as follows:

“17. The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the

⁴ (2009) 6 SCC 475

Company, thus, cannot be said to have committed an offence only because they are holders of offices. The Learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

18. In Pepsi Foods Ltd. v. Special Judicial Magistrate this Court held as under : (SCC p. 760, para 28)

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he had applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

19. Even as regards the availability of the remedy of filing an application for discharge, the same would not mean that although the allegations made in the complaint petition even if given face

value and taken to be correct in its entirety, do not disclose an offence or it is found to be otherwise an abuse of the process of the court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure.”

In Sharon Michael and Ors. Vs. State of Tamil Nadu and Anr.⁵, the Hon’ble Supreme Court observed as follows :

“16. The first information report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant Company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the Company.

17. In R. Kalyani v. Janak C. Mehta this Court held : (SCC pp. 526-27, paras 29-32)

“29. ... As there had never been any interaction between the appellant and them, the question of any representation which is one of the main ingredients for constituting an offence of cheating, as contained in Section 415 of the Penal Code, did not and could not arise.

30. Similarly, it has not been alleged that they were entrusted with or otherwise had dominion over the property of the appellant or they have committed any criminal breach of trust.

31. So far as allegations in regard to commission of the offence of forgery are concerned, the same had been made only against Respondent 3 and not against Respondent 2.

⁵ 2009 (3) SCC 375

Sending a copy thereof to the National Stock Exchange without there being anything further to show that Respondent 2 had any knowledge of the fact that the same was a forged and fabricated document cannot constitute an offence.

32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the Company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created.”

It was furthermore observed: (R. Kalyani case, SCC 529, para 41)

“41. If a person, thus, has to be proceeded with as being variously (sic vicariously) liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the company as well as the person responsible for the acts of the company.”

18. The liability of the Company is, therefore, a civil liability. It is also not a case where although a prima facie case had been made out disclosing commission of an offence, the court is called upon to consider the defence of the accused. The first information report itself refers to the documents. They can, therefore, be taken into consideration for the purpose of ascertaining as to whether the allegations made in the complaint petition read as a whole, even if taken to be correct in its entirety, discloses commission of any cognizable offence or not. As admittedly Respondent 2 was the supplier of garments which were found out to be defective in nature,

we are of the opinion that the dispute between the parties is civil in nature.”

*In **R.Kalyani Vs. Janak C. Mehta & Ors.**⁶ the Hon’ble Supreme Court held as follows:*

“24. Apparently, the first information report does not contain any allegation against Appellant 1. The principal allegations therein are only against the third respondent which may be enumerated hereinafter:

- (1) He, without the knowledge and consent of the complainant with mala fide intention, operated the account maintained in her name.*
- (2) He promised to take over the liabilities of the company’s account, R-144 and at his instance only the appellant and her husband resigned from the company and he and Mr. Sridhar became the Directors.*
- (3) Accused 3 promised to pay a sum of Rs. 9.57 lakhs being the balance in Account K-4 and also Rs. 11.97 lakhs being the value of shares purchased in the account as early as 1999 but not delivered in time, but he failed and/or neglected to do so.*

25. Para 11 of the said first information report which is material for our purpose reads as under:

“11. The complaint submits that the third accused in R-14 account without the knowledge and consent of the complainant caused liabilities in the said account and even after taking over the said liabilities by the third accused by inducting himself as Director of the company now with ulterior intentions, fabricated a letter dated 10-1-2002 purported to have been written by the complainant by forging signature of the complainant, thereby trying to misappropriate the money due to the complainant fro the personal account and also the first and second accused who are responsible for the day-to-day

⁶ (2009) 1 SCC 516

management and affairs of the company as responsible persons of the company, liable for the act of the third accused who is a manager in their company.”

It was also alleged therein that the appellant came to learn that the second accused had forwarded a letter dated 10-1-2002 to the National Stock Exchange which is said to be a forged and fabricated letter, the contents whereof are:

“Pursuant to the discussions my brother, Mr. A. Sridharan had with you regarding settlement of all outstanding payments in the accounts which we were operating, I request you to transfer the credit balance of Rs.9,57,037.16 from my Personal Account No. K004 to adjust the debit balance of Rs.21,08,420.45 in our company SRI R.S.R. Securities Account No. R104. Any further debit balance after adjustment as above will be recoverable against the company.”

