



Judgment

341 apl1687.22

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**IN THE HIGH COURT OF JUDICATURE AT
BOMBAY, NAGPUR BENCH, NAGPUR**

CRIMINAL APPLICATION (APL) NO.1687 OF 2022

1. Shri Pratik s/o Kanhaiyalal Bansal,
aged about 40 years, occupation: service,
ICICI Lombard, r/o 101, Diamond
Trade Centre, Dr.R.S.Bhandari Marg,
Indore (Madhya Pradesh).

2. ICICI Lombard General Insurance Co.
Ltd., having registered office at Zenith
House, Kesharao Khade Marg,
Mahalaxmi, Mumbai.
authorized officer.

..... **Applicants.**

:: VERSUS ::

1. The State of Maharashtra,
through its Police Station
Officer, Shegaon, district:
Buldhana.

2. Shri Gajanan Cotspin, a
partnership firm through its
Partner-Devendra Madhusudan
Bhattad, aged about major, occupation:
business, r/o Shegaon, taluka
Shegaon, district: Buldhana.

..... **Non-applicants.**

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Ms.Ashwini Athalye, Counsel for Applicants.

Shri C.A.Lokhande, Additional Public Prosecutor for Non-
applicant No.1/State.

Shri S.N.Bhattad, Counsel for Non-applicant No2.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 08/01/2025

PRONOUNCED ON : 16/01/2025

JUDGMENT

1. This application is filed by applicants under Section 482 of the Code of Criminal Procedure for quashing of criminal proceeding of Regular Criminal Case No.101/2009 pending before learned Judicial Magistrate First Class, Shegaon, district Buldhana.

2. Brief facts necessary for disposal of the application are as under:

Non-applicant No.2 (the complainant) filed a complaint under Sections 420 and 468 of the Indian Penal Code contending that applicant No.1 is authorized signatory of applicant No.2 - ICICI Lombard General Insurance Company Limited which deals in General Insurance Business. The complainant had insured its stock

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worth of Rs.50.00 lacs of Raw Cotton, Cotton Lint, F.P Bells, and Cotton Seeds stored and kept in open godown in the complainant's factory at Shegaon and had paid insurance premium of Rs.23142/- vide cheque No.132955 dated 21.4.2005. On receipt of the cheque, acknowledgement dated 21.4.2005 was issued by applicant No.1. It was informed to the complainant that the policy would be issued in due course. It was further communicated that the liability of the company would be subject to the realization of the cheque. It was further communicated that if the amount is less than premium quoted or revised as per changes in the sum proposed for insurance or covered desired risk by proposal. It was agreed that the proposal shall be accepted for consideration for reducing the sum appropriated premium and the policy shall be finalized. Accordingly, premium was accepted and an acknowledgement was issued on

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24.4.2005. As per the contention of the complainant, the communication issued shows policy document would be issued having accepted the premium. Thus, the contract of insurance is completed. The ICICI Lombard Office informed the complainant that he had taken the Special and Fire Perils Policy of Rs.50.00 lacs for which the premium was paid. Though the cheque was put for clearance on 22.4.2005, the policy was not issued. On 23.4.2005, at about 12 O'clock noon, the fire broke out in the godown and after due efforts, it could not be controlled and the damage was caused to the stock, building, and cotton bolls etc. The surveyor of applicant No.1-company visited the spot and assessed the damage. Authorized signatory of applicant No.2 had also visited the spot on 25.4.2005 along with one Gaurav Arora and continuously they have visited from 25.4.2005 to 28.4.2005. The complainant filed a claim for damage

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sustained on account of the fire, but with dishonest intention a cheque issued towards premium was sent to the complainant on 18.5.2005. The applicant No.2-company also issued anti-dated letter mentioning date 25.4.2005 by courier which was received by the complainant on 12.5.2005. It was dishonestly informed that risk for the amount of Rs.50.00 lacs is not covered. The complainant has not accepted the cheque and sent back with notice dated 11.6.2005. As per the contention of the complainant, authorized officer of the applicant No.2 was personally present on the spot on 25.4.2005 and with an intention to defraud the complainant, a false document dated 25.4.2005 was prepared.

3. With these contentions, the complainant filed a complaint in the court of learned JMFC, Shegaon. Learned Magistrate took the cognizance and issued process by passing order on 9.11.2009. The applicants put their

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appearance and filed the discharge application which came to be rejected on 2.11.2015. Against the said order, the applicants have filed a revision bearing Criminal Revision No.70/2015 and the same was dismissed by order dated 11.7.2022.

