IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 791 of 2018
With
CRAN 7 of 2021 & CRAN 9 of 2022

Abhinandan Dyeing Pvt. Ltd. & Ors.
Versus
The State of West Bengal & Another

For the Petitioners	:	Mr. Meghajit Mukherjee Adv. Ms. Brinda Sengupta, Adv. Ms. Srijeeta Gupta, Adv. Ms. Sonia Das, Adv.
For the Opposite Party No. 2	:	Mr. Niladri Sekhar Ghosh, Adv. Mr. Sourav Mondal, Adv. Ms. Sampurna Chatterjee, Adv. Ms. Labani Sikder, Adv. Mr. Rony Mondal, Adv.
Heard on	:	05.11.2024
Judgment on	:	03.01.2025

Ajay Kumar Gupta, J:

1. Petitioners have filed this Criminal Revisional application under Section 482 of the Code of Criminal Procedure, 1973 praying for setting aside of the Impugned Order dated 26th March, 2018 passed by the Court of the Learned Judge, Bench-I of City Sessions Court at Calcutta in Criminal Revision No. 174 of 2017 thereby affirmed the Order dated 17th April, 2017 passed by the Court of the Learned Metropolitan Magistrate, 3rd Court at Calcutta in connection with Case No. CN-11778 of 2017 under Sections 406/420/120B of the Indian Penal Code, 1860.

2. By the said impugned order dated 17th April, 2017, the Learned Metropolitan Magistrate has taken cognizance under Sections 406/420/120B of the Indian Penal Code, 1860 on the basis of a petition of complaint filed along with affidavit and documents before the Learned Magistrate. The Learned Magistrate, in the said case, examined the complainant as well as another witness under Section 200 of the Code of Criminal Procedure, 1973 and after going through the initial deposition of both witnesses and as per the documents produced by the complainant, a *prima facie* case was found to be made out against the accused persons under Sections 406/420/120B of the Indian Penal Code, 1860 and ultimately issued summons against the accused persons and fixed a date on 06.06.2017 for S/R and Appearance. The impugned order, under challenge, is set out herein below: -

> *"Today is fixed for S/A.*
>
> *Complainant is present along with all original documents.*
>
> *Complainant and the witness is examined U/s 200 Cr.P.C.*
>
> *Having gone through the initial deposition of both the witness and as per the document produced the complainant, a prima facie case U/s 406/420/120B of Indian Penal Code is found to be made out against the accused person.*
>
> *Hence, issue summons against the accused persons U/s 406/420/120B of Indian Penal Code.*
>
> *Fix 06.6.17 for S/R and Appearance.*
>
> *Requisites at once."*

3. The brief facts of the instant case are that one Prem Kumar Agarwal, by virtue of a special power of attorney dated 28th July, 2016, executed in his favour by M/S India Trading Oil Company (herein after referred as 'the Complainant') filed a petition of complaint under Section 200 of the Cr.PC before the Learned Additional Chief Metropolitan Magistrate at Calcutta and same was registered as CN – 11778 of 2017. In the said petition of complaint, the complainant alleges that in or about June 2015, the accused persons had proposed to buy Furnace Oil. Based on this proposal and believing the accused persons to be of high repute, the complainant agreed to sell different quantities of the furnace oil to all of accused on different occasions worth to a total of Rs. 14,74,772/-.

4. The said products were duly accepted by the accused without any demur or protest regarding their quality or quantity. Despite invoices being issued on the respective dates of supply of furnace oil, the accused persons failed, neglected and/or ignored to make the payment of invoices upon demand, the accused persons avoided payment under various pretext and, subsequently, the accused persons snapped all contacts with complainant. As such, the petitioners had intention to cheat the complainant from the outset for their wrongful gain, thereby caused wrongful loss to the complainant to the tune of Rs. 14,74,772/- and they have also misappropriated aforesaid sum with mala fide intention. Accordingly, they have committed an offence under Sections 406/420/120B of the Indian Penal Code, 1860.

5. Whereas the contention of the petitioners is that the Learned Judge has failed to appreciate that non-payment/under payment, ipso facto, does not make out a criminal offence. The petitioners are innocent and are in no way connected with the instant case for criminal offence. In order to enforce the civil claim, the complainant has been dressed of as a criminal offence.

6. It is further the contention of the petitioners that they had paid Rs. 3, 05, 20,532/- to the opposite party no. 2. The complainant has only claimed interest for delayed payment in the petition of complaint @ 24% per annum, which is evidently a civil matter. But, without considering the entire facts, the Learned Court below vide order dated 17th April, 2017 mechanically and without applying his judicious mind issued process against the petitioners and fixed a date on 06.06.2017 for S/R and Appearance.

