

Awadhesh Kumar Paras Nath Pathak vs The State Of Maharashtra And Anr on 26 February, 2020

Author: M. G. Sewlikar

Bench: T.V. Nalawade, M.G. Sewlikar

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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2562 OF 2019

Awadhesh Kumar Paras Nath Pathak
age 58 years, occ. Service
r/o Mundegaon Igatpuri
Dist. Nashik

Applicant

Versus

1. The State of Maharashtra
Through Cidco Waluj Police Station
District Aurangabad.
2. Jagdeepkumar Ashokkumar Tyagi
IT Head Cosmo Films Ltd. Co.
age 58 years, occ. Service
r/o B-14/8-9, MIDC Area
Waluj, Dist. Aurangabad.

Respondents

Mr. V.D. Sapkal, Advocate holding for Mr. P.P. Uttarwar, Advocate for the applicant.

Mrs. V.S.Choudhary, APP for respondent No. 1.

Mr. Bharat Chugh & Irshan Dewan, Advocates holding for Mr. K.C. Sant, Advocate for respondent No. 2.

WITH
CRIMINAL APPLICATION NO. 1988 OF 2019

Devendra Rameshchandra Jain
age 33 years, occ. Business
having address at Row House No. E5
Khinwasra Orange Pride,
Gut No. 176, Opp. Abbas Petrol Pump
Waluj Mahanagar -1,
Aurangabad
Dist. Aurangabad.

Applicant

Versus

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1. The State of Maharashtra
At the instance of
The Police Inspector & Investigating Officer
Satara Police Station, Aurangabad City
Aurangabad
Dist. Aurangabad.
Presently investigated by
The Police Inspector & Investigating Officer
Economic Offences Wing, Aurangabad
Having office at The Economic Offences Wing
The Office of the Commissioner of Police
Aurangabad, Dist. Aurangabad.
2. The Commissioner of Police
The Office of the Commissioner of Police
Aurangabad City, Aurangabad
Dist. Aurangabad
3. Mr. Ravindra s/o Prahladrao Gokhale
Age 50 years, occ. Business
Having address at
Resident of Plot No. 45, Gat No. 102,
Behind Surya Lawns,
Datnagar, Beed Bypass road
Aurangabad.

Respondents

Mr. A.D. Ostwal with Mr. Kiran D. Jadhav with Mr. Shubham
Nabriya, advocates for applicants.
Mrs. V.S Choudhary, APP for respondents No. 1 and 2.
Mr. R.F. Totla, Advocate holding for Mr. Rahul Totla, Advocate for
respondent No. 3

CORAM : T.V. Nalawade &
M.G. Sewlikar, JJ.

RESERVED ON : 24th January, 2020.
PRONOUNCED ON : 26th February, 2020.

ORDER (PER M. G. SEWLIKAR, J.)

1. Both these criminal applications are being dealt with together as a common question is involved in both the applications.

2. Facts in Criminal Application No. 2562/2020 are as under :-

Applicant Awadhesh Kumar Paras Nath Pathak (hereinafter referred to as the 'applicant') was employed in Cosmo Films Limited Company (hereinafter referred to as 'Cosmo Films').

Head office of Cosmo Films is at Delhi and has a plant at Waluj MIDC, Aurangabad. Applicant was employed as Technical Manager since 05.08.1996. He tendered resignation on 04.12.2018. At that time, he was the managing head of the said plant. His resignation was accepted on 31.12.2018. Thereafter the applicant got employment in Jindal Polyfilms Ltd., Igatpuri, Dist. Nasik.

