

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 4226 of 2023

Kusum Kanoria

Versus

The State of West Bengal & Another

For the Petitioner : Mr. Manwendra Singh Yadav, Adv.
Ms. Satabdi Naskar, Adv.

Heard on : 06.12.2024

Judgment on : 29.01.2025

Ajay Kumar Gupta, J:

1. This instant Criminal Revisional application under Section 482 of the Code of Criminal Procedure, 1973 has been filed by the petitioner/accused seeking for quashing of the proceeding being C.N.S. No. 1097 of 2021 corresponding to F. No. CNS/481009/2021

(Shree Shyam Ply & Laminates Vs. Kusum Kanoria), for commission of alleged offence under Sections 406/420 of the Indian Penal Code, 1860 and all orders passed therein including orders dated 03.12.2021 and 03.05.2023 now pending before the Court of the Learned 19th Metropolitan Magistrate, Calcutta.

2. The facts of the case, in nutshell, are that a petition of complaint dated 25.11.2021 along with certain documents was filed before the Court of the Learned Additional Chief Metropolitan Magistrate, 2nd Court, Calcutta seeking prosecution of the petitioner for commission of offences under Sections 406/420 of the Indian Penal Code, 1860. It has been contended by the complainant in the said petition of complaint that the complainant is a supplier of Plywood, Decorative Veneer, Laminates Wood, Highlighter and Allied Products to their customers or retail business personals. They have substantial reputation and goodwill in the market.

3. It has been alleged that the accused/petitioner allegedly went to the complainant's office and represented herself as a reputed businessman and deals in Plywood, Decorative Veneer, Laminates Wood, Highlighter and Allied Products as a wholesaler. The accused/petitioner represented having good market reputation and very good business circle, had given complainant an impression of a

very good business in future. The complainant, believing the reputation of the accused/petitioner, acceded to the proposal of the accused/petitioner and agreed to supply Plywood as per demand of the accused.

4. It was also alleged that believing upon the assurance of the accused/petitioner, the complainant supplied plywood to the accused/petitioner on credit from time to time as per order through courier for a sum of Rs. 5,93,760/-. The complainant further alleged that at the relevant times, the accused personally and also through representative used to collect the plywood against proper bills.

5. It was further alleged that while receiving the plywood, no objection/demur was made regarding the quality and quantity of the plywood was ever raised. However, even after expiry of considerable period of time, the accused/petitioner did not make payment in spite of repeated demand. The accused/petitioner, on different pretext, started asking for time to pay the dues amount. The accused person avoided to meet with the complainant and stopped communicating and also avoided picking phone calls of the complainant.

6. The complainant personally went to the office of the accused/petitioner for asking payment, the accused/petitioner allegedly became furious and started abusing the complainant in

filthy and decorative languages and further threatened with dire consequences. The petitioner finally flatly refused to pay the money.

7. The complainant sent a legal notice dated 23.09.2020 asking for payment of the said dues amount. But, even receiving the said notice, the petitioner did not make any payment. It was further alleged that from the very beginning or since inception, the accused/petitioner cheated, misrepresented and had no intention to make payment against supply of plywood sold to the accused/petitioner thereby caused wrongful loss to the complainant/opposite party no. 2 and further wrongful gain to her.

8. On the basis of said petition of complaint and documents attached therewith, the Learned Additional Chief Metropolitan Magistrate, 2nd Court, Calcutta took cognizance and transferred the case to the file of the Learned Metropolitan Magistrate, 19th Court, Calcutta for enquiry and disposal in accordance with law.

9. The Learned Metropolitan Magistrate, 19th Court, Calcutta after examining the complainant and his witness by an order dated 08.12.2021, has pleased to issue summon upon the petitioner/accused for commission of offences under Sections 406/420 of the Indian Penal Code, 1860. After receiving the said summon, the petitioner, through her learned advocate, entered

appearance and filed a petition under Section 205 of the CrPC. The said petition was heard on 04.08.2022 and upon hearing the learned advocate, the Learned Magistrate has pleased to direct the accused, *inter alia*, to file an affidavit in support of the undertaking given in the petitioner under Section 205 of the CrPC. In pursuant to the said direction, the petitioner has filed undertaking on affidavit on 07.12.2022.

10. On 03.05.2023, the petitioner, due to her indisposition, could not appear before the Learned Court below and filed a petition together with a medical certificate as she was advised rest by the attending physician. The said petition was heard along with the affidavit filed by the petitioner on 07.12.2022 and upon perusal of the same, the Learned Magistrate was pleased to reject the petition filed by the petitioner under Section 205 of the CrPC on the grounds that the petitioner resides within the vicinity of the Learned Court below and the personal appearance by the petitioner would not cause enormous hardship to the petitioner. The Learned Court below did not consider the medical document of physical unfitness of the petitioner to turn up before the Court due to her old age and insisted for personal appearance of the accused/petitioner.