7. Being aggrieved with the said order, the petitioners have challenged the same before the Court of the Learned Chief Judge, City Sessions Court at Calcutta by way of filing a Criminal Revision No. 174 of 2017 under Sections 397/399 of CrPC. However, by Judgment and Order dated 26th March, 2018, the Learned Judge, Bench – I of City Sessions Court, Calcutta affirmed the impugned order dated 17th April, 2017 passed by the Learned Metropolitan Magistrate, 3rd Court at Calcutta in case No. CN – 11778 of 2017 without delving into the merit of the case, despite the fact the criminal case cannot stand based on civil disputes. Hence, this Criminal Revisional application.

SUBMISSION ON BEHALF OF THE PETITIONERS:

8. Learned counsel appearing on behalf of the petitioners submitted that the actually commercial transaction commenced on and from 2005. The petitioners had paid amount of purchase of furnace oil time to time and there is no outstanding amount at all. The complainant only charged interest on the principal amount for alleged delayed payment. Apart from that, the complainant has also charged excess rate of furnace oil. It came to their knowledge in the 1st week of July, 2015, during an International Audit Exercise, that the rates charged by the opposite party no. 2 in the bills on account of supply so affected were in excess of rates published in the Ready Reckoner issued by HPC. The petitioners would not have made any payment against such excess of rates charged by the complainant as they are not entitled to.

9. It was further submitted that the petitioners are not liable to pay the amount as claimed by the complainant to the tune of Rs. 14,74,772/- as the complainant had already over charged the petitioners. As such, claiming of interest @ 24% per annum or any other rates does not and cannot arise. All allegations contained in the said petition of complaint have been denied and disputed by the petitioners and sought for setting aside the impugned order dated 26th March, 2018 passed by the Learned Judge, Bench – I, City Sessions Court at Calcutta.

10. The learned counsel appearing on behalf of the petitioners also placed reliance of following judgments to bolster his contention that none of the alleged offences has been attracted in the present case. The complaint is fake. The allegations do not show or reflect any ingredients of the offences as alleged qua the petitioners herein. It is purely a commercial transaction. Therefore, to prevent the abuse of process of law or secure the ends of justice, the order may be set aside. Those judgments are as under: -

i. *Alpic Finance Ltd. Vs. P. Sadasivan & Anr.*[1]*;*

ii. *Hotline Teletubes and Components Ltd. & Ors. Vs. State of Bihar & Anr.*[2]*;*

iii. *Satishchandra Ratanlal Shah Vs. State of Gujarat & Anr.*[3]*;*

iv. *Uma Shankar Gopalika Vs. State of Bihar & Anr.*[4]*;*

v. *Vijay Kumar Ghai & Ors. Vs. State of West Bengal & Ors.*[5]*;*

[1] (2001) 3 SCC 513;
[2] (2005) 10 SCC 261;
[3] (2019) 9 SCC 148;
[4] (2005) 10 SCC 336;
[5] (2022) 7 SCC 124;

vi. *Sarabjit Kaur Vs. State of Punjab and Anr.*[6]*;*

vii. *Lalit Chaturvedi and Others Vs. State of Uttar Pradesh and Another*[7]*;*

viii. *A. M. Mohan Vs. The State represented by SHO and Anr.*[8]*;*

ix. *Naresh Kumar & Anr. Vs. The State of Karnataka & Anr.*[9]*;*

x. *Sanat Karar & Ors. Vs. State of West Bengal & Anr.*[10]*;*

xi. *Gannon Dunkerley & Company Limited & Ors. Vs. Chhatishgarh Impex Private Limited*[11]*;*

SUBMISSION ON BEHALF OF THE OPPOSITE PARTY NO. 2:

11. Per contra, learned counsel appearing on behalf of the opposite party no. 2 submitted that the complainant has disclosed all the ingredients of the offences punishable under Sections 406/420/120B of the Indian Penal Code, 1860. In spite of several reminders, the petitioners had never paid the amount claimed by the complainant.