*In **V.R. Dalal & Ors. Vs. Yougendra Naranji Thakkar & Anr.**⁷ the Hon’ble Supreme Court held as follows:*

“16. As regards essential ingredients of the offence of cheating, it was stated: (Indian Oil Corpn. Case, SCC p. 757, para 32)

“32. (i) deception of a person either by making a false or misleading representation or by other action or omission, (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.”

⁷ (2008) 15 SCC 625

In **Devendra & Ors. Vs. State of Uttar Pradesh & Anr.**⁸ the Hon'ble Supreme Court observed as follows:

“16. In V.Y. Jose v. State of Gujarat this Court opined : (SCC p.83, para 14)

“14. An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:

- (i) deception of a person either by making a false or misleading representation or by other action or omission;*
- (ii) fraudulently or dishonestly inducing any person to deliver any property; or to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.*

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code can be said to have been made out.”

It is, therefore, evident that a misrepresentation from the very beginning is a sine qua non for constitution of an offence of cheating, although in some cases, an intention to cheat may develop at a later stage of formation of the contract.”

In **V.Y. Jose & Anr. Vs. State of Gujarat & Anr.**⁹ the Hon'ble Supreme Court observed as follows:

⁸ (2009) 7 SCC 495

“14. An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:

- (i) deception of a person either by making a false or misleading representation or by other action or omission;*
- (ii) fraudulently or dishonestly inducing any person to deliver any property; or to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.*

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code can be said to have been made out.”

...

28. A matter which essentially involves dispute of a civil nature should not be allowed to be the subject-matter of a criminal offence, the latter being not a short cut of executing a decree which is non-existent. The superior courts, with a view to maintain purity in the administration of justice, should not allow abuse of the process of court. It has a duty in terms of Section 483 of the Code of Criminal Procedure to supervise the functionings of the trial courts.

29. An offence of cheating may consist of two classes of cases:

(1) Where the complainant has been induced fraudulently or dishonestly. Such is not the case here;

(2) When by reason of such deception, the complainant has not done or omitted to do anything which he would not do or omit to do if he as not deceived or induced by the accused.”

*In **B. Suresh Yadav Vs. Sharifa Bee and Anr.**¹⁰, the Hon’ble Supreme Court observed as follows:*

“11. Ingredients of cheating are:

- (i) deception of a person either by making a false or misleading representation or by other action or omission; and*
- (ii) fraudulent or dishonest inducement of that person to either deliver any property to any person or to consent to the retention thereof by any person or to intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.*

...

13. For the purpose of establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. In a case of this nature, it is permissible in law to consider the stand taken by a party in a pending civil litigation. We do not, however, mean to lay down a law that the liability of a person cannot be both civil and criminal at the same time. But when a stand has been taken in a complaint petition which is contrary to or inconsistent with the stand taken by him in a civil suit, it assumes significance.

¹⁰ (2007) 13 SCC 107

Had the fact as purported to have been represented before us that the appellant herein got the said two rooms demolished and concealed the said fact at the time of execution of the deed of sale, the matter might have been different. As the deed of sale was executed on 30-09-2005 and the purported demolition took place on 29-09-2005, it was expected that the complainant/first respondent would come out with her real grievance in the written statement filed by her in the aforementioned suit. She, for reasons best known to her, did not choose to do so.”

In *Inder Mohan Goswami and Anr. Vs. State of Uttaranchal and Ors.*¹¹, the Hon’ble Supreme Court observed as follows:

“40. Firstly, We shall deal with Section 420 IPC. Cheating is defined in Section 415 IPC and is punishable under Section 420 IPC. Section 415 is set out below:

“415. Cheating. – Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to ‘cheat’.

Explanation. – A dishonest concealment of facts is a deception within the meaning of this Section.”

41. Section 415 IPC thus requires –

1. Deception of any person.

2. (a) Fraudulently or dishonestly inducing that person –

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which

¹¹ (2007) 12 SCC 1

act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

42. On a reading of the aforesaid Section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but need not be fraudulent or dishonest. 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 a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning.”

