

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3637 of 2019

With

CRAN 5 of 2023

M/s. Gurudayal Gangabux (Pvt.) Ltd. & Ors.

Vs

The State of West Bengal & Anr.

For the Petitioners : Mr. Ayan Bhattacharya,
Mr. Neelesh Choudhury,
Ms. Anuradha Poddar.

For the Opposite Party No. 2 : Ms. Priyanka Agarwal.

For the State : None.

Hearing concluded on : 15.01.2024

Judgment on : 07.03.2024

Shampa Dutt (Paul), J.:

1. The present revisional application has been preferred praying for quashing of the proceeding pending before the Learned Metropolitan Magistrate 9th Court, Kolkata, in connection with Complaint Case no. C.S. 32544 of 2019, under Sections 406/409/420/120B of the Indian Penal Code, 1860.
2. The petitioners' case herein is that the petitioner no. 1 is a company within the meaning of the Companies Act, 1956, having its Registered office as mentioned in the cause title. The petitioners no. 2, 3 & 4 are the Directors of the petitioner no.1.
3. The petitioners no. 2, 3 & 4 being the directors of the petitioner no. 1 are in full charge of the day to day affairs and/or business of petitioner no. 1 and they take all necessary decisions on behalf of the petitioner no. 1/company.
4. The petitioners state that the petitioner no. 1/company deals with the business of export & import and the petitioners are doing such business for a considerable period of time with great reputation.
5. For the purpose of smooth running of the aforesaid business the petitioners used to obtain financial assistance from various banks and other financial institutions. The petitioners further state that in the year 2016, the petitioners being aware of the name of opposite party no. 2 being a company, who used to provide financial assistance to individuals

and companies, approached the opposite party no. 2 for a loan and/or financial accommodation to the tune of Rs. 50 Lakhs.

6. After proper verification and inspection, the opposite party no. 2 agreed to provide and/or disburse a loan to the tune of Rs. 50 Lakhs and accordingly on 21.03.2016 the said amount was transferred through RTGS/NEFT in favour of the petitioner no.1. It was further agreed that the entire money will be repaid within March 2017, if not extended further.
7. After such disbursement and/or entrustment of the money the petitioners started paying the installments each and every month without any default. But in the month of December 2016 the petitioners decided to foreclose the loan, which was obtained from the opposite party no.2 by paying the residue amount, which was supposed to be paid within March 2017. And to discharge the liability to pay, the petitioners called upon the opposite party no. 2 and expressed the petitioners willingness to repay the residue amount.
8. The opposite party no.2 agreed to the proposal made by the petitioners and accordingly received the residue amount **in cash** in the month of December 2016. The petitioners were further assured by the opposite party no. 2 that no further documentation was required to prove that the petitioners had discharged their liability to pay and that the aforesaid transaction had come to an end. Since then no further transaction

and/or any loan accommodation was ever obtained from the opposite party no. 2.

9. It is stated that now a purported case has been initiated by the opposite party no. 2 under Sections 406/409/420/120B of the Indian Penal Code against the petitioners alleging that the petitioners have neglected to pay the loan amount since December 2016 and in spite of repeated reminders and/or demand made by the opposite party no. 2, the petitioners did not pay and further threatened the opposite party no. 2 with dire consequences.
10. On the basis of aforesaid allegation a complaint case was registered being complaint case no. 32544/2019 under Sections 406/409/420/120B of the Indian Penal Code against the petitioners.
11. The petitioners submit that in the Month of December, 2016 the petitioners to discharge their liability had already paid the substantial amount in cheque as well as in cash, which was supposed to be paid before March, 2017 to the opposite party no. 2 to which the opposite party no. 2 expressed his satisfaction and thereafter no further transaction and/or Loan was obtained from the opposite party no. 2. Therefore the allegation as made in the said purported complaint is absolutely baseless and therefore to prevent such abuse of the process of the court, such purported complaint is to be quashed in the interest of justice.
12. **An application under Section 340 Cr.P.C. has been filed by the opposite party no. 2/complaint alleging** that the opposite party no. 2

has preferred the instant application to bring out the false statements made by the abovenamed petitioners in the first revisional application, on oath, with a view to interfere with and obstruct the administration of justice. It is further stated that the abovenamed persons have deliberately resorted to using false evidence and making false statements before this Hon'ble Court in the instant proceedings whereby they also seek to invoke the plenary and inherent powers of this Hon'ble Court under Section 482 of Cr.P.C. which is meant for doing equitable justice.