12. It was further submitted that the Learned Court below rightly issued summons after examining two witnesses under Sections 200 of the CrPC and when it is found prima facie case

[6] (2023) 5 SCC 360;
[7] 2024 SCC OnLine SC 171;
[8] 2024 SCC OnLine SC 339;
[9] 2024 (3) SCALE 664 : 2024 SCC OnLine SC 268;
[10] 2014 (1) AICLR 670;
[11] 2024 SCC Online Cal 7092.

against the petitioners, summons was issued. Subsequently, the Learned Sessions Judge also satisfied with the said impugned order and affirmed the same. The facts of cheating and inducement would be decided after conclusion of Trial as such, at this initial stage, if the impugned order is set aside, it would greatly prejudice the complainant. Therefore, the instant Criminal Revisional application is liable to be dismissed.

DISCUSSIONS AND FINDINGS BY THIS COURT:

13. Heard the arguments of the rival parties and on perusal of the record as well as judgments referred by the learned counsel appearing on behalf of the petitioners, this Court finds the dispute arises from the alleged failure of the accused person to pay the sum of Rs. 14,74,772/- (Rupees Fourteen Lakhs Seventy-Four Thousand Seven Hundred Seventy-Two) only. Admittedly, there have been commercial transactions between the complainant and accused persons over a prolonged period. The accused persons had purchased furnace oil from the complainant from time to time. Accused person had accepted the alleged invoices without raising any protest or demur as to the amount of the invoices and supply of furnace oil and undertook to make the payment of the invoices soon. Despite the lapse of the agreed period of payment, the accused persons failed and/or neglected and/or ignored to make the payment of the invoices in spite of repeated demand by the complainant and finally snapped all contacts with the complainant.

14. The accused person collectively replied to the notice dated 30.04.2016 issued by the complainant through accused no. 1 stating therein that the complainant had charged accused persons amount in excess of the rates as per the reckoner of HPCL and also that if accused persons had been aware of this, they would not have accepted the invoices. The accused persons also mentioned that while Ministry of Petroleum and Natural Gas regulates the prices of petrol, diesel, LP Gas and kerosene oil, the prices of other products such as furnace oil, are not regulated and are determined by the sellers like the complainant, based on the competitive market process.

15. Now, the question arises non-payment of alleged invoices amount of Rs. 14,74,772/- (Rupees Fourteen Lakhs Seventy-Four Thousand Seven Hundred Seventy-Two) only to the complainant would constitute offence punishable under Sections 406/420/34 of the Indian Penal Code, 1860?

16. Non-payment of amount of a commercial transaction is apparently case of civil in nature and that could be decided by Civil Court. No other prima facie ingredients were made out by the

Opposite Party in a petition of complaint regarding offence punishable under Sections 406/420/120B of the Indian Penal Code as alleged.

17. Upon careful perusal of the petition of complaint, it appears that there was no fraudulent or dishonest inducement or deception by intentional practice by the Petitioners right from the beginning. Even if subsequent payment has not been made, that will not tantamount to deception, fraudulent or dishonest inducement nor would it amount to deception by intentional means right from the beginning. It is not the case of the complainant that the accused persons have not paid any amount from the very beginning.

18. This Court also relied on Judgments rendered by the Hon'ble Apex Court on this issue. Those are taken up herein below:

The Hon'ble Supreme Court in the case of ***The State of Kerala v. A. Pareed Pillai and Anr.***[12] has held as follows: -

> *"To hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise. Such a dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfil the promise."*

[12] 1972 Cri.LJ. 1243

19. In the present case, it has nowhere been stated that at the very inception there was any intention on behalf of the petitioners to deceive, which is a condition precedent for an offence under Section 420 of the Indian Penal Code, 1860. Furthermore, there is nothing in the complaint to show that the petitioners had dishonest and fraudulent intention at the time of placing order for supply of Furnace Oil or when the opposite party no. 2 supplies the Furnace Oil to the Petitioners. It is admitted facts that there were previous commercial transactions between the parties. Dispute arises between the parties when the said company allegedly failed to pay the number of invoices to the tune of Rs. 14,74,772/- (Rupees Fourteen lacs Seven four thousand seven hundred seventy-two) only. Whereas, the petitioners' case is different. There are disputes between the parties regarding interest charges and excess payment of previous invoices amount. This dispute is apparently civil in nature and that could be decided by Civil Court. No other prima facie ingredients were made out by the opposite party no. 2 in a petition of complaint regarding offence punishable under Section 406 or 420 of the CrPC as alleged.

