

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

C.R.R. 3453 of 2023

Pobitra Gogoi & Anr.

Vs.

The State of West Bengal and Another

For the Petitioners : Mr. Sayan Kanjilal
Mr. Sattik Rout

For the Opposite Party No.2 : Ms. Soni Ojha
Ms. Sambrita B. Chatterjee

Heard on : 28.01.2025

Judgment on : 31.01.2025

Dr. Ajoy Kumar Mukherjee , J.:

1. The petitioners herein have preferred the present application being aggrieved by the impugned proceeding i.e. complaint case no. CS/39131/2023, presently pending before Judicial Magistrate, 13th Court Calcutta.

2. Pursuant to a petition of complaint under section 200 of the Code of Criminal procedure preferred by the opposite party herein, the court below

issued process against the petitioners herein under section 406/420/120B/34 of the Indian Penal code.

3. The allegations made in the written complaint is that petitioner no.1 had approached the opposite party no.2, for financial assistance in the form of a loan for purchasing a vehicle, after agreeing to repay the loan along with interest as per the terms and conditions of the loan agreement. The opposite party no.2 believing the assurance of the petitioner no.1 had disbursed the loan in his favour and the petitioner no.2 signed and executed the said loan agreement as a guarantor. It is further alleged in the complaint that thereafter the petitioner no.1 had repaid some of his legal liabilities and debts to the opposite party but till date a sum of Rs. 7,10,147/- from the total loan amount remains unpaid by the petitioner no.1. It is further alleged in the complaint that in spite of receiving the demand notice, petitioner failed to repay the outstanding amount and thereby the petitioners have defrauded the opposite party no.2, causing wrongful loss of Rs. 7,10,147/- to the financial institution.

4. Mr. Kanjilal learned counsel appearing on behalf of the petitioners submit that the learned Magistrate had issued process against the petitioners in a most mechanical and perverse manner without perusing the allegations levelled in the petition of complaint as well as other materials on record, in its true and proper perspective. He failed to appreciate that the opposite party no.2 with *malafide* intention and with intent to avail a short cut method for recovery of the outstanding loan amount, if any, has lodged the present complaint.

5. Petitioners further contended that petitioner no.1 had made regular payment to the opposite party no.2 and admittedly an amount to the tune of Rs. 3,55,308/-(approximately) has been paid to the opposite party no.2 herein by the petitioner no.1. Thereafter, due to second phase of lock down and the ongoing pandemic situation, the business of petitioner no.1 became defunct and for which he suffered financial losses and in such circumstances petitioner no. 1 was unable to pay the monthly instalments on regular basis and owing to such default, the present criminal proceeding has been initiated, even though on a plain reading of the petition of complaint, it would suggest that the dispute is out and out civil in nature and at best may be a mere breach of contract, which cannot attract criminality.

6. Mr. Kanjilal further contended that from the averments made in the petition of complaint, it is established that there was a continuous business transaction between the parties and subsequently the dispute arose with regard to the payment of the rest outstanding dues, which even if accepted on its face value, does not give rise to a criminal proceeding, against the petitioners. Moreover, the opposite party no.2 has failed to establish the role of the petitioner no.2 in the whole transaction, who being the mother of petitioner No.1, only signed the loan agreement document as a guarantor and for which no criminal case can be instituted against her. This clearly portrays the *malafide* intention of the defacto complainant/opposite party no.2 in harassing the petitioner by implicating her. In support of petitioners contention that criminal proceeding cannot be initiated for the disputes which are essentially civil in nature, he relied

upon the judgment of ***Naresh Kumar and another Vs. The State of Karnataka and another***, reported in **2024 SCC Online SC 268**. He also relied upon the case of ***Dalip Kaur and others Vs. Jagnar Singh and another***, reported in **(2009) 14 SCC 696** in support of his contention that non refunding of amount advanced simply results in a breach of contract and does not constitute cheating or criminal breach of trust. In support of his contention that the Magistrate cannot issue process mechanically without applying judicial mind, he relied upon the ratio of the judgment passed by Apex Court in ***M/S Pepsi Foods Ltd. And another Vs. Special Judicial Magistrate and others***, reported in **(1998) 5 SCC 749**. In such circumstances, petitioners have prayed for quashing the entire proceeding.

7. Ms. Soni Ojha learned counsel appearing on behalf of the opposite party no.2 opposed the prayer made by the petitioners and contended that the petitioners have wrongly alleged that merely because the transaction was commercial in nature, there was no ingredient for lodging criminal complaint. She submits that the intent of cheating is evident from the very conduct of the petitioners. She further contended that the petitioner no.1 availed financial assistance of Rs. 6,79,264/- as per loan agreement, dated 21.05.2020 and as per the terms and condition of agreement, the loan amount together with interest was repayable in 71 equal monthly instalments (in short EMI) of Rs. 14,804/- each and out of which petitioners paid only 24 instalments and failed and neglected to pay 29 monthly instalment. Accordingly it is evident from the conduct of the petitioners, who even could not be reached thereafter, that the petitioners had clear intention to cheat and deceive the opposite party no. 2 herein and

for which the complaint has been lodged, which contains all the ingredients of offences under section 406 and 420 of IPC.

8. She further submits that the correctness of such allegation can be decided only on the basis of evidence, which will be laid during the course of trial and not at this stage. Relying upon a judgment of the Apex Court in ***Priti Saraf and another Vs. State (NCT of Delhi) and another***, reported in **(2021) 16 SCC 142**, counsel for the opposite party contended that the Hon'ble Apex Court in that judgment cautioned that merely because there is a remedy provided for breach of contract, does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy and the initiation of criminal proceeding in any manner will be an abuse of the process of the court. Accordingly she argued that the present complaint case should be allowed to go on for trial and the contentions raised in the complaint by the complainant should be tested during the course of trial and if the proceeding is quashed at this stage it would cause miscarriage of justice and thereby will cause prejudice to the opposite party no.2 and as such she prayed for dismissal of the present application.