4. By this application, the applicants are seeking quashing of the proceedings as well as the discharge.

5. Learned counsel Ms.Ashwini Athalye for applicants submitted that as far as factual aspect, that the applicant No.1 is the authorized signatory of the applicant No.2- company which deals in General Insurance Business, is not disputed. It is also not disputed that there was a proposal from the complainant for insuring his stock worth of Rs.50.00 lacs and cheque of premium of Rs.23142/- vide cheque No.132955 dated 21.4.2005 was issued. It is also not disputed that the acknowledgement as to the receipt of cheque was issued by the applicant

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No.1. However, the contention of the complainant, that the applicant No.2 informed the complainant that he had taken Special and Fire Perils Policy of Rs.50.00 lacs for which the premium was paid, is not admitted. It is also not admitted that the authorized officer of the applicant No.2 has visited the spot and was present at Shegaon from 25.4.2005 to 28.4.2005. It is also denied that with a dishonest intention a cheque issued towards premium was sent to the complainant and the policy was cancelled. She submitted that in fact, there was no concluded contract between the present applicants and the complainant. Mere retention of the cheque towards premium is not sufficient to show that it was a concluded contract. She submitted that at the most the case of the complainant would be a breach of the contract. As far as ingredients of Sections 420 and 406 of the Indian Penal Code are concerned, the same are not made out. A breach of

contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Merely on the allegation of failure to keep up promise will not be enough to initiate criminal proceedings. The applicants have already filed Special Civil Suit No.29/2009 for damages and compensation. The said suit was dismissed. Against the said suit, first appeal was filed and the same was allowed and the second appeal is pending before this court. As far as dishonest intention is concerned, nothing is on record to show that there was any dishonest intention on the part of the present applicants.

6. In support of her contentions, learned counsel for applicants placed reliance on following decisions:

1. Birla Corporation Limited vs. Adventz Investments and Holdings Limited and ors, reported in (2019) 16 SCC 610;

2. Anil Mahajan vs. Bhor Industries and anr, reported in (2005)10 SCC 228;

3. Samir Sahay alias Sameer Sahay vs. State of Uttar Pradesh and anr, reported in (2018)14 SCC 223;

4. Sarabjit Kaur vs. State of Punjab and anr, reported in (2023)5 SCC 360, and

5. Oriental Fire and General Insurance Co. vs. Panvel Industries Cooperative, reported in 1992 ACJ 503.

7. *Per contra*, learned Additional Public Prosecutor Shri C.A.Lokhande for the State supported the order passed by learned Magistrate, Shegaon as well as learned Additional Sessions Judge, Khamgaon.

8. Learned Counsel Shri S.N.Bhattad for the complainant submitted that the applicants had taken two stands that at one breath they are saying there was no policy and on the second breath they are saying that there was no concluded contract. In fact, the documents on

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record show that premium was accepted. The communication dated 21.4.2005 sufficiently shows that cheque of premium was accepted. The communication further shows that it was informed that if the amount is less than premium quoted or revised as per changes in the sum proposed for insurance or covered desired risk by proposal, it was agreed that the proposal shall be accepted for consideration for reducing the sum appropriated premium and the policy shall be finalized accordingly. The claim of the applicants is not maintainable as in a first appeal decree passed by learned Civil Judge Senior Division is reversed by RCA No.56/2015. There is *prima facie* no merits in the contentions of the applicants and, therefore, the application deserves to be rejected.

9. After hearing both the sides, it reveals that the contention of the complainant that applicant No.1 is the authorized signatory and applicant No.2 is General

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Insurance Company is not disputed. It is also not disputed that the applicant No.2 had proposed to insure its stock worth of Rs.50.00 lacs of Raw Cotton, Cotton Lint, F.P Bells, and Cotton Seeds with the applicant No.2 and also issued cheque bearing No.132955 dated 21.4.2005 towards the premium. Applicant No.2 has also issued acknowledgement signed by applicant No.1 on 21.4.2005. Admittedly, no insurance policy was issued. Though the cheque was put for clearance on 22.4.2005, the policy was not issued. As far as unfortunate incident dated 23.4.2005 is concerned, the same is also not disputed. It is also not disputed that the cheque of premium was sent to the complainant on 18.5.2005, but the complainant has not accepted the cheque and sent back with notice dated 11.6.2005. The contention of the complainant that the authorized signatory of the applicant No.2 visited the spot from 25.4.2005 to 28.4.2005 is denied by the applicants.

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10. Before advertng to the issue, it has to be seen whether there was a concluded contract between the applicants and the complainant.

11. The normal principle regarding conclusion of the contract is laid down under Section 7 of the Indian Contract Act, which reads thus:

“7. Acceptance must be absolute.— In order to convert a proposal into a promise the acceptance must –

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.”