20. The difference between Criminal breach of Trust and Cheating has been highlighted by the Hon'ble Supreme Court in the case of ***Delhi Race Club (1940) Ltd. & Ors vs. State of Uttar Pradesh & Anr.***[13] in paragraphs nos. 24 to 30 as under:-

> *"24. This Court in its decision in* ***S.W. Palanitkar & Ors. v. State of Bihar & Anr.*** *reported in (2002) 1 SCC 241 : AIR 2001 SC 2960) expounded the difference in the ingredients required for constituting an of offence of criminal breach of trust (Section 406 IPC) viz-a-viz the offence of cheating (Section 420). The relevant observations read as under: -*
>
> > *"9. The ingredients in order to constitute a criminal breach of trust are: (i) entrusting a person with property or with any dominion over property, (ii) that person entrusted (a) dishonestly misappropriating or converting that property to his own use; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, (ii) of any legal contract made, touching the discharge of such trust.*
> >
> > *10. The ingredients of an offence of cheating are: (i) there should be fraudulent or dishonest inducement of a person by deceiving him, (ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced*

[13] AIR 2024 SC 4531 : AIR Online 2024 SC 612.

> *to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by (ii)(b), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."*

25. What can be discerned from the above is that the offences of criminal breach of trust (Section 406 IPC) and cheating (Section 420 IPC) have specific ingredients.

In order to constitute a criminal breach of trust (Section 406 IPC): -

1) There must be entrustment with person for property or dominion over the property, and

2) The person entrusted: -

a) dishonestly misappropriated or converted property to his own use, or

b) dishonestly used or disposed of the property or willfully suffers any other person so to do in violation of:

i. any direction of law prescribing the method in which the trust is discharged; or

ii. legal contract touching the discharge of trust (see: S.W.P. Palanitkar (supra).

Similarly, in respect of an offence under Section 420 IPC, the essential ingredients are: -

1) deception of any person, either by making a false or misleading representation or by other action or by omission;

2) fraudulently or dishonestly inducing any person to deliver any property, or

3) the consent that any persons shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit (see: Harmanpreet Singh Ahluwalia v. State of Punjab, (2009) 7 SCC 712 : (2009) Cri.L.J. 3462 (SC))

26. Further, in both the aforesaid sections, mens rea i.e. intention to defraud or the dishonest intention must be present, and in the case of cheating it must be there from the very beginning or inception.

27. In our view, the plain reading of the complaint fails to spell out any of the aforesaid ingredients noted above. We may only say, with a view to clear a serious misconception of law in the mind of the police as well as the courts below, that if it is a case of the complainant that offence of criminal breach of trust as defined under Section 405 of IPC, punishable under Section 406 of IPC, is committed by the accused, then in the same breath it cannot be said that the accused has also committed the offence of *cheating as defined and explained in Section 415 of the IPC, punishable under Section 420 of the IPC.*

28. Every act of breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of manipulating act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person may seek his remedy for damages in civil courts but, any breach of trust with a mens rea, gives rise to a criminal prosecution as well. It has been held in Hari Prasad Chamaria v. Bishun Kumar Surekha & Ors., reported in (1973) 2 SCC 823 : (AIR 1974 SC 301) as under:

> *"4. We have heard Mr. Maheshwari on behalf of the appellant and are of the opinion that no case has been made out against the respondents under Section 420 Penal Code, 1860. For the purpose of the present appeal, we would assume that the various allegations of fact which have been made in the complaint by the appellant are correct. Even after making that allowance, we find that the complaint does not disclose the commission of any offence on the part of the respondents under Section 420 Penal Code, 1860. There is nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with Rs. 35.000/- There is also nothing to indicate that the respondents induced the appellant to pay them Rs. 35,000/- by*

> *deceiving him. It is further not the case of the appellant that a representation was made, the respondents knew the same to be false. The fact that the respondents subsequently did not abide by their commitment that they would show the appellant to be the proprietor of Drang Transport Corporation and would also render accounts to him in the month of December might create civil liability on the respondents for the offence of cheating."*

29. To put it in other words, the case of cheating and dishonest intention starts with the very inception of the transaction. But in the case of criminal breach of trust, a person who comes into possession of the movable property and receives it legally, but illegally retains it or converts it to his own use against the terms of the contract, then the question is, in a case like this, whether the retention is with dishonest intention or not, whether the retention involves criminal breach of trust or only a civil liability would depend upon the facts of each case.