3. It is further alleged that the complainant (arrayed as respondent No. 2 in this application and hereinafter referred to as Respondent No. 2) is the Information Technology Head in Cosmo Films. Respondent No. 2 fled a complaint against the applicant alleging that during the continuance of employment of the applicant with Cosmo Films, the applicant was provided with a laptop by Cosmo Films. On the day the applicant demitted the office i.e. on 31.12.2018, the applicant was asked to return the said laptop. At that time, the applicant requested one Sachin Gore, who is the employee of Cosmo Films, to copy his personal data which was stored in the said laptop under the folder AKP-115 and provide the same to the applicant as the said folder contained applicant's personal data. The said Sachin Gore believing the representation of the applicant, copied the data from the folder AKP-115 in a pen drive and provided it to the applicant. In the year 2018, in Delhi office there was theft of data of the company which was committed by one Varun Sangi who was the employee of Cosmo Films. This aroused suspicion of respondent No. 2, for the reason of which he checked the folder AKP- 115 and to his astonishment, he found that the said folder contained the data regarding manufacturing of flm, rates of products, commission value, manufacturing line, production line etc. This folder contained many important fles relating to production and business plans of Cosmo Films. On these allegations, complaint was lodged by respondent No. 2 with Police Station MIDC Waluj, Aurangabad, on the basis of which, offence under Sections 408, 420 of the Indian Penal Code and 43(b), 66 C and 72 of the Information Technology Amendment Act, 2008, came to be registered against the applicant.

4. The facts in Criminal Application No. 1988/2019 are that complainant Ravindra Prahlad Gokhale is working in Accounts and Administration Department of Grind Master Machines Pvt. Ltd., owned by Mr. Milind Kelkar. The said Ravindra Gokhale (hereinafter referred to as 'respondent No. 2') lodged a complaint with Railway Station MIDC Police Station, Aurangabad, that the applicant joined the said Grind Master Machines Pvt. Ltd. On 27.10.2010 as an Engineer. He executed an undertaking on bond paper of Rs. 100/- to the effect that the applicant would not share or mis-use any design, technology, information, plans, technological matters and documents relating to drawings with any one. Similar agreement was executed by one Jayesh Dudkekar and Arun Tidke, who joined Grind Master Machines on 11.03.2006 and 05.03.2012 respectively. Applicant tendered resignation on 26.10.2017 which was accepted on 01.12.2017. Jayesh Dudkekar tendered resignation on 09.06.2018 which was accepted on 13.09.2018 and the resignation of Arun Tidke was accepted was 04.09.2017.

5. It is further alleged in the complaint that in the month of October 2018, Human Resource Manager (HR Manager) Sandip Pimple noticed that Arun Tidke had joined Trysing Automation Company. On further probe, it was noticed that applicant, Arun Tidke and Jayesh Dudkekar had entered into a partnership on 28.02.2018 and all of them tendered resignation at regular intervals with a pre-arranged plan. Jayesh Dudkekar, during continuation of employment with Grind Master Machines, under active connivance with applicant, had committed theft of the technology by transmitting drawings and quotations of the company through his personal email id jayesh.dudkekar2012@gmail.com to the applicant. The said information was mailed on the email id of the applicant and one Shekhar Gudekar, the owner of Sunrise Automation. The said Shekhar Gudekar by using the technology of Grind Master Machine, prepared a replica of Robot Cell For Hot Label pasting on Coil machine as being manufactured by Grind Master Machine. This machine was sold by Shekhar Gudekar to Plastrochem India Private Limited at Kolkata on 31.08.2018 for Rs. 1,32,97,000/-. The production cost of the said machine manufactured by Grind Master Machine is Rs. 1,06,37,600/-. In this manner, Grind Master Machine is deprived of profit of Rs. 26,59,400/-. Applicant, during the period from 27.10.2010 to 01.12.2017 i.e. during the continuation of employment with Grind Master Machine, committed theft of data relating to the said company which was stored in its system. In this manner, applicant, Jayesh Dudkekar and Arun Tidke cheated Grind Master Machine. On these allegations, offence under Sections 406, 420 read with section 34 of the Indian Penal Code and Sections 72 of the Information Technology Act, 2000 (hereinafter referred to as "I.T. Act" for short) and Section 63 and 63-B of the Copyright Act, 1957 has been registered against them.