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12. A contract of insurance, like any other contract, is created where there has been an unqualified acceptance by one party of an offer made by the other. So long as the matter is still under negotiation there is no contract, although it is open to the parties, pending conclusion of the negotiations, to enter into an interim contract of a limited nature, for example in the form of a cover-note. If the contract is created otherwise than by acceptance of a written proposal it must be shown that there has been agreement on the fundamentals of the insurance proposed, namely, the subject-matter of the insurance, the amount of the insurance unless this is unlimited, the nature of the risks insured against, the period for which the insurance is to last and the rate of premium to be charged, although the exact amount may have to be calculated. The Hon'ble Apex Court in the case of **Life Insurance Corporation of India vs. Raja Vasireddy Komalavalli Kamba and ors,**

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reported in AIR 1984 SC 1014 dealt with this issue and it is held that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, *prima facie*, acceptance must be communicated to the offeror. Similarly, The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. While dealing with the situation, it is further observed in paragraph No.13, which is reproduced as under:

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When an insurance policy becomes effective is well-settled by the authorities but before we note the said authorities, it may be stated that it is clear that the expression "underwrite" signifies accept liability under'. The dictionary meaning also indicates that. (See in this connection The Concise oxford Dictionary Sixth Edition p. 1267.) It is true that normally the expression "underwrite" is used in Marine insurance but the expression used in Chapter III of the Financial powers of the Standing order in this case specifically used the expression "underwriting and revivals" of policies in case of Life Insurance Corporation and stated that it was the Divisional Manager who was competent to underwrite policy for Rs 50,000 and above. The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance. See in this

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connection the statement of law in Corpus Juris Secundum, Vol. XLV page 986 wherein it has been stated as:-

“The mere receipt and retention of premiums until after the death of applicant does not give rise to a contract, although the circumstances may be such that approval could be inferred from retention of the premium. The mere execution of the policy is not an acceptance; an acceptance, to be complete, must be communicated to the offeror, either directly, or by some definite act, such as placing the contract in the mail. The test is not intention alone. When the application so requires, the acceptance must be evidenced by the signature of one of the company's executive officers.”

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13. Thus, mere retention of the amount of premium will not mean acceptance of the contract of insurance. Some more actions are required on the part of the insurer to indicate that there was acceptance of the contract of insurance.

14. In the present case, only cheque towards the premium was accepted, but the cheque was not cleared and the amount was not received by the insurance company towards the premium and insurance certificates were also not issued. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed.

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15. Thus, it means that it is not necessary that in every contract of insurance, the proposal has to come from assurer and the insurer has to accept it unconditionally to convert it into a contract.

16. The similar view is expressed by this court in the case of **Oriental Fire and General Insurance Co. vs. Panvel Industries Cooperative** *supra* that mere payment of premium amount and its acceptance by agent cannot amount to a concluded contract of insurance. In order to convert a proposal into a promise the acceptance must be (1) be absolute and unqualified, and (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his

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proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.

17. Thus, it is a consistent view that mere receipt and retention of premium even for a long time is not acceptance and cannot give rise to a contract.

18. By applying the same principle, if facts of the present case are considered, it is the allegation that though the cheque was put for clearance on 22.4.2005, the policy was not issued. Admittedly, there is no document on record to show that it was at any time communicated by the applicants to the complainant that his proposal was accepted and premium of Rs.23142/- was accepted against the said policy. On the contrary, communication dated **25.4.2005** shows that cheque was returned and the company shown its inability to cover risk for the amount of sum insured of Rs.50.00 *ab initio*.

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19. The contents of the complaint show that with a dishonest intention, the anti-dated letter was prepared and the cheque was returned. The contents of the complaint do not describe as to how at the inception the element of cheating was existed.

20. Here, the main offence alleged by the complaint is that the applicants committed the offence under Sections 420 and 468 of the Indian Penal Code and the case of the complainant is that the applicants cheated him.

21. To deceive is, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. It must also be shown that there exists a fraudulent or dishonest intention at the time of commission of the offence. As far as present complaint is concerned, there is no allegation that the applicants made any willful representation to the complainant.

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22. It has to be seen, whether the contents of the complaint are sufficient to show that since inception there was intention and with that intention the cheque was accepted towards the premium and subsequently liability to issue insurance policy and to cover the risk are denied.

23. It is well settled that summoning of accused in criminal case is a serious matter. The criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have criminal law set into motion, but the nature of the allegations made in the complaint and the material either in the nature of formal statement of documents are to be produced to establish the charge against the accused. Whether mere breach of promise would constitute an offence?

