

SATISHCHANDRA RATANLAL SHAH

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v.

STATE OF GUJARAT AND ANOTHER

(Criminal Appeal No. 9 of 2019)

JANUARY 03, 2019

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**[N. V. RAMANA AND
MOHAN M. SHANTANAGOUNDAR, JJ.]**

Code of Criminal Procedure, 1973: s.482 – Quashing of charge-sheet under ss.406, 420 and 417 IPC – The case against the appellant-accused was that he had obtained loan from money lending company in which respondent no.2 was Director – Appellant did not repay the amount back and rather threatened respondent no.2 with dire consequences and as a result respondent no.2 lodged FIR – Appellant filed petition before High Court for quashing of FIR – Meanwhile, charge-sheet was filed against the appellant under ss.406, 420 and 417 IPC – Appellant filed application seeking amendment of s.482 petition wherein he sought quashing of charge-sheet also – High Court dismissed the quashing petition and directed Trial Court to complete the trial and observed that prima facie an offence of cheating under s.420 was made out – On appeal, held: A mere breach of a promise, agreement or contract does not, ipso facto, constitute the offence of the criminal breach of trust contained in s.405 IPC without there being a clear case of entrustment – There is nothing either in the complaint or in any material pointing to the fact that any property was entrusted to the appellant which he dishonestly converted for his own use so as to satisfy the ingredients of s.405 punishable under s.406 IPC – As regards the charge under s.415, mere inability of the appellant to return the loan amount would not give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence – There is nothing in the complaint or the material to show that there was dishonest representation or inducement on part of the appellant – However, the High Court seemed to be carried away by the moral element involved in the breach of promise and made

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- A *certain observations – These observations are expunged – The proceedings initiated based on the FIR instituted at the instance of respondent no. 2 are quashed – Penal Code, 1860 – ss. 405, 406, 415 and 420.*

Allowing the appeal, the Court

- B **HELD:** 1. The criminal application preferred by the accused before the High Court was against the order of the Trial Court at the stage of framing of charges, wherein it is the duty of the court to apply its judicial mind to the material placed before it and to come to a clear conclusion that a *prima facie* case has been made out against the accused. An order for framing of charges is of serious concern to the accused as it affects his liberty substantially. Courts must therefore be cautious that their decision at this stage causes no irreparable harm to the accused. In respect to quashing of the charges, it is well settled that such exercise needs to be undertaken by the High Court in exceptional cases. The framing of charges being initial stages in the trial process, the court therein cannot base the decision of quashing the charge on the basis of the quality or quantity of evidence rather the enquiry must be limited to a *prima facie* examination. [Paras 10, 11] [278-F-H; 279-A]

- E *State of Bihar v. Ramesh Singh* 1977 Cri IJ 1606 – relied on.

- 2.1 The dispute arose out of a loan transaction between the parties. Record showed that respondent no.2 knew the appellant and the attendant circumstances before lending the loan.
- F Further, admittedly, in order to recover the said amount, respondent no. 2 had instituted a summary civil suit which is still pending adjudication. The law clearly recognizes a difference between simple payment/investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not, *ipso facto*, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment. There is nothing either in the complaint or in any material pointing to the fact that any property was entrusted to the appellant 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. Therefore, the Magistrate

committed a serious error in issuing process against the appellants for the said offence. Unfortunately, the High Court also failed to correct this manifest error. [Paras 12, 13] [279-B-E]

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2.2 In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. In the instant case, admittedly the appellant was trapped in economic crisis and therefore, he had approached respondent no. 2 to ameliorate the situation of crisis. Further, in order to recover the said amount, respondent no. 2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred. [Para 14] [279-F-H; 280-A-B]

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Hridaya Ranjan Prasad Verma v. State of Bihar (2000) 4 SCC 168 : [2000] 2 SCR 859; Gian Singh v. State of Punjab (2012) 10 SCC 303 : [2012] 8 SCR 753 – relied on.

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2.3 The legislature intended to criminalize only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and in-efficient transfers, under Section 415 of IPC. However, the High Court appears to have been carried away by the moral element involved in the breach of promise and made certain observations. Being a policy consideration, such suggestions need to be restricted. These observations of the High Court were not only unnecessary for the adjudication of this matter, but the same could have been understood as casting some kind of aspersions on the accused. This clearly reflected a loaded dice situation against the appellant. The High Court should have maintained judicial restraint and desisted from making such general observations at this stage of the criminal proceeding, as they may have had a bearing on the adjudication of the trial.