6. Heard learned counsel for the respective parties.

7. Learned counsel for applicants placed reliance on the case of Sharat Babu Digumarti Vs. Government of NCT of Delhi reported in AIR 2017 SC 150. In this authority, the Honourable Apex Court has held as under :-

32. The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the Indian Penal Code and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence Under Section 292 Indian Penal Code.

Thus, the Honourable Apex Court has held that if legislative intendment is clear then the latter enactment shall prevail and the same is to be interpreted in accord with the said intention. If the special provisions having the overriding effect covers the criminal act and the offender, he gets out of the net of the Indian Penal Code.

8. Reliance was also placed on the case of Gagan Harsh Sharma and other Vs. The State of Maharashtra and others reported in 2019 Cri.L.J. 1398. After taking into consideration the entire scheme of the I.T. Act and also the law laid down by the Honourable Apex Court in the case of Sharat Babu (Supra), the Division Bench of this Court came to the conclusion that the criminal act under sections 389, 406 and 420 of the Indian Penal Code is covered by section 43 read with section 66 and 72 of the Information and Technology Act, 2000. The Division Bench in paragraphs No. 27 and 28 has held as under :-

27. Applying the aforesaid principles to the facts involved in the case, perusal of the complaint would reveal that the allegations relate to the use of the data code by the employees of the complainant company by accessing the Code and stealing the said data by using the computer source code. The Act of accessing or securing access to computer/computer system or computer network or computer resources by any person without permission of the owner or any person who is in charge of the computer, computer system, computer network or downloading of any such data or information from computer in a similar manner falls within the purview of Section 43 of the Information Technology Act, 2000. When such Act is done dishonestly and fraudulently it would attract the punishment under Section 66 of the Information Technology Act, such Act being held to be an offence. The ingredients of dishonesty and fraudulently are the same which are present if the person is charged with Section 420 of the Indian penal Code. The Offence of Section 379 in terms of technology is also covered under Section 43.

Further, as far as Section 408 is concerned which relates to criminal breach of trust, by a clerk or servant who is entrusted in such capacity with the property or with any dominion over property, would also fall within the purview of Section 43 would intents to cover any act of accessing a computer by stealing of any data, computer data base or any information from such computer or a computer system including information or data held or stored in any removable storage medium and if it is done with fraudulent and dishonest intention then it amounts to an offence. The ingredients of an offences under which are attracted by invoking and applying the Section 420, 408, 389 of the Indian Penal Code are covered by Section 66 of the Information Technology Act, 2000 and prosecuting the petitioners under the both Indian Penal Code and Information Technology Act would be a brazen violation of protection against double jeopardy.

28. In such circumstances if the special enactment in form of the information Technology Act contains a special mechanism to deal with the offences falling within the purview of information Technology Act, then the invocation and application of the provisions of the Indian Penal Code being

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applicable to the same set of facts is totally uncalled for. Though the learned APP as well as Shri Gupte has vehemently argued that the prosecution under the provisions of the Indian Penal Code can be continued and at the time of taking cognizance the Competent Court can determine the

provisions of which enactments are attracted and it is too premature to exclude the investigation in the offences constituted under the Indian Penal Code, we are not ready to accept the said contention of the learned Senior Counsel, specifically in the light of the observations of the Hon'ble Apex Court in the case of Sharat Babu Digumarti (Surpa). We are of the specific opinion that it is not permissible to merely undergo the rigmarole of investigation although it is not open for the Investigating Officer to invoke and apply the provisions of the Indian Penal Code, in light of the specific provisions contained in the Information Technology Act, 2000 and leave it to the discretion of the Police Authorities to decide in which direction the investigation is to be proceeded. The Information Technology Act, 2000 being a special enactment, it requires an able investigation keeping in mind the purpose of the enactment and to look the new venturing of crimes with the assistance of the Technology.