- 13.** It is further stated that it is required to compare the statements/averments made under oath by the abovenamed petitioners under the said first revisional application to the statements/averments, made under oath, in a subsequent application moved under Section 482 of the Cr.P.C. being CRR No. 1450 of 2022 (hereinafter referred to as the 'said second revisional application'). The said second revisional application has been preferred by the petitioners no. 2 and 4 herein, being petitioner no. 1 and 2 therein respectively, inter alia, praying for quashing of the proceeding in C.S. No. 53426 of 2019 initiated by the opposite party no.2 herein against the petitioners therein under Sections 138/141 of the Negotiable Instruments Act, 1881 pending before the Court of the Learned Metropolitan Magistrate, 11th Court.
- 14.** While there are several false statements under the said first revisional application that the entire liability has been discharged by the petitioners, under the said second revisional application, there is not a

single pleading and/or averment that the entire liability of Rs. 50,00,000/- has been discharged by either of the petitioners or the company. Even though the said second revisional application was filed more than two years after the said first revisional application, there is not an iota and/or hint under such second application that the petitioners have repaid Rs. 50,00,000/- to the opposite party no. 2 in cash.

- 15.** The following averments from the said second revisional application as made by the petitioner has been stressed upon by the opposite party:-

***“10.4.** After proper verification and inspection done by the opposite party no. 2 agreed to provide and/or disbursed a loan to the tune of Rs. 50 lakh and accordingly on March 21, 2016 the said amount was remitted through RTGS/NEFT in favour of M/s Gurudayal Gangabux. It was further agreed that the entire money will be paid within March 2017, if not extended further.*

***10.5.** But subsequently the petitioners decided to foreclose the loan, which was obtained from the opposite party no. 2 by paying the residue amount, which was supposed to be paid within March 2017 and to discharge the liability to pay, the petitioners called upon the opposite party no. 2 and expressed their willingness to pay off the residue amount.”*

- 16.** As such, while the case being made out by the petitioners under the said first revisional application is that no case is made out against the petitioners under Sections 406/409/420/120B of the IPC since the entire amount has been repaid by the petitioners, the case being made out by the petitioners under the said second revisional application is that the impugned cheque is purportedly invalid for being purportedly

materially altered. Under the said second revisional application, the petitioners have stopped short of claiming that the entire dues have been repaid and have rather made a vague statement conveying willingness to repay.

17. Affidavit in opposition to the application under Section 340 Cr.P.C. denying all the statements therein and Supplementary Affidavit has been filed by the petitioner, stating that after filing of the revisional application being CRR No. 3637 of 2019, on October 23, 2019, the opposite party no. 2 had filed a petition of complaint before the Court of the Learned Chief Metropolitan Magistrate at Calcutta under Sections 138/141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "NI Act") on the allegations to the effect that after receiving the Summons in the present case on August 28, 2019, the petitioner no. 3 approached the opposite party no. 2 in the court premises and entered into a settlement and that pursuant to such settlement a cheque bearing Cheque No. 510577 dated August 01, 2019 for Rs. 50,00,000/- drawn on Kotak Mahindra Bank, Brabourne Road, Kolkata, duly signed by the petitioner no. 3 was issued by the petitioner no. 1. It was further alleged that **the said cheque on being presented to its banker was returned unpaid with the remark "alteration in date"**.
18. It is submitted that on April 19, 2022 on the date of examination-in-chief of the PW1, the opposite party no. 2 herein filed its affidavit-in-

chief along with the documents including the copy of the cheque, which was not made available to the petitioners earlier. That in spite of asking for inspection, the copy of the cheque was made available to the petitioners only on April, 19, 2022.

