2024 INSC 626

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 3114 OF 2024

Delhi Race Club (1940) Ltd. & Ors. **…Appellant(s)**

Versus

State of Uttar Pradesh & Anr. **…Respondent(s)**

J U D G M E N T

J. B. PARDIWALA, J.:

1. This appeal arises from the order passed by the High Court of Judicature at Allahabad dated 03.04.2024 in Application No. 15453 of 2023 filed by the appellant herein by which, the High Court rejected the same and thereby declined to quash and set aside the summoning order dated 28.02.2023 passed by the Additional Chief Judicial Magistrate, Khurja, Bulandshahar in Complaint Case No. 547 of 2021.

2. Facts giving rise to this appeal may be summarised as under:

(i) The respondent No. 2 herein is the original complainant. He lodged a private complaint in the court of Additional Chief Judicial Magistrate, Khurja, Bulandshahar against the appellants herein for the offence punishable under Sections 406, 420 & 120B respectively of the Indian Penal Code, 1860 (for short, "**IPC**").

The complaint reads thus:

> *"It is most respectful that the Applicant Vipin Kumar Agarwal, son of Late Shri Bhagwat Swaroop Agarwal, who is the owner of a firm Agarwal Udyog, New Mandi, Khurja. The applicant's firm used to supply horse feed, barley and oats to Delhi Race Club 1940 Limited, New Delhi since 1990. In the year 1995, the then head of the Race Club, Shri PS Vedi and the then Secretary Sehgal told the applicant that from now on the bills for the supply of horse grain and oats would be made in the name of Delhi Horse Trainers Association, Race Course Road, New Delhi. And the Head and Secretary of the same association have now been made separate, they will pay you for the goods supplied. Till the year 2017, the payment of the applicant's firm continued to be regular and now at present Delhi Horse Trainers Association President Kazim Ali Khan and Secretary Sanjeev Charan owe a payment of Rs 9,11,434/- to the applicant's firm. Whenever the applicant makes demands, they keep evading when the applicant tried to talk to the current President of the Race Club, J. S. Vedi and the current Secretary about this. Then the Secretary GS Vedi said that you should demand your dues from Delhi Horse Trainers Association only, we have no relation with them, then the applicant tried to meet Kazim Ali Pradhan along with Manish Kumar Sharma, son of Mahesh Kumar Sharma, resident of Nawalpura Khurja and Chirag Agarwal, son of Vijay Agarwal, resident of Malpura, Khurja but they refused to talk to the applicant and threatened that if he came here again, it would be very bad and started a scuffle. The applicant feels that both the above mentioned officials of Delhi Race Club 1940 Limited, New Delhi and Delhi Horse Trainers Association, in connivance with each other, cheated the applicant and dishonestly obtained*

the goods from the applicant's firm in bad faith and they used it for their club and association and now they do not want to pay for the goods given by the applicant. All of them under conspiracy want to grab the money of the applicant's firm, after which the applicant had given a legal notice to the above mentioned people through his advocate on 18th June 2020 but even after receiving the notice, the above people neither gave any reply to the notice nor was the applicant's outstanding amount paid. In this context, the applicant gave an application to Inspector-in-charge of Kotwali Khurja Nagar on 25.07.2021 and on 06.08.2021, an application letter was sent to SSP Sir Bulandshahar through postal registry, but till date no action has been taken nor has the applicant's report been registered.

Therefore, it is prayed that after the investigation, please summon the accused along with evidence to the court and punish them for the crime committed by them.

Date 27.08.2021"

(ii) The plain reading of the complaint would indicate that the appellant No. 1 is a legal entity. The appellant No. 2 is the Secretary of the appellant No. 1 Company, and the appellant No. 3 is the Honorary President and Non-Executive Director of the appellant No. 1 Company. They used to purchase grains and oats from the complainant meant to be fed to the horses maintained by the appellant No. 1 Company. According to the complainant, an amount of Rs. 9,11,434/- (Rupees Nine Lakh Eleven Thousand Four Hundred Thirty Four) is due and payable to him by the appellants towards the sale of horse grains and oats over a period of time. It is alleged that as the appellants failed to make the payment, he thought fit to file the complaint as according to him he has been cheated by the appellants.