9. Learned counsel Shri Ostwal argued that Gagan Harsh Sharma case was challenged before the Honourable Supreme Court and the Honourable Supreme Court dismissed it in limine. The Honourable Supreme Court has held in the case of State of Uttar Pradesh Vs. Aman Mittal & another in Criminal Appeal Nos. 1328- 1329 of 2019 decided on 04.09.2019 as under :

"(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In

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either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being fled."

10. We do not agree with the observations of the Division Bench for the following reasons :-

The offence leveled against the applicants in both the applications are under sections 406, 408, 420 of the Indian Penal Code and Sections 43(D), 66C and 72 of I.T. Act. For this purpose, definition of Section 415 of the Indian Penal Code will have to be looked into which reads thus :

S. 415 - Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation - A dishonest concealment of facts is a deception within the meaning of this section.

11. The Honourable Supreme Court in the case of M/s Medchl Chemicals and Pharma Pvt. Ltd. Vs. M/s Biological E. Ltd.

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And others reported in AIR 2000 Supreme Court 1869 has explained the ingredients of Section 415 as under :-

10. The ingredients require to constitute an offence under Section 415 has been lucidly dealt with by this Court in the Case of Ram Jas v. State of U.P. (1970) 2 SCC 740 : (AIR 1974 SC 1811 : 1974 Cri LJ 1261) wherein this Court observed as below :

"The ingredients required to constitute the 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 to do or omit to do anything which he would not do or omit if he were not so deceived; and

(ii) in cases covered by (ii)(b) the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

12. Section 420 of the Indian Penal Code deals with cheating and dishonestly inducing delivery of property which reads as under :-

S.420 Cheating and dishonestly inducing delivery of property -

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being

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converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Thus, the ingredients of section 420 are

i) There has to be cheating.

- ii) There has to be dishonest inducement
- iii) The person is deceived and is induced to deliver any property to

any person or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed and which is capable of being converted into a valuable security.

13. The Honourable Supreme Court in the case of M/s Medchl Chemicals (Supra) has observed that in order to attract the provisions of section 418 and 420 of the Indian Penal Code, guilty intent at the time of making promise is required and subsequent failure to fulfill the promise by itself does not attract the provisions of sections 418 or 420 of the Indian Penal Code. Mens rea is one of the essential ingredients of the offence of cheating under section 420 of the Indian Penal Code.

14. Other offences leveled against applicants in both the applications are under Sections 406 and 408 of the Indian Penal

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Code i.e. criminal breach of trust. Section 405 of the Indian Penal Code defines criminal breach of trust as under :-

S. 405 Criminal breach of trust - Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

Section 405 of the Indian Penal Code deals with criminal breach of trust. A careful reading of the Section 405 of the Indian Penal Code shows that a criminal breach of trust involves the following ingredients :

(a) a person should have been entrusted with property, or entrusted with dominion over property;

(b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so;

(c) that such misappropriation, conversion, use or disposal should

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be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

15. Section 406 of the Indian Penal Code prescribes punishment for criminal breach of trust as defined in Section 405 of the Indian Penal Code. For the offence punishable under Section 406 of the Indian Penal code, the following conditions are required to be fulfilled :

(i) that the accused was entrusted with property or with dominion over it and

(ii) that he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

16. The gist of the offence is misappropriation done in a dishonest manner. There are two distinct parts of the said offence. The first involves the fact of entrustment, wherein an obligation arises in relation to the property over which dominion or control is acquired. The second part deals with misappropriation which should be contrary to the terms of the obligation which is created. Thus, once it is proved that the beneficial interest in the property was

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vested in some other person other than the accused and the accused has held that property on behalf of that person, appropriation of that beneficial interest in the property by the accused for his own amounts to 'criminal breach of trust'.

17. So far as Section 420 of the Indian Penal Code is concerned, it deals with cheating. Essential ingredients of Section 420 of the Indian Penal code are :- (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security, and (iii) mens rea of the accused at the time of making the inducement.