- 19.** It is stated that in the premises, being aggrieved by and dissatisfied with the proceeding being CS No. 53426 of 2019 under Sections 138/141 of the NI Act pending before the Court of the Learned Metropolitan Magistrate, 11th Court at Calcutta, the petitioners no. 2 and 4 herein filed a petition under Section 482 of the Cr.P.C. before this Hon'ble Court which was registered as CRR No. 1450 of 2022, seeking stay of all further proceedings in CS No. 53426 of 2019 under Sections 138/141 of the NI Act pending before the Court of the Learned Metropolitan Magistrate, 11th Court at Calcutta including the Order dated September 19, 2022 passed in connection therewith.
- 20.** The opposite party no. 2/complainant then filed an Affidavit in reply stating there in that they deny the statements made by the petitioners in their pleadings.
- 21.** The proceedings before the trial Court being complaint case no. 32544 of 2019 is under Sections 406/409/420/120B of the Indian Penal Code.
- 22.** In the petition of complaint it is thus stated that as the accused persons refused to make repayment, being merchants, committed cheating and criminal breach of trust punishable under Sections

406/409/420 read with 120B of the Indian Penal Code and are liable to be prosecuted accordingly.

23. That the representation and inducement made by the accused persons since very inception are of falsehood and all made only with the motive to defraud the complainant company, and being merchants by entering into a criminal conspiracy on false and fraudulent representations, the accused persons have taken the huge amount from the complainant company and have consumed many years deferring the repayment, eventually to shamelessly and maliciously refuse any liability for the same by blatantly and flatly denying the entire transaction.
24. Annexure P-2 at Page 23, is the ledger account of the petitioner in respect of the opposite party no. 2 for the period from 20.03.2016 to 31.03.2019.
25. The said statement of account shows payment of interest on the said loan amount. The claim of the petitioner is that the residue amount of Rs. 50,000/- was paid in cash in December, 2016 but there is admittedly no document in support of the said payment in cash, which has been explained as follows:-

*Accordingly, a Post-dated Cheque bearing No. 510577 date August 01, 2017 (**said PDC**) was issued by M/s Gurudayal Gangabux in favour of the opposite party no.2. Subsequently, on the request of the opposite party no. 2, the residue amount was paid in cash with the understanding by and between the parties that the said PDC would not be used. On account of mutual relationship between the parties, the said PDC which*

had been given by M/s Grurdayal Gangabux to the opposite party no. 2 was also not recalled by M/s Gurudayal Gangabux.

- 26.** The petitioners by way of filing their written argument and a rejoinder have submitted that the dispute if any is civil in nature.
- 27.** It is submitted that from the allegations leveled in the impugned complaint, it would be evident that the case of the opposite party no. 2 was a case of money lent and advanced. In the impugned complaint, the opposite party no. 2 had not only suppressed the factum of repayment of loan and/or issuance of the said PDC but also the fact of due repayment of loan by M/s Gurudayal Gangabux by paying in installments as would be evident from the Ledger the revisional application.
- 28.** No civil suit and/or money suit was filed by the opposite party no. 2 in order to enforce its monetary claim against M/s Gurudayal Gangabux.
- 29.** It is further submitted that from the allegations leveled in the present complaint, it would be evident that the claim of the opposite party no. 2 is purely civil in nature. In order to exert pressure upon the petitioners, the opposite party no. 2 had dressed up its claim as a criminal offence. It is trite law that mere non-payment and/or under payment is no offence under Section 420 of the IPC. In order to constitute an offence under Section 420 of the IPC, it is incumbent to have 'mens rea' from the very inception.

30. It is therefore submitted that the word “inducement” is qualified by the term “fraudulently” of “dishonestly”. ‘Mens rea’ from the inception is the crux of an offence under Section 420 of the IPC which differentiates it from a case of mere non-payment and/or under-payment. Subsequent arising of mens rea is not a constituent factor of an offence under Section 420 of the IPC.

31. The following judgments have been relied upon by the petitioners:-

1.	2023 SCC OnLine Cal	HTC India Pvt. Ltd. & Ors. v. Link Telecom Pvt. Ltd.	Entire
2.	(2023) 3 SCC 423	Deepak Gaba & Ors. V. State of Uttar Pradesh & Anr.	Para 18/19/20
3.	(2019) 16 SCC 739	Prof. R.K. Vijayasathary & Anr. v. Sudha Seetharam & Anr.	Para 15/16/17/18 /19/20/23/2 8
4.	(2019) 9 SCC 148	Satishchandra Ratanlal Shah v. State of Gujarat & Anr.	Para 13/14
5.	(2008) 1 C Cr LR (Cal) 789	Kingshuk Neogi v. The State of West Bengal & Anr.	Para 3/10/12/13
6.	(2005) 10 SCC 261	Hotline Teletubes and Components Ltd. & Ors. v. State of Bihar & Anr.	Entire
7.	(2001)	Alpic Finance Ltd.	Para 10