11. Thereafter, the matter was fixed on 30.06.2023, 29.08.2023 and 27.09.2023. On 29.08.2023, the petitioner prayed for dispensation of her personal appearance by filing a petition supported by medical certificate for the reasons stated in the medical certificate. However, the Learned Court below, by order dated 29.08.2023, directed the petitioner to appear on the next date, in default, warrant of arrest shall be issued.

12. The petition under Section 205 of the CrPC was rejected on erroneous grounds and mistaken premises that the petitioner has not filed any medical certificate or personal appearance would not cause hardship to the petitioner or the grounds laid down for allowing an application under Section 205 of CrPC are not fulfilled by the petitioner. Further, the Learned Court below failed to appreciate the grounds contained in the petition under Section 205 of the CrPC and the undertaking filed on affidavit seeking exemption from personal appearance in its true perspective. The Learned Court below further did not refer to and/or deal with the case law reported in **(2001) 7 SCC 401 (Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. and others)** relied upon by the learned advocate for the petitioner in course of such hearing.

13. The petitioner further contended that considering the petition of complaint and the statement of the witnesses, Learned Court took cognizance under Section 202 of the CrPC on solemn affirmation as sacrosanct, no case under Sections 406/420 of the IPC and inducement from very inception can be said to have been made out against the petitioner. Hence, this Criminal Revisional application.

14. Despite service of notice, none appeared on behalf of the opposite parties. No accommodation was sought for. Therefore, the matter was taken up for hearing in the absence of the opposite parties.

15. In course of hearing, learned counsel appearing on behalf of the petitioner submitted that the allegation made by the opposite party no. 2/complainant is purely civil in nature. The allegation of complainant is mainly that complainant has supplied plywood on different dates to the petitioner. Whatever transaction made between the parties was a business transaction, which never comes within the domain of criminal act. Dispute regarding dues could be decided by the Civil Court and not by the Criminal Court. Question of inducement or cheating to the supplier/complainant never arose when there were terms of business transaction. Though, the

complainant has supplied the plywood on several dates to the petitioner but the petitioner and her mother-in-law, Padma Kanoria already paid to the complainant by cheque in entirety and that would be evident from the ledger account disclosed by the opposite party no. 2/complainant with the petition of complaint. Vouchers details, given in the complaint, clearly indicated that the petitioner has already paid more than 15 Lakhs to the complainant.

16. Even for the sake of argument, if any dues is pending that would be attracted a civil suit for recovery. The complainant has filed this complaint with an allegation for offence punishable under Sections 406/420 of the IPC though no ingredients fulfilled either in complaint or through deposition. Therefore, the proceeding, initiated against the petitioner, is clearly abuse of process of law and same is liable to be quashed so far as the petitioner is concerned.

17. Finally, the learned counsel submitted that the complainant made the written complaint before the Learned Trial Court is awful of vague and non-specific and same does not disclose sufficient grounds or ingredients to proceed against the petitioner. In such a situation, criminal proceeding should not be allowed to be continued for securing the ends of justice.

18. Heard the argument and submissions made by the learned counsel appearing on behalf of the petitioner and on perusal of the judgment referred by the learned counsel, this Court finds the opposite party no. 2 had filed a petition of complaint alleging, *inter alia*, that criminal breach of trust and cheating committed by the Petitioner. The petitioner did not pay any amount indicates her culpable intention from the beginning. The petitioner did not make any payment even on repeated requests and written communication.

19. The complainant alleged that the petitioner represented herself as a reputed businessman and dealers of Plywood, Decorative Veneer, Laminates Wood, Highlighter and Allied Products as a wholesaler at the beginning. Based on that, the complainant supplied plywood worth Rs. 5,93,760/- on credit on different dates. The dispute arises when the petitioner herein fails to make any payment despite repeated demands and even after giving legal notice. The complainant claims that the petitioner has no intention to pay, leading to alleged cheating and misrepresentation. Whereas, the petitioner herein contended that the dispute is purely civil in nature and the criminal proceedings initiated against her are an abuse of process of law. Offence as alleged is not at all attracted.

20. The differences in the ingredients required for an offence of Criminal Breach of Trust and Cheating have been highlighted by the Hon'ble Supreme Court in the case of ***Delhi Race Club (1940) Ltd. & Ors vs. State of Uttar Pradesh & Anr.***¹ in paragraph 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 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

¹ AIR 2024 SC 4531 : AIR Online 2024 SC 612.

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 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. Palanikar (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 Sections 406 and 420 of the Indian Penal Code in the said 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. This Court also relied a judgment of the Hon'ble Supreme Court in the case of **The State of Kerala v. A. Pareed Pillai and Anr.**², where it was 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 fulfill the promise."