18. It is, thus, clear from this definition that to attract the provisions of Section 405 of the Indian Penal Code, there has to be dishonest misappropriation of the property to one's own use or dishonest use or disposal of that property in violation of any direction of law or any legal contract. If any of these ingredients is absent, Section 405 will not be attracted. Section 406 of the Indian Penal Code deals with punishment for criminal breach of trust and Section 408 deals with criminal breach of trust by clerk or servant.

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19. Now, it will have to be examined whether these criminal acts are covered by the I. T. Act. Section 43 of the I. T. Act deals with penalties, compensation and adjudication and Section 66 makes the acts referred to in Section 43 punishable with imprisonment if they are done dishonestly or

fraudulently. Section 43 of the I. T. Act reads as under :-

43. Penalty and compensation for damage to computer, computer system, etc. If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network --

(a) accesses or secures access to such computer, computer system or computer network [or computer resource];

(b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

(c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

(d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;

(e) disrupts or causes disruption of any computer, computer system or computer network;

(f) denies or causes the denial of access to any person

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authorised to access any computer, computer system or computer network by any means;

(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

(h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,

(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;

(j) steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage; [he shall be liable to pay damages by way of compensation to the person so affected].

Explanation.

For the purposes of this section:

(i) "computer contaminant" means any set of computer instructions that are designed --

(a) to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network; or

(b) by any means to usurp the normal operation of the computer, computer system, or computer network;

(ii) "computer data base" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer

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network and are intended for use in a computer, computer system or computer network;

(iii) "computer virus" means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, data or instruction is executed or some other event takes place in that computer resource;

(iv) "damage" means to destroy, alter, delete, add, modify or rearrange any computer resource by any means.

(v) "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

20. Dishonestly has been defined in Section 24 of the Indian Penal Code which reads as under :-

24. "Dishonestly" - Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

The term "fraudulently" is defined in Section 25 of the Indian Penal Code which reads as under :-

25. "Fraudulently" - A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

21. Section 43 of the Information Technology Act does not contemplate the cases in which permission is obtained by cheating

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the owner or a person in charge of computer. It simply says that if these acts are done without permission they are penalised if they are done dishonestly or fraudulently. The expression dishonestly means the acts done with the intention of causing wrongful gain to oneself and wrongful loss to another. Fraudulently is defined to mean the acts done with intent to defraud others. Under Section 420 of the Indian Penal Code, 'dishonestly' is one of the ingredients but not the sole ingredient. For attracting offence under Section 420 of the Indian Penal Code, in addition to dishonest intention, elements of cheating and inducement to deliver property are also the essential ingredients which are lacking in Section 43 read with Section 66 of the I.T Act. Therefore, in our considered opinion, Section 43 does not cover the criminal act contemplated in Section 420 of the Indian Penal Code.

22. Section 66 of the I.T. Act deals with the cases involving the acts enumerated in Section 43(a) to (j) of the Act done dishonestly or fraudulently. In Criminal Application no. 2562/2019, the allegations are that the applicant deceived Sachin Gore by misrepresenting that the folder APK-115 contains his personal data and Sachin Gore was induced to copy the said folder and give it to

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the applicant. But, infact, the said folder contained valuable data regarding designs etc. In our opinion, Section 43 read with Section 66 of the I.T. Act does not cover the acts alleged in Criminal Application no. 2562/2019. The acts done dishonestly or fraudulently will not cover the cases where allegations of deception are made.

23. Moreover, in the case of The State of Uttar Pradesh Vs. Aman Mittal (supra), the Honourable Supreme Court has kept this question open and observed as under :-

25. The Bombay High Court in Gagan Harsh Sharma has found that even a dishonest and fraudulent act falls within the scope of Section 66 of IT Act. We are not called upon in the present appeals to examine whether an accused can be tried for an offence under IPC in view of Section 66 of IT Act. Such question can be raised and decided in an appropriate case.