(iii) The court concerned initially took cognizance upon the complaint but postponed the issuance of process as it thought fit to initiate magisterial inquiry under Section 202 of the Code of Criminal Procedure, 1973 (for short, "CrPC"). The statement of the complainant recorded by the Additional Chief Judicial Magistrate in the course of the magisterial inquiry under Section 202 of the CrPC reads thus:

> *"Name of the witness Ankit Agarwal S/o Vipin Agarwal aged about 34 years, Occupation-Businessman, resident of 13, Malpura, Subhash Road, Khurja, PS-Khurja Nagar, District Bulandshahar today on 08.3.22 on oath gave statement that:- Vipin Kumar Agarwal is the owner of a firm Agarwal Udyog which is located in New Mandi Khurja. Delhi Race Course Club 1940 Limited has been purchasing horse feed from the above mentioned firm for a long time and payment for the same has been done on time After the year 2017, Delhi Horse Trainers Association President Kazim Ali and Secretary Sanjeev Charan kept paying the goods. Since thereafter, the above mentioned people owe Rs 9,11,434/- to the above firm. After repeated requests, both the above mentioned firms have been telling to make payment to each other but the opposite party has also not made the payment.*
>
> *Delhi Race Course Club President JS Bedi and Secretary HK Uppal are delaying the payment of horse feed purchased by them. The people of the above two firms have colluded with each other and do not want to pay for the goods taken. Vipin Agarwal, proprietor of Agarwal Udyog, is my father hence I am aware of the entire matter"*

(iv) The Magistrate also recorded the statement of one Manish Kumar in course of the inquiry under Section 202 of the CrPC. The statement reads thus:

> *"Witness name Manish Kumar Sharma father's name aged 33*

years occupation labourer resident of Nawalpura, Khurja Police Station Khurja Nagar District Bulandshahar today on 08.03.22 on oath gave statement that:-

I have been working as a bookkeeper for the last 17 years at Vipin Kumar Agarwal's firm Agarwal Udyog, which is located in New Mandi Khurja. From the above mentioned firm, Delhi Race Course Club 1940 Limited which is a New Delhi based firm. Have been buying horse grain and oats. President of this firm J S Bedi and Secretary H K Uppal have been coming to our firm to buy horse feed and oats and the firm has been paying for the purchased goods. It was said by the above two that now the bills for horse feed and oats will be made in the name of Delhi Horse Trainers Association Delhi and the Head of this firm, Kazim Ali and Secretary Sanjeev Charan will pay it. On the request of the above people, horse grain and oats continued to be supplied from our firm. The above mentioned people owes Rs. 9,11,434/- to our firm, upon being repeatedly asked for payment, the above mentioned people are evading. Once Chirag Agarwal and I went to their office in New Delhi, they refused to talk to Vipin Agarwal and us and they threatened that if they come here again, it will be very bad and they started scuffle. The outstanding amount of Rs. 9,11,434/- has not yet been paid by the officials of the above two firms. The above mentioned people have fraudulently obtained the goods from our firm in bad faith and do not want to pay for the same. They have used the supplied goods. Certified after reading and listening."

(v) At the end of the magisterial inquiry, the court issued process for the offence punishable under Section 406 of the IPC. The order issuing process reads thus:

"Date:- 28.02.2023

The file was presented for orders. The complainant has been heard on the question of summons on an earlier date.

On behalf of the complainant Vipin Kumar Aggarwal, the above complaint was presented against the opposite parties Delhi Race Club etc. to the effect that the firm of the complainant was

supplying horse grain, barley and oats to Delhi Race Club since the year 1990. In the year 1995, the President of the Race Club, Mr. P.S. Vedi and the then Sachin Sehgal ji said that the bill would be made in the name of Delhi Horse Trainers Association, Race Course Road, New Delhi and the Head and Secretary of the same association have now been made separately. They will make the payment for the goods given by you. Till the year 2017, the applicant's firm's payment continued to be regular and now at present the payment of Rs 9,11,434/- is outstanding from the applicant's firm when the applicant talked about this to the current President of the Race Club, J.S. Vedi and the current Secretary then the secretary said that you should demand your dues from Delhi Horse Trainers Association only. Then the applicant tried to meet Kajim Ali but he refused to talk to the applicant and got into a scuffle. The above two associations and officials unanimously cheated the applicant and obtained goods from the applicant's firm and do not want to pay for the goods given by the applicant. The applicant had given a legal notice to the above people through his advocate on 18 June 2020 but even after receiving the notice, the above people neither gave any reply to the notice nor paid the outstanding amount of the applicant. In this context, the applicant gave an application to Khurja Nagar police station and on 06.08.2021 an application was given to SSP Bulandshahar but no action has been taken till date.