In Hotline Teletubes and Components Ltd. & Ors. Vs. State of Bihar & Anr.¹² the Hon’ble Supreme Court observed as follows:

“2. This appeal by special leave has been filed by the appellants against the order passed by the Patna High Court, refusing to quash their prosecution under Sections 406 and 420 of the Indian Penal Code (for short “IPC”). In the complaint petition, it has been alleged that the complainant supplied goods to the accused persons, but they failed to pay the price therefor. There is no whisper in the complaint that at the very inception of the contract between the parties, there was any intention to cheat. It appears from a bare perusal of the complaint that it is a case of purely civil liability and no criminal offence is disclosed, much less offences either under Section 406 or 420 IPC. So far as the High Court is concerned, it has not considered this aspect of the matter, but has refused to quash the prosecution observing that it was a fit case where parties should take steps for settlement. In our view, allowing such prosecution to continue would amount to an abuse of the process of court and to prevent the same, it would be just and expedient to quash the same.”

In Uma Shankar Gopalika Vs. State of Bihar and Ors.¹³, the Hon’ble Supreme Court observed as follows:

¹² (2005) 10 SCC 261

“3. The short facts are that Madhusudan Ram Gupta, Respondent 2 filed a complaint in the Court of the Chief Judicial Magistrate, Dhanbad bearing Complaint Case No. 88 of 1998 for prosecution of M/S Gopalika Finance Corporation Limited, Sitarampur within the district of Burdwan and its two Directors, namely, the appellant and his brother Vijay Shanker (since deceased) under Sections 420/120-B IPC alleging therein, inter alia that M/S Gopalika Finance Corporation Ltd. (hereinafter referred to as “the Corporation”) was engaged in the business of financing the purchase of vehicles under the hire-purchase scheme and the complainant who was desirous of purchasing a truck approached the accused persons for financial assistance in the year 1991 whereupon the appellant and his brother Vijay Shanker agreed to finance the purchase of truck by the complainant on hire-purchase agreement. Pursuant to the aforesaid agreement, the complainant made over his part of the investment by paying a sum of Rs. 1,60,000 to the appellant. He also handed over various documents to the appellant. Thereafter, on payment of balance price of the vehicle to the dealer by the financier, chassis was made over to the complainant, who spent a sum of rupees One Lakh for building body of the truck where after the truck started plying. The complainant could repay only three installments to the financier. In the meantime on 30-11-1991 the truck in question loaded with goods became traceless, for which the matter was reported to the police as well as the insurance company. The complainant submitted a claim before the insurance company to the tune of Rs. 4,20,000. According to the complainant, thereafter on 20-07-1195, the appellant called upon him at his Sindhri house and induced him to permit the appellant to handle the insurance claim, which request was acceded to by the complainant on assurances given by the appellant that when the claim of Rs. 4,20,000 is received from the insurance company, out of that a sum of Rs. 2,60,000 which the complainant was entitled to received would be paid to him. Upon this assurance a complaint was made by the accused persons before the West Bengal Consumer Grievances Redressal Forum in which the complainant was also made a party and by order dated 23-07-1996 the entire claim was allowed and the insurance company was directed to pay Rs. 4,20,000 with interest accrued thereon and pursuant thereto the insurance company issued a cheque for Rs. 4,20,000 in favour of the Corporation which was encashed by the appellant but out of the said amount a sum Rs. 2,60,000 was never paid to the complainant in spite of assurances given to him by the appellant which necessitated filing of the complaint for prosecution of the accused persons.

...

6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of complaint any criminal offence whatsoever is made out much less offences under Sections 420/120-B IPC. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs.4,20,000, they would pay a sum of Rs. 2,60,000 to the complainant out of that but the same has never been paid. Apart from that there is no other allegation in the petition of complaint. It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the Consumer Forum in relation to the claim of Rs. 4,20,000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC.

7. In our view petition of complaint does not disclose any criminal offence at all much less any offence either under Section 420 or Section 120-B IPC and the present case is a case purely civil dispute between the parties for which remedy lies before a civil court by filing a properly constituted suit. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of Court and to prevent the same it was just and expedient for the High Court to quash the same by exercising the powers under Section 482 Cr.P.C. which it has erroneously refused.”

In **Murari Lal Gupta Vs. Gopi Singh** the Hon’ble Supreme Court observed as follows:

“The respondent, Gopi Singh, filed a criminal complaint against the petitioner herein complaining of an offence under Sections 406 and 420 IPC. According to the complaint, the petitioner has a property in Delhi in respect of which he entered into an agreement to sell in favour of the respondent for a consideration of Rs.4.50 lakhs. An amount of Rs. 3.50 lakhs was paid. The balance of Rs. 1 lakh was to be paid at the time of registration of sale deed and delivery of possession. Thereafter, the petitioner did not honour the agreement in spite of three legal notices having been given. According to the respondent, the petitioner has thus cheated him.