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- A Therefore, the observations made in paragraphs 42 and 43 of the impugned judgment stand expunged. The application filed by the appellant under Section 482 of Cr.P.C. is allowed and the proceedings initiated based on the FIR instituted at the instance of respondent no. 2 are quashed. [Paras 15, 16, 17, 18]
 B [280-B-G]

Case Law Reference

	1977 Cri LJ 1606	relied on	Para 11
	[2000] 2 SCR 859	relied on	Para 14
C	[2012] 8 SCR 753	relied on	Para 15

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 9 of 2019.

- D From the Judgment and Order dated 12.04.2018 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application (for quashing and set aside FIR/Order) No.4033 of 2012.

Praveen Kumar Rai, Hemal Kiritkumar Sheth, Advs. for the Appellant.

I. H. Syed, Varinder Kumar Sharma, Ms. Puja, Ms. Vishakha, Ms. Parul Luthra (for Ms. Hemantika Wahi), Advs. for the Respondents.

E The Judgment of the Court was delivered by

N. V. RAMANA, J. 1. Leave granted.

F 2. The present appeal is preferred against the impugned judgment, dated 12.04.2018, passed by the High Court of Gujarat, in Criminal Miscellaneous Application No. 4033 of 2012, wherein the High Court has dismissed appellant's application seeking quashing of the order framing the charges dated 04.12.2013 by the Additional Chief Metropolitan Magistrate in Criminal Case No. 388 of 2012.

G 3. It is pertinent to note the facts giving rise to the appeal in a detailed manner. The respondent no. 2- *complainant* is the director of a money lending company by the name of Dharshan Fiscal Pvt. Ltd. The appellant, who is a retired bank employee, approached the complainant's company in the month of January 2008 for a loan of Rs. 27,00,000/- . Accordingly, the respondent no. 2 transferred the funds as a loan, which H was to be repaid by the appellant within a year with interest. Thereafter,

the appellant has not repaid the amount back to the respondent no.2. Further, respondent no.2 alleged that when he approached the appellant, he was threatened by the appellant with dire consequences. Thereafter, the respondent no.2 filed a complaint based on which the FIR bearing I/C.R. No. 22/2012, dated 25.01.2012, was filed before the Kagdaphith Police Station, Ahmedabad, against the present appellant under Section 406, 409, 417, 420, 294 (b) and 506 (2) of IPC. On 23.02.2012, the appellant was enlarged on bail by the High Court after being arrested on 29.01.2012. The appellant preferred an application under Section 482 of the Cr.P.C for the quashing of the FIR bearing I/C.R No. 22/2012.

4. The charge sheet No. 28 of 2012 dated 01.03.2012, came to be filed against the appellant under Sections 406, 420 and 417 of IPC. Pursuant to the same, the Magistrate issued summons. The appellant alleged that on 04.12.2013, he was given a copy of the said chargesheet, and that the charges were framed by the Metropolitan Magistrate on the same day in a blank sheet without giving him an opportunity of being heard, as the appellant was unaccompanied by any counsel. The appellant alleges that the same was in violation of Section 239 of the Criminal Procedure Code.

5. In light of the aforesaid developments, the appellant filed an application seeking amendment of the prayer in Criminal Miscellaneous Application no. 4033 of 2012 wherein he sought for the inclusion of prayer seeking to quash and set aside the chargesheet no. 28/ 2012 in FIR No. I/C.R No.22/2012 and the charges framed by the Metropolitan Magistrate vide order dated 04.12.2013 and all further proceeding carried out in Criminal Case no. 388/2012 pending before the Additional Metropolitan Magistrate.

6. It is pertinent to note that, simultaneously respondent no.2 had preferred a summary suit in Summary Civil Suit no. 928/2011 seeking the recovery of Rs.33,46,225/- which was inclusive of the interest upon the principal amount. The same was admitted on 25.04.2011 and is still pending before the City Civil Judge, Ahmedabad.