On behalf of the complainant, he got himself examined under Section 200 of the Code of Criminal Procedure and under Section 202 CrPC, the statement of witnesses Ankit Aggarwal as PW-1 and Manish Kumar Sharma as PW-2 was recorded. In which they supported the statements mentioned in the complaint. One copy of the application sent by the complainant to the Senior Superintendent of Police as documentary evidence in support of his statements, a photocopy of the registry receipt, one copy of the net receipt postal registry, five copies of the bill book, one true copy of the remaining balance, one copy of receipt of goods, one copy of remaining balance, one copy of legal notice were filed per receipt.

The complainant has stated in his statement under Section 200 CrPC, "after five years of 1990, these people said that we will not make the payment. A separate organization has been formed for payment, which will do it. An organization named Delhi

Trainers Association has been formed. Now I owe these people nine lakh eleven thousand four hundred thirty-four rupees. When we asked for money several times, we did not receive it. The President of Delhi Race Course is not ready to talk. I am suffering from cancer. Business is seen by children only. We also gave them legal notice but nothing happened."

Perused the entire evidence material available on file.

On the basis of the evidence presented by the complainant under section 200 CrPC and section 202 CrPC, there is prima facie basis for summoning the opposition parties Delhi Race Course Club, Delhi Race Horse Trainers Association, JS Bedi, HK Uppal, Kazim Ali Khan and Sanjeev Charan for consideration under section 406 IPC. There are sufficient grounds for summoning for trial of a punishable offense under Section 406 IPC.

ORDER

The opposite parties Delhi Race Course Club, Delhi Race Horse Trainers Association, JS Bedi, HK Uppal, Kazim Ali Khan and Sanjeev Charan are summoned for trial for the offense under section 406 of the Indian Penal Code. The complainant should process the summons against the opposition parties within a week, every summons should be issued along with a copy of the complaint letter, the complainant list should be filed and the witnesses should be filed.

The case file be put up on 27.04.2023 for appearance."

3. In such circumstances referred to above, the appellants preferred an application under Section 482 of the CrPC in the High Court, praying for quashing of the summoning order dated 28.02.2023 passed by the Additional Chief Judicial Magistrate, Khurja, Bulandshahar.

4. The High Court rejected the application filed by the appellants herein, observing as under:

"15. On the basis of averments made in the complaint, it is a case of the complainant who was regularly supplying Oats, used for horses. In the year 1995, the complainant was asked to raise invoice in favour of the 'Association'. The complainant agreed and continued to raise invoice in favour of the 'Association'. After 2017, an amount of Rs. 9,11,434/- became due upon the applicants. He contacted Delhi Race Club (1940) Ltd. and he was directed to contact the 'Association'. The applicant Delhi Race Club (1940) Ltd. and 'Association' are not separate legal entity. The applicants and the 'Association' were in collusion and committed fraud with complainant. The goods supplied by complainant were received but its payment was not made.

16. Admittedly, no civil proceedings are pending for the amount in question between the parties. It is not the case of the applicants that transaction was a commercial transaction whereas the case of opposite party No. 2 is for the supply made by him. He is bound to raise his payment on the direction of the Delhi Race Club (1940) Ltd. He raised invoices in favour of the 'Association' from 1995. There is no change in the manner of raising invoices by the complainant. Delhi Race Club (1940) Ltd. continued to make payment upto the year 2017. The complainant was not being paid Rs. 9,11,434/- by the applicants who instead transferred their responsibility to the 'Association'.

17. Suffice to mention here that the copies of the invoices are brought on record through counter affidavit by the complainant and the same are not controverted by the applicants. Prima facie, it reflects that the invoices were raised by complainant in accordance with the advice received by him and he continued to receive payment on the basis of such invoices and when the payment of Rs. 9,11,434/- was not paid to the complainant he contacted Delhi Race Club (1940) Ltd. which averted him to the 'Association'. It appears that Delhi Race Club (1940) Ltd. and the 'Association' are not separate entity.