	3 SCC 513	v. P. Sadasivan & Anr.	
8.	(2000) 2 SCC 636	G. Sagar Suri & Anr. v. State of U.P. & Ors.	At Page 96.
9.	(2005) 1 SCC 122	Zandu Pharmaceuticals Works Ltd. & Ors. vs Mohd. Sharaful Haque & Anr.	Para 13
10.	1992 Cri. L.J. 1448 (Cal)	A.K. Khosla & Ors. vs. T.S. Venkatesan & Anr.	Para 52/53/54
11.	AIR 1992 SC 604	State of Haryana & Ors. vs. Ch. Bhajan Lal & Ors.	Para 108

32. Besides that it is submitted that the instant proceeding is tainted with manifest mala fide which is evident from the suppression of material facts which is as follows:-

- a. servicing of loan by repayment of interest;
- b. issuance of PDC on April 21, 2017 and receipt thereof by the opposite party no. 2;
- c. repayment of the loan in cash with the understanding of not to use the said PDC;
- d. letter dated October 01, 2019 issued by the petitioners in response to the purported Notice under Section 138(b) of the NI Act.

33. It is finally submitted that a proceeding which is an outcome of suppression of material facts swims into nullity. The Hon'ble Supreme Court of India and this Hon'ble Court time and again had frowned on such practice of suppression of material fact and therefore quashed the proceedings which were with the aid of suppression.

34. The opposite party no. 2 has also filed written notes and further notes an Argument relying upon following judgments:-

- i. Sanapareddy Maheedhar and Anr. vs State of Andhra Pradesh and Anr., (2007) 13 (Add) S.C.R.*
- ii. Neeharika Infrastructure Pvt. Ltd. vs State of Maharashtra and Anr., (2021) SCC online SC 315.*
- iii. Vijayander Kumar and Ors. vs State of Rajasthan and Anr., (2014) 3 SCC 389.*
- iv. Lalmuni Devi (Smt) vs State of Bihar and Ors., 9 (2001) 2 SCC 17 SC Online 1795.*
- v. Murray & Co. vs Ashoke Kr. Newatia and Anr., (2000) 2 SCC 367.*
- vi. Mehtab Son of Shri Mohd. Sabir vs Union of India, (2011) SCC Online Del 2895: (2013) 2 Tac 307.*
- vii. Priyanka Srivastava and Anr. vs State of Uttar Pradesh and Ors., (2015) 6 SCC 287.*
- viii. Baban Singh and Ors. vs Jagdish Singh and Ors., AIR 1967 SC 68, (1966) 3 SCR 552.*

ix. **Jakir Hossain Gayen vs Union of India, (2020) CRM 7902 of (2020).**

35. Section 406 of the Indian Penal Code, lays down:-

“406. Punishment for criminal breach of trust.— Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Ingredients of offence.— The essential ingredients of the offence under Sec. 406 are as follows:-

- (1) Mens rea is essential ingredient of offence.
- (2) There must be an entrustment, there must be misappropriation or conversion to one's own use, or use in violation of a legal direction or of any legal contract.
- (3) The accused was entrusted with the property or domain over it.
- (4) He dishonestly misappropriated or converted to his own use such property;
- (5) He dishonestly used or disposed of that property or willfully suffered any other person to do so in failure of-
 - (a) Any direction of law prescribing the mode in which such trust is to be discharged, or
 - (b) Any legal contract made touching upon the discharge of such trust.”

36. Section 409 of I.P.C. lays down:-

“409. Criminal breach of trust by public servant, or by banker, merchant or agent.- Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Ingredients of offence.- The essential ingredients of the offence under sec. 409 are as follows:-

- (1) Accused was a public servant, or a banker or merchant or agent or factor or broker or an attorney;
- (2) In such capacity accused was entrusted with certain property or he gained domain over such property which was not his own;
- (3) Accused committed criminal breach of trust with respect to such property.”