7. *Vide* order dated 12.04.2018, the High Court dismissed the quashing petition preferred by the appellant and directed the trial court to complete the trial within three months. The High Court further went on to observe that, *prima facie* an offence of cheating under Section 420 is made out but charge under Section 406 pertaining to criminal

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- A breach of trust is not applicable in the given factual scenario. However, the High Court did not remove the charges under Section 406 and observed that no case has been made out to get the charge quashed. Aggrieved by the aforesaid dismissal, the appellant has preferred the present Special Leave Petition.
- B 8. The counsel on behalf of the appellant has urged that a perusal of the complaint would reveal that the allegations as contained in the complaint are civil in nature and the requisite averments so as to make out a case of cheating are absent. Hence, *prima facie* does not disclose the commission of the alleged offence. Moreover, it is pertinent to note that after filing Summary Suit No.928 of 2011 on 21.04.2011, the complainant has filed the written complaint dated 05.01.2012 and has attempted to give the cloak of a criminal offence to the present case which is purely civil in nature, just to harass the appellant. Lastly, the criminal complaint filed by the respondent no.2 is initiated after a lapse of more than three years from the date of offence i.e. 21.03.2008.
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- D 9. On the contrary, the counsel on behalf of respondent no.2, while supporting the judgment of the High Court has stated that the appellant had fraudulent intention from the beginning having induced the respondent no.2 to lend the aforesaid amount of Rs. 27 lacs. Further, the appellant never had the intention to repay the loan even though multiple requests were made to him. The counsel pressed that whether the intention was to cheat from the inception or not is a question of fact and the same can only be decided by trial after appreciating the entire evidence.
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- F 10. Before we analyse this case, it is to be noted that the criminal application preferred by the accused before the High Court was against the order of the Trial Court at the stage of framing of charges, wherein it is the duty of the court to apply its judicial mind to the material placed before it and to come to a clear conclusion that a *prima facie* case has been made out against the accused. An order for framing of charges is of serious concern to the accused as it affects his liberty substantially.
- G Courts must therefore be cautious that their decision at this stage causes no irreparable harm to the accused.
- H 11. Coming to the aspect of quashing of the charges, it is well settled that such exercise needs to be undertaken by the High Court in exceptional cases. It is also well settled that the framing of charges

being initial stages in the trial process, the court therein cannot base the decision of quashing the charge on the basis of the quality or quantity of evidence rather the enquiry must be limited to a *prima facie* examination. [refer to ***State of Bihar vs. Ramesh Singh, 1977 CriLJ 1606***.]

12. Having observed the background principles applicable herein, we need to consider the individual charges against the appellant. Turning to Section 405 read with 406 of IPC, we observe that the dispute arises out of a loan transaction between the parties. It falls from the record that the respondent no.2 knew the appellant and the attendant circumstances before lending the loan. Further it is an admitted fact that in order to recover the aforesaid amount, the respondent no. 2 had instituted a summary civil suit which is still pending adjudication. The law clearly recognizes a difference between simple payment/investment of money and entrustment of money or property. A mere breach of a promise, agreement or contract does not, *ipso facto*, constitute the offence of the criminal breach of trust contained in Section 405 IPC without there being a clear case of entrustment.

13. In this context, we may note that there is nothing either in the complaint or in any material before us, pointing to the fact that any property was entrusted to the appellant 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. Hence the learned Magistrate committed a serious error in issuing process against the appellants for the said offence. Unfortunately, the High Court also failed to correct this manifest error.

14. Now coming to the charge under Section 415 punishable under Section 420 of IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and *mens rea*. (See ***Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168***). In the case before us, admittedly the appellant was trapped in economic crisis and therefore, he had approached the respondent no. 2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, the respondent no. 2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the appellant to return the loan amount cannot give rise to a criminal

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- A prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this *mens rea* which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred.
- B 15. Moreover, this Court in a number of cases has usually cautioned against criminalizing civil disputes, such as breach of contractual obligations [refer to *Gian Singh v. State of Punjab, (2012) 10 SCC 303*]. The legislature intended to criminalize only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and in-efficient transfers, under Section 415 of IPC.
- C 16. However, the High Court appears to have been carried away by the moral element involved in the breach of promise and made certain observations. Being a policy consideration, such suggestions need to be restricted. The aforementioned observations of the High Court were not only unnecessary for the adjudication of this matter, but the same could have been understood as casting some kind of aspersions on the accused. This clearly reflected a loaded dice situation against the appellant herein.
- D 17. In our considered opinion, the High Court should have maintained judicial restraint and desisted from making such general observations at this stage of the criminal proceeding, as they may have had a bearing on the adjudication of the trial. Therefore, the observations made in paragraphs 42 and 43 of the impugned judgment stand expunged.
- E 18. In view of the above, we are unable to uphold the impugned order passed by the High Court in Criminal Miscellaneous Application No. 4033 of 2012 and the same is hereby set aside. The application filed by the appellant under Section 482 of Cr.P.C. is allowed and the proceedings initiated based on the FIR instituted at the instance of respondent no. 2 are hereby quashed.
- F 19. The appeal is allowed in the aforesaid terms.