18. On the face of record, it appears that originally complainant was supplying oats to the 'Company'. In the year 1995, the complainant was directed to raise invoices in favour of the 'Association'. The Company continued to receive supply of Oats made by the complainant even after 1995, whereas invoices were raised in favour of the 'Association'. This direction of the company goes to show that there was some mala fide intention

> *on the part of the Company. The complainant bona fide continued to make supply under the direction of the Company. The invoices were raised by the complainant in similar manner since 1995 to 2017 and thereafter. It appears that there was an oral direction to raise invoices in favour of 'Association' made by the Company, which indicates mala fide of the Company.*
>
> *19. After hearing the learned counsel for the parties and after perusing the impugned order, this Court is of the opinion that impugned order has been passed on the basis of facts and circumstances of the case after considering the evidence on record. There is no legal infirmity in the impugned orders, which may call for any interference by this Court in exercise of powers conferred under Section 482 Cr.P.C.*"

5. Thus, according to the High Court, the intention on the part of the company was *prima facie mala fide* and the payment of Rs. 9,11,434/- could be said to be intentionally withheld.

SCOPE OF INQUIRY UNDER SECTION 202 OF THE CRPC

6. It is by now well settled that at the stage of issuing process it is not the duty of the Court to find out as to whether the accused will be ultimately convicted or acquitted. The object of consideration of the merits of the case at this stage could only be to determine whether there are sufficient grounds for proceeding further or not. Mere existence of some grounds which would be material in deciding whether the accused should be convicted or acquitted does not generally indicate that the case must necessarily fail. On the other hand, such grounds may indicate the need for proceeding further in order to discover the truth after a full and proper investigation. If, however, a bare perusal of a complaint or the evidence led in support of it shows essential ingredients of the offences alleged are absent or that

the dispute is only of a civil nature or that there are such patent absurdities in evidence produced that it would be a waste of time to proceed further, then of course, the complaint is liable to be dismissed at that stage only. What the Magistrate has to determine at the stage of issue of process is not the correctness or the probability or improbability of individual items of evidence on disputable grounds, but the existence or otherwise of a prima facie case on the assumption that what is stated can be true unless the prosecution allegations are so fantastic that they cannot reasonably be held to be true. [See : ***D.N. Bhattacharjee v. State of West Bengal :*** (1972) 3 SCC 414 : AIR 1972 SC 1607 : (1972 Cri LJ 1037)].

7. Further it is also well settled that at the stage of issuing process a Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be *prima facie* satisfied whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case nor can the High Court go into this matter in its inherent jurisdiction which is to be sparingly used. The scope of the inquiry under Section 202 of the CrPC is extremely limited — only to the ascertainment of the truth or falsehood of the allegations made in the complaint — (i) on the materials placed by the complainant before the Court (ii) for the limited purpose of finding out whether a *prima facie* case for issue of process has been made out, and (iii) for deciding the question purely from the point of view of the complainant without at all

adverting to any defence that the accused may have. In fact in proceedings under Section 202 of the CrPC, the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a *prima facie* case against him. The discretion given to the Magistrate on this behalf has to be judicially exercised by him. Once the Magistrate has exercised his discretion, it is not for the High Court or even the Supreme Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in the conviction of the accused. These considerations are totally foreign to the scope and ambit of an inquiry under Section 202 of the CrPC which culminates into an order under Section 204. [See : ***Smt. Nagawwa v. Veeranna Shivalingappa Kanjalgi*** : (1976) 3 SCC 736]. It is no doubt true that in this very decision this Court has enumerated certain illustrations as to when the order of Magistrate issuing process against the accused can be quashed or set aside. These illustrations are as under :—

> *"(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the*

> *accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused.*
>
> *(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused.*
>
> *(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and*
>
> *(4) Where the complaint suffers from fundamental legal defects, such as want of sanction or absence of a complaint by legally competent authority and the like."*

8. Each Penal Section of the Indian Penal Code or of the other laws can be subjected to an analysis by posing and answering the following questions: -

I. What is the overt act stipulated in the Section, which overt act has resulted in an injury?

II. What is the state of mind stipulated in respect of the accused and which state of mind must precede or accompany the act of the accused?