9. I have considered submissions made by both the parties.

10. Having observed the background principles applicable herein, I need to consider the individual charges against the petitioners. Turning to allegations made under section 405 read with 406, it appears from complaint that the dispute arises out of a loan transaction between the parties. It further appears from the written complaint that the complainant is a company to whom the accused persons approached for taking financial assistance in purchasing a vehicle. However, the grievance is that though

the accused persons executed loan agreement and assured to pay as per payment schedule, but inspite of making some of the payments through EMI, till date he has not paid outstanding amount of Rs. 7,10,147/- and thereby dishonestly and fraudulently caused wrongful loss to the complainant/company and from the very inception they had in their mind to cheat the company.

11. The law in this context clearly recognizes a difference between simple payment of money and entrustment of money or property. A mere breach of promise made through a loan agreement does not ipso facto constitute the criminal breach of trust contained in section 405 IPC, without there being a clear case of entrustment. From the materials available in record, there is nothing to show that any property was entrusted to the petitioner at all which he dishonestly converted for his own use, so as to satisfy the ingredients of section 405 punishable under section 406 of IPC.

12. Now coming to the allegation made in respect of offence under section 415 punishable under section 420 of the IPC, it is no more *res integra* that there is a difference between mere breach of contract and cheating. In the context of contracts, the distinction between the mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. During course of argument learned Counsel for the petitioner submitted that out of the total loan amount, they have already made payment of Rs. 3,55,308/-. It is further case of the petitioners that petitioner no.1 availed financial assistance of Rs. 6,79,264/- which were agreed to be paid by 71 EMI of Rs. 14,804/- each, out of which petitioner paid the said amount of EMI for 24 months and

neglected to pay the rest monthly instalments. In such circumstances the mere inability of the petitioner and the guarantor to return the loan amount, can hardly give rise to a criminal prosecution for cheating, unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as the *mens rea* i.e. guilty mind is the crux of the offence. It is also evident from the averment that there was no dispute between the parties so long the petitioner paid the EMI and dispute in fact arose when petitioner failed to pay EMI. A breach of contract does not give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Accordingly even if all the facts mentioned in complaints and materials annexed therein are taken on their face value, no such dishonest representation or inducement could be found or inferred at least from the inception, since petitioners have already paid few number of instalments.

13. The Supreme Court in a number of cases has cautioned against criminalising civil dispute such as breach of contractual obligations. The legislature intended to criminalize only those breaches which are accompanied by fraudulent or dishonest or deceptive inducements, which resulted in involuntary and inefficient transfers under section 415 of IPC. Therefore, the entire idea of lodging the complaint seems to be to convert a civil dispute into criminal and put pressure on the petitioners for repayment of the amount allegedly advanced towards loan. It has been observed time and again that the criminal courts are not meant to be used for settling scores or pressurize parties to settle the civil dispute.

14. In the present context before taking cognizance and also before issuance of process, Magistrate concerned should have posed a question as to whether any act of inducement on the part of the petitioners has been raised and whether the petitioners had an intention to cheat the complainant from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of loan agreement on the part of the petitioners by not paying the monthly instalments, the same would not constitute an offence of cheating. There are also decisions which holds that the same act or transaction cannot result in an offence of cheating and criminal breach of trust simultaneously, as for the offence of cheating dishonest intention must exist at the inception of the transaction, whereas in case of criminal breach of trust, there must exist a relationship between the parties, whereby one party entrusts another with the property as per law and dishonest intention comes later. In this case entrustment is missing and infact not even alleged in the complaint.

15. It is true that at the stage of issuing summon a magistrate only needs to be satisfied with a prima facie case for taking cognizance but the duty of the magistrate is also before issuing process to be satisfied whether there is sufficient ground for proceeding. In the order impugned dated 4th May, 2023 by which the process has been issued against the petitioners under section 204 of the Cr.P.C, it does not reflect anything about satisfaction of the Magistrate. Though I am not unmindful to the fact that at the stage of issuance of summons detailed reasoning as to why he is issuing summon is not necessary, but the order must reflect that he is satisfied that the allegations made in the complaint give rise to the offences

for which the petitioners have been summoned for trial. A loan transaction/repayment dispute which ought to have been resolved through the forum of civil court cannot be given criminal colour at the whim of the complainant. Learned Magistrate infact has failed to apply his mind in issuing summon from the facts and circumstances of the case.

16. In **M/S Pepsi Foods Ltd. and another (supra)**, the Apex Court has cautioned that summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto by examining the nature of the allegations made in the complaint and the evidence both oral and documentary in support thereof and that they are sufficient for the complainant to succeed in bringing charge against the accused persons. In fact in the present context, the Magistrate did not carefully scrutinize the materials brought on record and he should have put questions to the complainant and his witnesses to elicit answers to find out whether any criminal case has prima facie made out against any of the accused or not.

17. In view of aforesaid discussion I have no hesitation to conclude that further continuance of the present proceeding will be mere abuse of process of court. The judgment relied upon by the opposite party herein reported in **Priti Sharaf and another (Supra)** is factually distinguishable.

18. CRR 3453 of 2023 is allowed. The criminal proceeding being complaint case no. CS 39131/2023 presently pending before learned Judicial Magistrate, 13th Court Calcutta, is hereby quashed.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. AJOY KUMAR MUKHERJEE, J.)