24. It was argued that Section 72 of the Information and Technology Act, 2000 deals with the acts involving criminal breach of trust. Section 72 of the Act reads as under :-

72. Penalty for breach of confidentiality and privacy -

Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register,

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correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

Thus, following are the ingredients of Section 72 of the Information and Technology Act :-

- i) A person should disclose electronic record, book, register, correspondence, information, document or any other material to any other person;
- ii) The person who discloses electronic record etc. should have secured the access to them in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder.
- iii) The electronic record etc. should have been disclosed without the consent of the person concerned.

25. Reliance was placed on Section 72-A of the Act which reads as under :-

Section 72A - Punishment for disclosure of information in breach of lawful contract.
-Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing

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personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.] The ingredients of Section 72-A of the Act are -

- i) Any person has secured access to any material containing personal information about another person and this access has been secured by providing service in terms of lawful contract.
- ii) Such person with intent to cause wrongful loss or wrongful gain discloses without consent of the person concerned or in breach of lawful contract such material to any other person.

Thus, Section 72-A will not come into play only when access has been secured while providing service in terms of lawful contract. Both the applications i.e. Criminal Application No. 2562/2019 and 1988/2019 do not contain allegations that access has been secured while providing service in

terms of lawful contract. Therefore, Section 72-A will have no application.

26. As indicated above, for invoking section 406 of the Indian

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Penal Code, there has to be entrustment or dominion over the property and the said property is misappropriated or converted to his own use without the consent of the person concerned or in breach of the directions or lawful contract. Therefore, the essential requirement for pressing into service the provisions of Section 406 of the Indian Penal Code are that the property entrusted has been misappropriated or converted to one's own use dishonestly. Section 72 of the I.T. Act can be pressed into service only when information is disclosed to another person without permission of the person concerned. It does not contemplate the situation wherein the property, in the case in hand, electronic record, is misappropriated or converted to one's own use. Disclosure of electronic record etc. to any person without permission of the concerned person is made punishable under Section 72 of the I.T. Act. Section 72 does not make punishable the act of converting the electronic record to one's own use. Therefore, Section 72 does not cover the criminal act contemplated in Section 406, 408 and 409 of the Indian Penal Code.

27. In Criminal Application No. 1988/2019, the allegations

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are that the applicant and his associates not only disclosed the electronic record etc. but also used this information, electronic record, data for their own business. This act was done by them during the continuance of the employment with Grind Master Machines. Therefore, in our opinion, Section 72 of the I.T. Act does not cover the case of converting the said electronic record to their own use.

28. In view of this, following questions are required to be referred to the Larger Bench :-

1) Whether Section 43 read with Section 66 of I.T. Act covers the cases :-

a) Involving the obtaining of permission, by cheating the owner or any other person, who is incharge of computer, computer system or computer network, and thereby induced the owner or person in charge of the computer, computer system or computer network for doing the act enumerated in Section 43 of the I.T. Act ?

b) The expression fraudulently or dishonestly covers the cases in which permission is obtained from the owner or person who is

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incharge of computer or computer system or computer network by cheating him ?

c) Whether Section 72 of the I.T. Act covers all the ingredients of Sections 406, 408, 409 of the Indian Penal Code especially cases in which access is secured dishonestly to any electronic correspondence, information, document or other material and the said electronic record correspondence, information, document or material in misappropriated or converted for one's own use ?

d) Whether the acts done under Sections 43 or 72 of the I.T. Act cover the criminal acts done with common intention ?

29. The Registrar (Judicial) of this Court, is therefore requested to place before the Hon'ble the Chief Justice, the papers of these criminal applications along with the copy of this order in accordance with Rule 7 of Chapter I of the Bombay High Court Appellate Side Rules, 1960.

(M. G. SEWLIKAR)
Judge

dyb

(T.V. NALAWADE)
Judge