ANALYSIS

9. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned order.

10. The case at hand is one of an unpaid seller. It is the case of the complainant that he used to regularly supply consignments of grains & oats meant for horses at the

Delhi Race Club. The complainant used to raise invoices in favour of the Club and the Club used to pay the requisite amount. However, according to the complainant after 2017, the Club stopped making the payment. It is the case of the complainant that an amount of Rs. 9,11,434/- is due and payable by the appellants towards the supply of the consignment of oats.

11. The impugned order passed by the High Court is a fine specimen of total non-application of mind. Although the complaint was filed for the offence punishable under Sections 406, 420 and 120B respectively of the IPC yet the Additional Chief Judicial Magistrate thought fit to take cognizance and issue process only for the offence of criminal breach of trust as defined under Section 405 of the IPC and made punishable under Section 406 of the IPC.

12. We are of the view that even if the entire case of the complainant is accepted as true no offence worth the name is disclosed.

13. This Court has time and again reminded that summoning of an accused in a criminal case is a serious matter. 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 the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both

oral and documentary in support thereof. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused. [See: ***Pepsi Foods Ltd. v. Special Judicial Magistrate*** : **(1998) 5 SCC 749**]

14. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the CrPC, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the appellant Nos. 2 and 3 respectively herein who are none other than office bearers of the appellant No. 1 Company. When the appellant No. 1 is the Company and it is alleged that the company has committed the offence then there is no question of attributing vicarious liability to the office bearers of the Company so far as the offence of cheating or criminal breach of trust is concerned. The office bearers could be arrayed as accused only if direct allegations are levelled against them. In other words, the complainant has to demonstrate that he has been cheated on account of criminal breach of trust or cheating or deception practiced by the office bearers. The Magistrate failed to pose unto himself the correct question *viz.* as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the

appellant Nos. 2 and 3 herein were personally liable for any offence. The appellant No. 1 is a body corporate. Vicarious liability of the office bearers would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

15. In ***Legal Remembrancer, West Bengal v. Abani Kumar Banerji*** reported in **AIR 1950 Cal 437**, a Division Bench of the Calcutta High Court speaking through Justice K.C. Das Gupta (as he then was) held that a magistrate is not bound to take cognizance of an offence merely because a complaint is filed before him. He is required to carefully apply his mind to the contents of the complaint before taking cognizance of any offence alleged therein. The relevant observations read as under: -

> *"... As I read s. 190 of the Code of Criminal Procedure and the subsequent sections, it seems to me to be clear that a magistrate is not bound to take cognizance of an offence, merely because a petition of complaint is filed before him. Mr. Mukherji's argument is that a magistrate cannot possibly take any action with regard to a petition of complaint, without applying his mind to it, and taking cognizance of the offence mentioned in the complaint necessarily takes place, when the magistrate's mind is applied to the petition. Consequently Mr. Mukherji argues, whenever a magistrate takes the action, say, of issuing search warrant or asking the police to enquire and to investigate, he has taken cognizance of the case. In my judgment, this is putting a wrong connotation on the words "taking cognizance". What is "taking cognizance" has not been defined in the Code of Criminal Procedure, and I have no desire now to attempt to define it. It seems to me clear,*

> *however, that before it can be said that any magistrate has taken cognizance of any offence under s. 190(1)(a) of the Code of Criminal Procedure, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter,—proceeding under s. 200, and thereafter sending it for enquiry and report under s. 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under s. 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. My conclusion, therefore, is that the learned magistrate is wrong in thinking that the Chief Presidency Magistrate was bound to take cognizance of the case as soon as the petition of complaint was filed."*
>
> (Emphasis supplied)

16. The aforesaid observation of the Calcutta High Court was referred to and relied upon with approval by this Court in its decision in ***R.R. Chari v. State of U.P.*** reported in **AIR 1951 SC 207**.