23. Similarly, in the case in hand, there is nothing to show that the petitioner had dishonest or fraudulent intention at the time of placing order for supply of Plywood to the opposite party no. 2. Complainant raised question about the outstanding dues amount. Non-payment of outstanding dues amount or even breach of contract, in commercial transaction, by no stretch of imagination, can be called dishonest inducements. It was/is purely a non-fulfilment of contract

² 1972 Cri.L.J.1243

to pay the outstanding Bill amount of a commercial transaction, 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.

24. In the case of **Haridaya Ranjan Prasad Verma and Ors. v. State of Bihar and Anr.**³, the Hon'ble Apex Court also held that: -

“There was no allegation in the complaint indicating, expressly or impliedly, any intentional deception on the part of the appellants right from the beginning of the transaction. The Hon'ble Apex Court drew distinction between cheating from mere breach of contract. According to the Hon'ble Apex Court, definition of cheating contemplates two separate classes of acts namely deception by fraudulent or dishonest inducement and deception by intention. Deception by fraudulent or dishonest inducement must be shown to exist right from the beginning of the transaction”.

25. It is not the case of the opposite party no. 2, in the present case, that the petitioner was deceived by fraudulent or dishonest inducement from the beginning or at the time of order of supply of Plywood. Rather, it appears the complainant/opposite party no. 2

³ (2000) 4 Supreme Court Cases 168

supplied Plywood amounting to Rs. 5,93,760/- on different occasions. Therefore, culpable intention, right from the beginning when the orders were made cannot be presumed simply from mere failure of a person to keep up promise subsequently. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. The Court must decide on the basis of the substance of the complaint and not on the basis of mere use of the expression “cheating” in the complaint. Outstanding amount of Rs. 5,93,760/- as alleged by the petitioner is not outcome of the dishonest intention of the petitioner from the very inception of the transaction cannot be presumed. In my view, neither the offence of cheating punishable under Section 420 of the Indian Penal Code, 1860 is made out from the complaint nor can I persuade myself to hold that an offence punishable under Sections 406/120B of the Indian Penal Code, 1860 is made out from the allegations made in the complaint.

26. Upon perusal of the copy of petition of complaint, it further shows that there was no fraudulent or dishonest inducement or deception by intentional practice by the petitioner right from the inception of order of supply of Plywood even if no payment has been made, that will neither tantamount to deception, fraudulent or

dishonest inducement nor would it amount to deception by intentional means right from the beginning. Therefore, the case either under Section 420 or 406 of IPC, in the facts of this case, has not been made out. Non-payment of outstanding amount cannot be termed as criminal act in the facts of this case.

27. In the case of ***Paramjeet Batra v. State of Uttarakhand***⁴, the Hon'ble Court recognized that although the inherent powers of a High Court under Section 482 of the Code of Criminal Procedure, 1973 should be exercised sparingly, yet the High Court must not hesitate in quashing such criminal proceedings which are essentially of a civil nature. This is what was held:

“12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a

⁴ (2013) 11 SCC 673

cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has hesitate to quash the criminal proceedings to prevent abuse of process of the court.”

(Emphasis supplied)

28. In the light of above discussions together with averments contained in the petition of complaint, this Court finds ingredients of the offences alleged by the opposite party no. 2 are absent. Merely because non-payment of outstanding amount does not constitute offences punishable under Sections 406 and 420 of the Indian Penal Code, 1860. The allegation in the complaint does not spell out any essential ingredients for commission of offence under Sections 406 and 420 of the Indian Penal Code, 1860.

29. 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 petitioner otherwise it would be an abuse of process of law. The Hon’ble Supreme Court time and again deprecated the proceedings initiated under Section 406/420 of the Indian Penal code on the allegation of non-payment of outstanding dues occurred in a commercial transaction. Attempt to convert a civil dispute into a criminal matter, potentially aimed at

pressurizing the petitioner into settling the dispute, by way of filing the criminal complaint, should not be encouraged. Accordingly, this Court would like to invoke its inherent power under Section 482 of the Code of Criminal Procedure, 1973 for quashing of the said criminal proceeding.

30. Consequently, **CRR No. 4226 of 2023** is **allowed**. Connected application, if any, is, also thus, disposed of.

31. The proceeding being C.N.S. No. 1097 of 2021 corresponding to F. No. CNS/481009/2021 (Shree Shyam Ply & Laminates Vs. Kusum Kanoria), for commission of alleged offence under Sections 406/420 of the Indian Penal Code, 1860 now pending before the Court of the Learned 19th Metropolitan Magistrate, Calcutta is hereby quashed insofar as the petitioner is concerned and all orders passed therein including orders dated 03.12.2021 and 03.05.2023 are set aside.

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

33. Case Diary, if any, is to be returned to the learned counsel appearing on behalf of the State.

34. Interim order, if any, stands vacated.

35. 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.)