30. The distinction between mere breach of contract and the offence of criminal breach of trust and cheating is a fine one. In case of cheating, the intention of the accused at the time of inducement should be looked into which may be judged by a subsequent conduct, but for this, the subsequent conduct is not the sole test. Mere breach of contract cannot give rise to a criminal prosecution for cheating *unless fraudulent or dishonest intention is shown right from the beginning of the transaction i.e. the time when the offence is said to have been committed. Therefore, it is this intention, which is the gist of the offence. Whereas, for the criminal breach of trust, the property must have been entrusted to the accused or he must have dominion over it. The property in respect of which the offence of breach of trust has been committed must be either the property of some person other than the accused or the beneficial interest in or ownership' of it must be of some other person. The accused must hold that property on trust of such other person. Although the offence, i.e. the offence of breach of trust and cheating involve dishonest intention, yet they are mutually exclusive and different in basic concept. There is a distinction between criminal breach of trust and cheating. For cheating, criminal intention is necessary at the time of making a false or misleading representation i.e., since inception. In criminal breach of trust, mere proof of entrustment is sufficient. Thus, in case of criminal breach of trust, the offender is lawfully entrusted with the property, and he dishonestly misappropriated the same. Whereas, in case of cheating, the offender fraudulently or dishonestly induces a person by deceiving him to deliver any property. In such a situation, both the offences cannot co-exist simultaneously."*

21. The Hon'ble Supreme Court further laid down legal propositions of law with regard to the applying of Section 406 and 420 of the Indian Penal code in particular case as follows:

> *"42. When dealing with a private complaint, the law enjoins upon the magistrate a duty to meticulously examine the contents of the complaint so as to determine whether the offence of cheating or criminal breach of trust as the case may be is made out from the averments made in the complaint. The magistrate must carefully apply its mind to ascertain whether the allegations, as stated, genuinely constitute these specific offences. In contrast, when a case arises from a FIR, this responsibility is of the police – to thoroughly ascertain whether the allegations levelled by the informant indeed falls under the category of cheating or criminal breach of trust. Unfortunately, it has become a common practice for the police officers to routinely and mechanically proceed to register an FIR for both the offences i.e. criminal breach of trust and cheating on a mere allegation of some dishonesty or fraud, without any proper application of mind.*
>
> *43. It is high time that the police officers across the country are imparted proper training in law so as to understand the fine distinction between the offence of cheating viz-a-viz criminal breach of trust. Both*

offences are independent and distinct. The two offences cannot coexist simultaneously in the same set of facts. They are antithetical to each other. The two provisions of the IPC (now BNS, 2023) are not twins that they cannot survive without each other."

22. In the present case in hand, there was nothing to show that the Petitioners had dishonest or fraudulent intention at the time when they placed purchased order to the complainant. However, complainant raised question about the non-payment of amount, by no stretch of imagination, can be called dishonest inducements. It was purely commercial dispute which definitely comes under civil dispute. Simply because of the amounts have not been paid or there are outstanding, will not make it a case of wilful or dishonest inducement or deception or criminal breach of trust.

23. In the light of aforesaid discussion and considering the aforesaid observations of the Hon'ble Supreme Court, this Court is of the view that it is not the case of the Opposite Party, in the present case, that he was deceived or cheated by fraudulent or dishonest inducement from the beginning of transaction. Rather, it is admitted facts that there were previous transactions between the parties and the Petitioners had paid amount of several invoices but same was late payment. Therefore, this Court is of the opinion that the ingredients of the offences alleged by the Opposite Party are absent. The mere non-payment or under payment of invoice amount and/or despite the lapse of the agreed period of payment, the accused persons failed and/or neglected and/or ignored to make the payment of the invoices in spite of repeated demand by the complainant do not constitute offences punishable under Sections 406/420 of the Indian Penal Code, 1860. The disputes between the parties are purely civil in nature and criminal proceeding in such a civil nature case should not be allowed to be continued any further against the present Petitioners for securing the ends of justice.

24. Accordingly, **CRR No. 791 of 2018** is **allowed. CRAN 7 of 2021**, **CRAN 9 of 2022** and all connected applications, if any, are also, thus, disposed of.

25. Consequently, Impugned Order dated 26th March, 2018 passed by the Court of the Learned Judge, Bench-I of City Sessions Court at Calcutta in Criminal Revision No. 174 of 2017 thereby affirmed the Order dated 17th April, 2017 passed by the Court of the Learned Metropolitan Magistrate, 3rd Court at Calcutta in connection with Case No. CN-11778 of 2017 under Sections 406/420/120B of the Indian Penal Code, 1860 is hereby set aside and also quashed the aforesaid proceeding insofar as the Petitioners are concerned.

26. Let a copy of this Judgment be sent to the Learned Trial Court for information.

27. Interim order, if any, stands vacated.

28. All parties will act on the server copies of this Judgment uploaded from the official website of this Court.

29. Urgent photostat certified copy of this Judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)