...

6. We have perused the pleadings of the parties, the complaint and the orders of the learned Magistrate and the Sessions Judge. Having taken into consideration all the material made available on record by the parties and after hearing the learned counsel for the parties, we are satisfied that the criminal proceedings initiated by the respondent against the petitioner are wholly unwarranted. The complaint is an abuse of the process of the court and the proceedings are, therefore, liable to be quashed. Even if all the averments made in the complaint are taken to be correct, yet the case for prosecution under Section 420 or Section 406 of the Penal Code is not made out. The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the respondent parted with the money. It is not the case of the respondent that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the respondent. Merely because an agreement to sell was entered into which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the respondent. No case for prosecution under Section 420 or Section 406 IPC is made out even *prima facie*. The complaint filed by the respondent and that too at Madhepura against the petitioner, who is a resident off Delhi, seems to be an attempt to pressurise the petitioner for coming to terms with the respondent.”

In ***Vir Prakash Sharma Vs. Anil Kumar Agarwal & Ors.***¹⁴ the Hon’ble Supreme Court held as follows:

“8. The dispute between the parties herein is essentially civil dispute. Non-payment or underpayment of the price of the goods by itself does not amount to commission of an offence of cheating or criminal breach of trust. No offence, having regard to the definition of criminal breach of trust contained in Section 405 of the Penal Code can be said to have been made out in the instant case. Section 405 of the Penal Code reads, 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

¹⁴ (2007) 7 SCC 373

has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

Neither any allegation has been made to show existence of the ingredients of the aforementioned provision nor any statement in the behalf has been made."

*In **Medmeme, LLC & Ors. Vs. Ihorse BPO Solutions Pvt. Ltd.**¹⁵ the Hon'ble Supreme Court observed as follows:*

"12. After going through the allegations contained in the complaint and the material on record, we are of firm conclusion that the matter entirely pertains to civil jurisdiction and not even a prima facie case is made out for the offences under Sections 420, 406 and 409 read with Section 120-B IPC even if the allegations contained in the complaint are to be taken on their face value. The complaint gives a clear impression that it was primarily a case where the respondent had alleged breach of contract on the part of the appellants in not making the entire payments for the services rendered to the appellants. On the other hand, it is not in dispute that substantial amounts have been paid by the appellants to the respondent company for the services rendered.

13. Reason for non-payment of the balance amount is given by the appellants is that the services rendered by the respondent company were not in terms of the agreement entered into between the parties and were deficient in nature. For this reason, even the appellants have filed claims against the respondent company alleging that the appellant suffered losses because of the defective services provided by the respondent."

*In **Anil Mahajan Vs. Bhor Industries Ltd. & Anr.** the Hon'ble Supreme Court observed that:*

"3. The allegations in the complaint are that a memorandum of understanding (MOU) dated 16-8-2000 was executed between the accused and the complainant for the period 16-8-2000 to 30-11-2000, which inter alia, stipulated that 50% of the payments against monthly quantity would be given in advance and balance 50% on receipt of the goods by M/s Shikhar Enterprises or its sister concern. The accused had two firms, namely, (1) M/s Shikhar Enterprises, and (2) M/s Gulshan Agencies at Delhi. The complainant delivered 56,94,120 reels of steel grip tapes valued at Rs.3,38,62,860 to the

¹⁵ (2018) 13 SCC 374

accused during the period 19-8-2000 to 20-11-2000 and out of this amount, the accused made only part-payment of Rs.3,05,39,086 leaving balance amount of Rs. 33,23,774. The allegations are that after making this payment, the accused did not make further payment despite repeated demands and started giving reasons such as cash-flow problems, non-receipt of right type of colour assortment and sales tax problems, etc., besides raising disputes in respect of the material purchased six years back being defective. After making the aforesaid averments in the complaint, it is concluded that the MOU was signed with mala fide and criminal intention of grabbing money and goods from the complainant's Company. The averments made in that regard are as under:

“From the above it is very clear that MOU was signed by the accused with mala fide and criminal intention of grabbing money and goods from the complainant's Company and to deceive, cheat and cause wrongful loss to the complainant's Company, but the complainant was not aware of the criminal intention of the accused while execution of above MOU.”