37. The Supreme Court in **N. Raghavender vs State of Andhra Pradesh,**

CBI, Criminal Appeal No. 5 of 2010, on 13.12.2021, held:-

“41. Section 409 IPC pertains to criminal breach of trust by a public servant or a banker, in respect of the property entrusted to him. The onus is on the prosecution to prove that the accused, a public servant or a banker was entrusted with the property which he is duly bound to account for and that he has committed criminal breach of trust. **(See: Sadupati Nageswara Rao v. State of Andhra Pradesh, (2012) 8 SCC 547).**

42. The entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under Section 405 are a sine qua non for making an offence punishable under Section 409 IPC. The expression ‘criminal breach of trust’ is defined under Section 405 IPC which provides, inter alia, that whoever being in any manner entrusted with property or with any dominion over a property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property contrary to law, or in violation of any law prescribing the mode in which such trust is to be discharged, or contravenes any legal contract, express or implied, etc. shall be held to have committed criminal breach of trust. Hence, to attract Section 405 IPC, the following ingredients must be satisfied:

- (i) Entrusting any person with property or with any dominion over property;

(ii) That person has dishonestly misappropriated or converted that property to his own use;

(iii) Or that person dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law or a legal contract.

43. It ought to be noted that the crucial word used in Section 405 IPC is 'dishonestly' and therefore, it pre-supposes the existence of mens rea. In other words, mere retention of property entrusted to a person without any misappropriation cannot fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. The second significant expression is 'misappropriates' which means improperly setting apart for ones use and to the exclusion of the owner.

44. No sooner are the two fundamental ingredients of 'criminal breach of trust' within the meaning of Section 405 IPC proved, and if such criminal breach is caused by a public servant or a banker, merchant or agent, the said offence of criminal breach of trust is punishable under Section 409 IPC, for which it is essential to prove that:

(i) The accused must be a public servant or a banker, merchant or agent;

(ii) He/She must have been entrusted, in such capacity, with property; and

(iii) He/She must have committed breach of trust in respect of such property.

45. Accordingly, unless it is proved that the accused, a public servant or a banker etc. was 'entrusted' with the property which he is duty bound to account for and that such a person has committed criminal breach of trust, Section 409 IPC may not be attracted. 'Entrustment of property' is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was 'entrusted' to the accused, it is not necessary to prove further, the actual

mode of entrustment of the property or misappropriation thereof. Where the 'entrustment' is admitted by the accused or has been established by the prosecution, the burden then shifts on the accused to prove that the obligation vis-à-vis the entrusted property was carried out in a legally and contractually acceptable manner."

38. In *Deepak Gaba & Ors. vs State of Uttar Pradesh & Anr.*, in *Criminal Appeal No. 2328 of 2022*, on 2 January, 2023, the Supreme Court held:-

"13. Section 406 of the IPC8 prescribes punishment for breach of trust which may extend to three years or with fine or with both, when ingredients of Section 405 of the IPC are satisfied. For Section 406 of the IPC to get attracted, there must be criminal breach of trust in terms of Section 405 of the IPC.9 For Section 405 of the IPC to be attracted, the following have to be established:

(a) the accused was entrusted with property, or entrusted with dominion over property;

8 406. Punishment for criminal breach of trust.—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

9 405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

(b) the accused had dishonestly misappropriated or converted to their own use that property, or dishonestly used or disposed of that property or wilfully suffer any other person to do so; and

(c) such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

14. *Thus, criminal breach of trust would, inter alia, mean using or disposing of the property by a person who is entrusted with or otherwise has dominion. Such an act must not only be done dishonestly, but also in violation of any direction of law or any contract express or implied relating to carrying out the trust.”*

39. The facts and circumstances in the present case show that:-

- (i) There is no material to prove “dishonest intention” and thus the existence of ‘mens rea’.
- (ii) There has been no ‘mis appropriation’ of the ‘property entrusted’ as, a post dated cheque had been issued by the petitioner no. 1 in favour of the opposite party no. 2 in spite of their case being that payment in cash had already been made, which is the subject matter in CRR 1450 of 2022.
- (iii) There has been no “mis appropriation” of the “property entrusted” as repayment has been effected either in cash and/or by issuing a post dated cheque.
- (iv) There has been no “use” of the disputed property by the petitioner in violation of law or contract. Thus, no “mis appropriation” which means improperly setting apart for ones use and to the exclusion of the owner (opposite party), **(N.**

Raghavender vs State of Andhra Pradesh (Supra)) and

(Deepak Gaba & Ors. vs State of Uttar Pradesh & Anr. (Supra)) .