24. The Hon'ble Apex Court in the case of **Anil Mahajan vs. Bhor Industries and anr** *supra* distinguished

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breach of contract and cheating and held that mere use of expression “cheating” in the complaint is of no consequence.

25. A breach of contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Merely on the allegation of failure to keep up promise will not be enough to initiate criminal proceedings. From the facts available on record, it is evident that the complainant had proposed to ensure his stock worth of Rs.50.00 lacs and issued the cheque of Rs.23142/- towards premium. The said cheque was accepted and acknowledgement was issued. As far as the intention of the applicants since inception is concerned, except the bare words of the complainant that he was cheated, nothing is on record to show that since inception there was an intention to cheat the complainant. It is a

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general principle of criminal law that a crime is not committed unless a person committing it has *mens rea*. The maxim '*actus non facit reum, nisi mens sit rea*', it means that the intention and act must both to constitute the crime. For commission of every offence the requisite thing is *mens rea* unless the statute expressly excludes it. So far as the offence of cheating is concerned it does require the *mens rea* to deceive.

26. According to Section 415 of the Indian Penal Code, the inducement must be fraudulent and dishonest which depends upon the intention of the accused at the time of inducement.

27. The Hon'ble Apex Court considered Sections 415 and 420 of the Indian Penal Code in the case of **Hridaya Rangan Pd. Verma and ors vs. State of Bihar and anr**, reported in (2000)4 SCC 168 and observe in paragraph Nos.14 and 15 as under:

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

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of

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contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.”

28. Thus, the question which I posed myself is, whether any act of inducement on the part of applicants has been raised by the complainant and whether the applicants had an intention to cheat him from very inception. If the facts of the case are considered, at the most, it would be a civil dispute resulting from a breach of

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contract on the part of applicants by non issuing the insurance policy after accepting the cheque and returning the same to the complainant.

29. In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.

30. The applicants filed an application under Section 482 of the Code of Criminal Procedure as their discharge application has been rejected and prayed for quashing of the proceeding.

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31. It is a settled principle of law at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence.

32. What needs to be considered is, whether there is a ground that the offence has been committed or not and whether a ground for convicting the accused has been made out.

33. In the case of **Union of India vs. Prafulla Kumar Samal and anr, reported in (1973)3 SCC 4**, the Hon'ble Apex Court considered the scope of Section 227 of the Code of Criminal Procedure. After advertng to the various

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decisions, the Hon'ble Apex Court has enumerated the following principles:

“(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal

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application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros

and cons of the matter and weigh the evidence as if he was conducting a trial.”

34. In the light of the well settled principles as to the consideration of discharge application as well as inherent jurisdiction under Section 482 of the Code of Criminal Procedure, the facts of the case and recital of the complaint nowhere disclose that since inception there was an intention and with that intention cheque of premium was accepted and subsequently the policy was denied. The contentions of the complainant do not describe as to how at the inception the element of cheating existed.

35. In the present case, the main offence alleged by the complainant is that the applicants have committed an offence under Section 420 of the Indian Penal Code and to attract the offence, it must have been shown that fraudulent or dishonest intention was existed at the time of commission of the offence. There is no allegation that

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the applicants made any willful or deceptive representations.

36. It is well settled that inherent jurisdiction under Section 482 of the Code of Criminal Procedure is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon the accused, in exercise of inherent powers, such proceedings can be quashed.

37. In the facts and circumstances of the above case, intention is the gist of the offence. It is the intention of the applicants which must determine whether at the time of accepting the proposal and premium, dishonest intention exists which is an essential ingredient of the offence and

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whether dishonest intention was in existence in causing wrongful loss to the complainant.

38. On examination of the complaint and the documents, at the most, it can be said that it is a simple case of civil dispute only to the extent of breach of contract. Requisite averments so as to make out a case of cheating and fabrication of documents are absolutely absent. A breach of contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning. At the most, allegation of failure to keep up promise will not be enough to initiate criminal proceedings.

39. In this view of the matter, in my opinion, the applicants have made out a case for quashing of the proceedings and, therefore, continuation of the criminal proceeding would be abuse of process of law.

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40. In the result, I pass following order:

ORDER

(1) The Criminal Application is allowed.

(2) The order dated 2.11.2015 passed by learned Judicial Magistrate First Class, Shegaon in Misc.Criminal Case No.101/2009 and order dated 11.7.2022 passed by learned Additional Sessions Judge, Khamgaon in Criminal Revision Application No.70/2015 are hereby quashed and set aside.

(3) The criminal proceeding against the applicants bearing Misc.Criminal Case No.101/2009 is hereby quashed and set aside and the applicants are discharged of offences under Sections 420 and 468 of the Indian Penal Code.

The application stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

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