6. The order of the Magistrate was challenged before the Court of Session. The learned Additional Sessions Judge, Pune, by order dated 19-10-2001 has set aside the order of the Magistrate issuing process. It has been stated by the learned Additional Sessions Judge in the order that:

“In this case there is no allegation that the accused made unlawful representation. Even, according to the complaint, they entered into memorandum of understanding. Grievance seems to be that the accused failed to discharge obligations under the MOU. In the complaint, there was no allegation that there was fraud or dishonest inducement on the part of the applicant and thereby the opponent parted with the property.”

Reliance has been placed, in that order, on various decisions of this Court holding that from mere 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.

...

8. The substance of the complaint is to be seen. Mere use of the expression “cheating” in the complaint is of no consequence. Except mention of the words “deceive” and “cheat” in the complaint filed before the Magistrate and “cheating” in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs. 3,05,39,086 out of the total amount of Rs. 3,38,62,860 was paid leaving balance of Rs. 33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainant’s own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question.”

In Vesa Holding Private Limited and Anr. Vs. State of Kerala and Ors.¹⁶, the Hon’ble Supreme Court observed as follows:

*“8. Per contra the learned counsel appearing for Respondent 3 contended that there is no merit in the contention of the appellants that the FIR discloses only a civil case or that there is no allegation making out the criminal offence of cheating. It is his further contention that the facts in the present case may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the complainant that by itself cannot be a ground to quash the criminal proceedings. In support of his submission he relied on the decision of this Court in Vijayander Kumar V. State of Rajasthan*¹⁷.

9. We also heard the learned counsel for the State, namely, Respondents 1 and 2.”

¹⁶ (2015) 8 SCC 293

¹⁷ (2014) 3 SCC 389 : (2014) 2 SCC(cri) 996

20. Learned Advocate for the State submitted prima facie materials in the case diary justify the offence committed by the petitioner and at a premature stage pending trial where the case can be decided after adducing evidence, the revisional application is liable to be dismissed.

21. The opposite party no.2 i.e. the complainant filed an application under Section 156 clause 3 of the Cr.P.C. before the court of Learned ACJM at Barrackpore being Case No. 280/2009 precisely stating to have hoodwinked by the petitioner to invest a sum of Rs. 10 lakhs which would yield an income of Rs. 1 lakh per month and consequently entered into an agreement of franchise with ERUDITE EDUCATIONAL CENTRE Pvt. Ltd. on 20.12.06 whereby the opposite party would operate a centre and to nomenclate the same as ERUDITE for imparting tuition/training to the students intending to appear in the entrance examinations of CAT, MAT, ZAT etc.

22. It was further agreed that 30% of the earnings would be paid as royalty to ERUDITE EDUCATIONAL CENTRE Pvt. Ltd. and the rest would be accounted to the opposite party No.2.

23. Pursuant to such agreement the opposite party No. 2 obtained tenanted occupancy at Rs. 12,000/- along with services of Rs. 8,000/- per month on 15th July, 2007 and incurred a further sum of Rs.5,00,000/- installing furniture and fixture, gleaning electric and telephone connections in his name etc.

24. The opposite party No.2 further obtained a trade license from the concerned municipality and advertisement in the daily newspaper regarding

the functioning of the aforesaid tutorial and incurred an expenditure of Rs. 4.5 lakhs.

25. The Opposite party No.2 assisted by the teachers provided by the petitioner commenced functioning as franchisee. However, sustained acute financial loss in the business due to failure on the part of the accused to discharge their obligations under the agreement. Subsequently, a fresh agreement was executed between the parties on 28.5.2008, whereby the petitioner and the other accused persons were liable to bear the entire cost of centre “and pay 70% of the earnings to the complainant.”

26. Pursuant to such agreement the petitioner and the other accused persons continued with the business of the aforesaid centre from 25th February, 2008 till 26th February, 2009 without paying and money to the opposite party no.2. Further insisting the opposite party no.2 to surrender his tenancy to the landlord substituting accused no.4 as a tenant instead of opposite party no.2 to the landlord on or about 2nd February, 2009, which was declined by opposite party no.2.