- (v) There has been no 'actual use' of the property by the petitioner and no dishonest intention and thus no mis-appropriation.
- (vi) As such the two fundamental ingredient of 'criminal breach of trust' within the meaning of Section 405 IPC has not been proved in the present case ***(N. Raghavender vs State of Andhra Pradesh (Supra))***.

40. Thus the ingredients required to constitute the offence of criminal breach of trust are absent (no materials on record).

41. In the present case, the dispute relates to a loan and its repayment.

There is absolutely no material on record to prima facie show that the accused has dishonestly mis-appropriated or converted the property for his own use. There is a strong case of repayment in this case.

42. It is also submitted that the continuance of both the proceedings under Sections 406/409/420/120B of the Indian Penal Code (CRR 3637 of 2019) as also under Section 138 of the Negotiable Instruments Act (CRR 1450 of 2022) is not maintainable in the eye of law as both cases relate to repayment of the same loan amount.

43. The Supreme Court in *Sangeetaben Mahendrabhai Patel vs State of Gujarat & Anr.*, in Criminal Appeal No. 645 of 2012, on 23

April, 2012, considering all previous judgments of the Court held:-

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

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

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

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the

provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

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

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

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

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

44. In respect of the present dispute even though a proceeding under Section 138 of the N.I. Act is pending, the present case under Sections 406/409/420/120B of IPC on the same dispute is maintainable as, though the facts may overlap but the ingredients of offences in the two proceedings are entirely different (***Sangeetaben Mahendrabhai Patel vs State of Gujarat & Anr. (Supra)***).

45. In *M/s. Indian Oil Corporation vs. M/S NEPC India Ltd. & Ors., Appeal (crl.) 834 of 2002 decided on 20.07.2006*, the Court considered the following point among the two points decided.

“8. The High Court by common judgment dated 23.3.2001 allowed both the petitions and quashed the two complaints. It accepted the second ground urged by the Respondents herein, but rejected the first ground. The said order of the High Court is under challenge in these appeals. On the rival contentions urged, the following points arise for consideration :

(i) Whether existence or availment of civil remedy in respect of disputes arising from breach of contract, bars remedy under criminal law?

(ii) Whether the allegations in the complaint, if accepted on face value, constitute any offence under sections 378, 403, 405, 415 or 425 IPC ?

Re : Point No. (i) :

9. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few - Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre [1988 (1) SCC 692], State of Haryana vs. Bhajanlal [1992 Supp (1) SCC 335], Rupan Deol Bajaj vs. Kanwar Pal Singh Gill [1995 (6) SCC 194], Central Bureau of Investigation

v. Duncans Agro Industries Ltd., [1996 (5) SCC 591], State of Bihar vs. Rajendra Agrawalla [1996 (8) SCC 164], Rajesh Bajaj v. State NCT of Delhi, [1999 (3) SCC 259], Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [2000 (3) SCC 269], Hridaya Ranjan Prasad Verma v. State of Bihar [2000 (4) SCC 168], M. Krishnan vs Vijay Kumar [2001 (8) SCC 645], and Zandu Phamaceutical Works Ltd. v. Mohd. Sharaful Haque [2005 (1) SCC 122]. The principles, relevant to our purpose are :

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

10. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.”

46. Now in the lines of the judgment under reference let us see if the allegations in the complaint in the present case, if accepted on face value, prima facie constitute any offence under Section 420 of the Indian Penal Code, as alleged against the petitioners.

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

“420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Ingredients of offence.— The essential ingredients of the offence under Sec. 420 are as follows:-

- (1) There should be fraudulent or dishonest inducement of a person by deceiving him;
- (2) (a) The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or

(b) the person so induced to do anything which he would not do or omit if he were not so deceived, and

(c) in cases covered by second part of clause (a), the act or omission should be one which caused or was likely to cause damage or harm to the person induced in body, mind or property.

The two essential ingredients of the offence under this section are –

(A) Deceit, that is to say dishonest or fraudulent misrepresentation, and

(B) Inducing the person deceived to part with property.”

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

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

49. The amount due in the present case is also the subject matter in a separate proceedings under Section 138 of the N.I. Act (CRR 1450 of 2022).

50. In the present case, admittedly there was a business transaction between the parties but there is no case against the petitioners that he dishonestly induced the complainant. There was neither any deceit nor any inducement to deceive the complainant. The transaction was

admittedly for the benefit of both the parties. The fact of wrongful loss of one resulting in wrongful gain of another is not present in this case as loan has been admitted and the dispute relates to its repayment. Thus the ingredients required to constitute the offence under Section 420 IPC are clearly absent in the present case.

51. This Court also relies upon the following judgments of the Supreme Court:-

a) *Sushil Sethi and Anr. vs The State of Arunachal Pradesh and Ors., AIR 2020 SC 765, Criminal Appeal No. 125 of 2020 (arising out of SLP (Crl.) No. 590 of 2019), on 31 January, 2020*, the Supreme Court held:-

“7.2 In the case of Vesa Holdings Private Limited (supra), it is observed and held by this Court 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. It is further observed and held that 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. It is further observed and held that 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 IPC can be said to have been made out. It is further observed and held that the real test is whether the allegations in the complaint disclose the criminal offence of cheating or not.

7.3 In the case of Hira Lal Hari Lal Bhagwati (supra), in paragraph 40, this Court has observed and held as under:

“40. It is settled law, by a catena of decisions, that for 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. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as officebearers right at the time of making application for exemption. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Penal Code, 1860 does not arise. We have read the chargesheet as a whole. There is no allegation in the first information report or the chargesheet indicating expressly or impliedly any intentional deception or fraudulent/dishonest intention on the part of the appellants right from the time of making the promise or misrepresentation. Nothing has been said on what those misrepresentations were and how the Ministry of Health was duped and what were the roles played by the appellants in the alleged offence. The appellants, in our view, could not be attributed any mens rea of evasion of customs duty or cheating the Government of India as the Cancer Society is a nonprofit organisation and, therefore, the allegations against the appellants levelled by the prosecution are unsustainable. The Kar Vivad Samadhan Scheme certificate along with Duncan [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045] and Sushila Rani [(2002) 2 SCC 697 : (2002) 2 Apex Decisions] judgments clearly absolve the appellants herein from all charges and allegations under any other law once the duty so demanded has been paid and the alleged offence has been compounded. It is also settled law that once a civil case has been compromised and the alleged offence has been compounded, to continue the criminal proceedings thereafter would be an abuse of the judicial process.” It is further observed and held by this Court in the aforesaid decision that to bring home the charge of conspiracy within the ambit of Section 120B of the IPC, it is necessary to establish that there was an

agreement between the parties for doing an unlawful act. It is further observed and held that it is difficult to establish conspiracy by direct evidence.

7.4 *In the case of V.Y Jose (supra), it is observed and held by this Court that one of the ingredients of cheating is the existence of fraudulent or dishonest intention of making initial promise or existence thereof, from the very beginning of formation of contract. It is further observed and held that it is one thing to say that a case has been made out for trial and as such criminal proceedings should not be quashed, but it is another thing to say that a person should undergo a criminal trial despite the fact that no case has been made out at all.*

7.5 *In the case of Sharad Kumar Sanghi (supra), this Court had an occasion to consider the initiation of criminal proceedings against the Managing Director or any officer of a company where company had not been arrayed as a party to the complaint. In the aforesaid decision, it is observed and held by this Court that in the absence of specific allegation against the Managing Director of vicarious liability, in the absence of company being arrayed as a party, no proceedings can be initiated against such Managing Director or any officer of a company. It is further observed and held that when a complainant intends to rope in a Managing Director or any officer of a company, it is essential to make requisite allegation to constitute the vicarious liability.*

7.6 *In the case of Joseph Salvaraja A v. State of Gujarat (2011) 7 SCC 59, it is observed and held by this Court that when dispute between the parties constitute only a civil wrong and not a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.*

7.7 *In the case of Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1, it is observed and held by this Court that the Court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. It is further observed and held by this Court that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. It is further observed and held that*

inherent jurisdiction of the High Courts under Section 482 Cr.P.C. though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself.