27. The complainant further alleged that the petitioner wanted to oust him from his tenanted premises and removed two air-conditioners stealthily and was prevented from accomplishing their clandestine act. The petitioner removed important document, furniture and stationary covertly committing theft in the aforesaid premises.

28. Certain terms of the agreement executed between the parties are replicated as follows:-

“Section : 3: ESTABLISHMENT OF THE CENTRE

“5. The entire cost of running the Centre, including acquisition of space, acquisition of Furniture, engaging of personnel and all other expenditure shall be borne and paid by the FRANCHISEE only and the FRANCHISEE shall not be able entitled to require ERUDITE to share any part or portion of such expenditure or reimburse any part thereof.

...

Section : 7 : EXPECTED REVENUE

Having regard to the size of the city in which the Centre is to be opened and on the basis of the rough estimate of persons likely to be interested in availing of training for MBA entrance examinations, ERUDITE shall in consultation with the FRANCHISEE, from time to time decide upon the expected enrolment for each course at or around the beginning of education or training for each such course and the FRANCHISEE shall make all efforts and promotional activities, including direct sales, activities, in order to achieve the mutually agreed enrolment for each such course as may be advised by ERUDITE from time to time.

...

Section : 10 : GENERAL OBLIGATION OF THE FRANCHISEE

(C) It is further clarified that at any given time if ERUDITE is of the opinion that the academic standards are not maintained by the FRANCHISEE, ERUDITE shall have the right to depute its own Faculty members and the FRANCHISEE shall reimburse to the ERUDITE the entire cost of deputing his faculty viz. Salary, perquisites, and even it shall be the duty of the FRANCHISEE to

extend full co-operation to the faculty so deputed by ERUDITE to perform their duties. The FRANCHISEE shall implement all corrective measures as advised by ERUDITE to ensure that the academic standards are brought upto the desired standards.

...

(M) Indemnification

The FRANCHISEE hereby undertakes to indemnify and keep indemnifying ERUDITE for any loss which may be caused to ERUDITE by reason of the act of any employee, officers, relative or associate violating the undertaking referred to in this section.

...

Section : 13 : PAYMENTS

The FRANCHISEE agrees to pay ERUDITE the following amounts under the terms and conditions of this agreement.

A. INITIAL LICENSE FEE

The FRANCHISEE agrees to pay Rs.3,00,000/- only an non-refundable license fee covering the period of this agreement (3 years). This will be paid as under:

- 1. Rs. 1,00,000/- on or before signing the agreement.*
- 2. Rs. 50,000/- on or before 2nd January, 2007.*
- 3. Rs. 1,50,000/- on or before 28th February, 2007.*

...

ROYALTY

ERUDITE shall periodically pay the FRANCHISEE an amount based on receipt of payment and on the actual accrual from the students at the rate of 70% (for the first 2 years) & 60% for the 3rd year of the course/tuition fees collected by the FRANCHISEE from the students,

after adjustments of any sums due and payable by the FRANCHISEE to ERUDITE.

...

PAYMENT MODALITIES

c. If the FRANCHISEE fails to make any payment of any amount under this AGREEMENT to ERUDITE within the periods prescribed herein, monthly compound interest at the rate of 24% p.a. on the amount due and outstanding will be paid by the FRANCHISEE to ERUDITE. However, this shall not prejudice the right of ERUDITE to terminate this AGREEMENT for the non-payment of amounts due to ERUDITE.

...

Section : 16: TERM AND TERMINATION

D. In the event of the FRANCHISEE committing an act of omission in respect of any of the obligations of the FRANCHISEE and such default not being remedied to the satisfaction of ERUDITE by the FRANCHISEE within 15 days of receipt of notice in writing from ERUDITE specifying the default, ERUDITE shall, without prejudice to the rights in respect of such default, be entitled to terminate AGREEMENT.

F. ERUDITE may terminate this agreement, if it comes to the conclusion that any course is not being properly conducted by the FRANCHISEE and that it is necessary for ERUDITE to take over the conduct of such course to maintain ERUDITE's good name, reputation and standard established ERUDITE.

H. As and from the termination date, the FRANCHISEE shall not be entitled to make use in any manner of its association with ERUDITE

or advertise such association or invite applications for admission to any course conducted by it.

J. The FRANCHISEE shall, notwithstanding any termination either by the efflux of time or sooner determination, be liable to pay all the amounts due and payable by the FRANCHISEE to ERUDITE under this AGREEMENT and the FRANCHISEE shall also continue to discharge its obligations hereunder in respect of the courses for which the training was not completed till the date of termination.

L. The FRANCHISEE hereby grants ERUDITE an irrevocable license to enter upon and use the centre(s) of the FRANCHISEE for the purpose of conducting such courses, in case ERUDITE desire to conduct such courses in such premises. ERUDITE shall be entitled to make use of the equipment, materials, records and software in the FRANCHISEE's Centre for the purpose of conducting such courses and take over all records regarding such courses.

...

Section : 17 : INDEMNIFICATION

(b) The FRANCHISEE shall not claim any damages, costs, charges or expenses from ERUDITE in respect of the liabilities arising out of the performance of obligations under the agreement, which it may suffer or otherwise incur by reason of any act, negligence, default or error in judgment on its part in performance or non-performance of any term of this agreement.

...

Section : 18 : GENERAL PROVISIONS

A. NO AGENCY

The parties hereto agree that the FRANCHISEE is an independent contractor. Nothing herein contained shall constitute the FRANCHISEE

as an agent, legal representative, partner, subsidiary, joint venture or employee of the ERUDITE. The FRANCHISEE shall have no right or power to, and shall not bind or obligate ERUDITE in any way, manner or thing whatsoever, nor represent that he has any right to do so.

B. ARBITRATION

All disputes and differences of whatsoever nature arriving out of this agreement, whether during its term or after expiry thereof or prior termination shall be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and any statutory amendment thereof. The dispute shall be referred to the sole arbitrator who shall be appointed by the CEO/Director of ERUDITE or any person duly authorized by him/her. The FRANCHISEE shall not challenge the nomination of the sole arbitrator on the ground that the nomination has been made by the CEO/Director of ERUDITE or such other person, being the employee of ERUDITE.”

29.The terms of the agreement display absolute civil liabilities.

30.In the case of **M N G Bharateesh Reddy vs. Ramesh Ranganathan and Another**¹⁸ the Hon’ble Supreme Court observed as follows :

“10. The contents of the complaint would have to be read in order to deduce as to whether the ingredients of the offence have been duly established.

...

14. The ingredients of the offence under Section 415 emerge from a textual reading. Firstly, to constitute cheating, a person must deceive another. Secondly, by doing so the former must induce the person so deceived to (i) deliver any property to any person; or (ii) to consent that any person shall retain any property; or (iii) intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and such an act or

¹⁸ Criminal Appeal No 1273 of 2022

omission must cause or be likely to cause damage or harm to that person in body, mind, reputation or property.

15. Section 420 deals with cheating and dishonestly inducing delivery of property. It reads as follows:

“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 capable of converting 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.”

16. In **Hridaya Ranjan Prasad Verma v. State of Bihar**¹⁹, a two-judge bench of this Court interpreted sections 415 and 420 of IPC to hold that fraudulent or dishonest intention is a precondition to constitute the offence of cheating. The relevant extract from the judgment reads thus:

“14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract

¹⁹ (2000) 4 SCC 168

and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which 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 or dishonest intention at the time of making the 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.**

(emphasis supplied)

17. In **Dalip Kaur v. Jagnar Singh**²⁰ a two-judge bench of this Court held that a dispute arising out of a breach of contract would not amount to an offence of cheating under section 415 and 420. The relevant extract is as follows:

“9. The ingredients of Section 420 of the Penal Code are:

“(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.”

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. **If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an (2009) 14 SCC 696 offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code.** (See *Ajay Mitra v. State of M.P.* [(2003) 3 SCC 11 : 2003 SCC (Cri) 703])” (emphasis supplied).

18. Applying the above principles, the ingredients of Sections 415 and 420 are not made out in the present case.

19. The allegations in the complaint are conspicuous by the absence of any reference to the practice of any deception or dishonest intention on behalf of the Appellant. Likewise, there is no allegation that the complainant was as a consequence induced to deliver any property or to consent that any person shall retain any property or that he was deceived to do or omit to do anything which he would have not done or omitted to do if he was not so deceived. The conspicuous aspect of the complaint which needs to be emphasized is that the ingredients of the offence of cheating are absent in the averments as they stand.”