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 Cr.P.C. and to quash the impugned criminal proceedings.”*

b) *Birla Corporation Ltd. vs. Adventz Investments and Holdings Limited & Ors., Criminal Appeal nos. 875, 876, 877 of 2019, wherein the Court held:-*

“86. *In Indian Oil Corpn. v. NEPC India Ltd. and Others (2006) 6 SCC 736, the Supreme Court after observing that there is a growing tendency in business circles to convert powerful civil disputes in criminal cases held as under:-*

“14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.”

c) *In Jay Shri & Anr. vs State of Rajasthan, Criminal Appeal No. of 2024 (arising out of SLP (Crl.) No. 14423 of*

2023), vide an order dated January 19, 2024, the Supreme

Court held:-

“Prima facie, in our opinion, mere breach of contract does not amount to an offence under Section 420 or Section 406 of the Indian Penal Code, 1860, unless fraudulent or dishonest intention is shown right at the beginning of the transaction. This Court has time and again cautioned about converting purely civil disputes into criminal cases. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.”

- 52.** In the present case there is no materials to show that there was any existence of dishonest/fraudulent intention while making any initial promise that is from the beginning of formation of contract.
- 53.** The petitioners were repaying the loan as agreed, when they decided to the clear the dues prematurely.
- 54.** In the said judgment in ***Birla Corporation Ltd. vs Adventz Investments and Holdings Limited & Ors. (supra)*** the Supreme Court also observed:-

“82. Exercise of power under Section 482 Cr.P.C. envisages three circumstances in which the inherent jurisdiction may be exercised namely:- (i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice. Inherent jurisdiction under Section 482 Cr.P.C. though wide has to be exercised sparingly, carefully and with caution.

83. *It is well settled that the inherent jurisdiction under Section 482 Cr.P.C. is designed to achieve a salutary purpose and that the criminal proceedings ought not to be permitted to degenerate into a weapon of harassment. When the Court is satisfied that the criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon the accused, in exercise of the inherent powers, such proceedings can be quashed. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, the Supreme Court reviewed the earlier decisions and summarised the principles as to when the issue of process can be quashed and held as under:-*

“5. Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminates into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that

there is sufficient ground for proceeding against the accused; (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.”

84. *In State of Haryana and Others v. Bhajan Lal and Others 1992 Supp (1) SCC 335, the Supreme Court considered the scope of inherent powers of the Court and after referring to earlier decisions, the Supreme Court enumerated categories of cases by way of illustration where the extraordinary jurisdiction under Article 226 of the Constitution of India can be exercised by the High Court to prevent abuse of process of Court or otherwise to secure ends of justice. It was held that “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.”*

87. *In Madhavrao Jiwajirao Scindia and Others v. Sambhajirao Chandrojirao Angre and Others (1988) 1 SCC 692, it was held that “when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima-facie establish the offence.” It was further held that “while considering the matter, the court is to take into consideration any special feature which appear in a particular case showing whether or not it is expedient in the interest of justice to permit a prosecution to continue.”*

88. The FIR or the criminal proceedings can be quashed if the allegations do not make out a prima-facie case or allegations are so improbable that no prudent person would ever reach a just conclusion that there are sufficient grounds for proceeding against the accused.....”

55. In the Present case, there is no substance in the allegations and no material exists to prima facie make out the complicity of the petitioner in a cognizable offence as alleged. As such the proceedings in this case should be quashed by exercising this courts inherent powers for ends of justice and to prevent the abuse of process of the court.

56. The revisional application being CRR 3637 of 2019 is accordingly allowed.

57. The proceedings pending before the Learned Metropolitan Magistrate 9th Court, Kolkata, in connection with Complaint Case no. C.S. 32544 of 2019, under Sections 406/409/420/120B of the Indian Penal Code, 1860, **is hereby quashed in respect of the petitioners herein.**

58. Considering the observations as made in the Judgments in CRR 3637 of 2019 & CRR 1450 of 2022, there is no merit in CRAN 5 of 2023 and as such the same stands rejected.

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

60. Interim order, if any, stands vacated.

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

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

(Shampa Dutt (Paul), J.)