In the case of **Vijay Kumar Ghai & Ors. vs. The State of West Bengal & Ors** the Hon’ble Supreme Court observed as follows :

Section 415 of IPC define cheating which reads as under:

“415. Cheating. —Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

The essential ingredients of the offense of cheating are:

1. Deception of any person
 2. (a) Fraudulently or dishonestly inducing that person-
 - (i) to deliver any property to any person: or
 - (ii) to consent that any person shall retain any property; or
 - (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.
28. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.
29. Section 420 IPC defines cheating and dishonestly inducing delivery of property which reads as under: -

“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.”

30. Section 420 IPC is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.

31. To establish the offence of Cheating in inducing the delivery of property, the following ingredients need to be proved:-

1. The representation made by the person was false.
2. The accused had prior knowledge that the representation he made was false.
3. The accused made false representation with dishonest intention in order to deceive the person to whom it was made.
4. The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.

32. As observed and held by this Court in the case of Prof. **R.K. Vijayasathya & Anr. Vs. Sudha Seetharam & Anr**²¹, the ingredients to constitute an offence under Section 420 are as follows:-

i) a person must commit the offence of cheating under Section 415;

and

ii) the person cheated must be dishonestly induced to;

a) deliver property to any person; or

b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 IPC.

31. The act of the parties in terms of the agreement were contractual in nature delineating dispute resolution clause as well as force majeure clause. Any dispute or contravention or conflict arising out of the said agreement is to be resolved through a process invoking the arbitration clause. The transaction between the parties is entirely civil in nature. A party acting in contradiction to the interest of the other concerning civil issues if creates genuine impairment, damage or prejudice cannot be disguised and imputed in a criminal case to extract, extort, coerce or compel to revalidate any kind of violation of mutual contract or indict him or her with criminal liability.
32. The initial motive of deception on the part of the petitioner is absent. The Company was not made a party to inculcate the petitioner as vicariously liable for the acts done on behalf of the Company.
33. The statements recorded under Section 161 Cr.P.C signified the same to be based on hearsay. The articles alleged to have been stolen from the tenanted premise of the opposite party no. 2 were not seized.
34. The ingredients to constitute the offence under Section 420 of the Indian Penal Code as cited above do not transpire from the averments of the complaint and the Charge-sheet did not vociferate as to how the offences under Section 420 and 380 of the Indian Penal Code were committed.
35. Section 380 of the Indian Penal Code state as follows:-

“380. Theft in dwelling house, etc. – *Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”*

36. The inherent power under Section 482 Cr.P.C. is well settled and to the possible extent, to give an exhaustive list of myriad kinds of cases wherein such power should be exercised, The Hon’ble Supreme Court has held in para 102 in **State of Haryana and Others v. Bhajan Lal and Others** (supra) as under :

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

. (1) Where the allegations made in the first information report or 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 a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose

a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

*The principles as laid down above have consistently been followed, as well as in the recent judgment of three Judge judgment of the Hon’ble Supreme Court in **Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Others**²².*

²² AIR 2021 SC 1918

29. Having gone through the complaint/FIR and even the Charge-sheet, it cannot be said that the averments in the FIR and the allegations in the complaint against the appellant constitute an offence under Section 380 & 420 IPC, 1860. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making promise being absent, no offence under Section 420 IPC can be said to have been made out. In the instant case, there is no material to indicate that petitioner had any mala fide intention against the opposite party no. 2 which is clearly deductible from the Agreement dated December 20, 2006 entered between the parties. At the same time, in order to attract the ingredients of Section 420 IPC it is imperative on the part of the complainant to prima facie establish that there was an intention on part of the petitioner and/or others to cheat and/or to defraud the complainant right from the inception. The mode and manner in which petitioner entered the premise and committed theft of the articles had not been prima facie established.
30. Accordingly, the revisional application is allowed.
31. The proceedings being G.R. No. 1005 of 2009, arising out of Titagarh Police Case No. 122 dated 24.03.2009, under Sections 420/380/120B of the Indian Penal Code pending before the Learned Additional Chief Judicial Magistrate at Barrackpore is quashed.
32. Connected application if any is also disposed of accordingly.
33. There is no order as to cost.
34. Department is directed to return the case diary to the concerned police station.

35. Let the copy of this judgment be sent to the Learned Trial Court as well as the police station concerned for necessary information and compliance.
36. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)