17. In ***Tilak Nagar Industries Ltd. & Ors. v. State of A.P.*** reported in **(2011) 15 SCC 571**, this Court held that the power under Section 156(3) of the CrPC can be exercised by a magistrate even before he takes cognizance provided the complaint discloses the commission of cognizable offences and if the complaint does not disclose commission of cognizable offences, such an order of the magistrate directing investigation is liable to be quashed. The relevant observations read as under: -

> *"11. After considering the rival submissions, we are of the view that the contentions of Mr Luthra are correct in view of Section 155(2) of the Code as explained in Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] . We are of the*

> *opinion that the statutory safeguard which is given under Section 155(2) of the Code must be strictly followed, since they are conceived in public interest and as a guarantee against frivolous and vexatious investigation.*
>
> ***12.** The order of the Magistrate dated 21-6-2010 does not disclose that he has taken cognizance. However, power under Section 156(3) can be exercised by the Magistrate even before he takes cognizance provided the complaint discloses the commission of cognizable offence. Since in the instant case the complaint does not do so, the order of the Magistrate stated above cannot be sustained in law and is accordingly quashed."*

18. The aforesaid decision was in context with the power of the Magistrate to order police investigation under Section 156(3) of the CrPC. What is sought to be conveyed in the said decision is that when the Magistrate orders police investigation under Section 156(3) of the CrPC he does not take cognizance upon the complaint. It is only upon receipt of the police report that the Magistrate may take cognizance. If at the stage of pre-cognizance, the Magistrate is expected to be careful or to put it in other words, the Magistrate is obliged to look into the complaint threadbare so as to reach to a *prima facie* conclusion whether the offence is disclosed or not, then he is expected to be more careful when he is actually taking cognizance upon a private complaint and ordering issue of process.

19. The aforesaid aspect could be said to have been completely lost sight of by the High Court, while rejecting the application filed by the appellant herein under Section 482 of the CrPC, seeking quashing of the summoning order.

20. In ***Mehmood Ul Rehman v. Khazir Mohammad Tunda*** reported in **(2015) 12 SCC 420**, this Court held thus: —

> *"22… The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court…In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 of CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 of CrPC, by issuing process for appearance. Application of mind is best demonstrated by disclosure of mind on the satisfaction…To be called to appear before criminal court as an accused is serious matter affecting one's dignity, self respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."*
>
> (Emphasis supplied)

21. The Principle of law discernible from the aforesaid decision is that issuance of summons is a serious matter and, therefore, should not be done mechanically and it should be done only upon satisfaction on the ground for proceeding further in the matter against a person concerned based on the materials collected during the inquiry.

22. In the aforesaid circumstances, the next question to be considered is whether a summons issued by a Magistrate can be interfered with in exercise of the power

under Section 482, CrPC. In the decisions in ***Bhushan Kumar v. State (NCT of Delhi)*** reported in **(2012) 5 SCC 424** and ***Pepsi Foods Ltd.*** (supra), this Court held that a petition filed under Section 482, CrPC, for quashing an order summoning the accused is maintainable. There cannot be any doubt that once it is held that *sine qua non* for exercise of the power to issue summons is the subjective satisfaction "*on the ground for proceeding further*" while exercising the power to consider the legality of a summons issued by a Magistrate, certainly it is the duty of the Court to look into the question as to whether the learned Magistrate had applied his mind to form an opinion as to the existence of sufficient ground for proceeding further and in that regard to issue summons to face the trial for the offence concerned. In this context, we think it appropriate to state that one should understand that 'taking cognizance', empowered under Section 190, CrPC, and 'issuing process', empowered under Section 204, CrPC, are different and distinct. [See the decision in ***Sunil Bharti Mittal v. C.B.I. :*** **(2015) 4 SCC 609**].

23. In ***Sunil Bharti Mittal*** (supra), this Court interpreted the expression "*sufficient grounds for proceeding*" and held that there should be sufficiency of materials against the accused concerned before proceeding under Section 204 of the CrPC. It was held thus: —

> *"53. <u>However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be</u>*

> *formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."*
>
> (Emphasis supplied)

DIFFERENCE BETWEEN CRIMINAL BREACH OF TRUST AND CHEATING

24. This Court in its decision in ***S.W. Palanitkar & Ors. v. State of Bihar & Anr.*** reported in **(2002) 1 SCC 241** expounded the difference in the ingredients required for constituting an of 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 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. Palanitkar*** (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) Cr.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** 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.

31. At the most, the court of the Additional Chief Judicial Magistrate could have issued process for the offence punishable under Section 420 of the IPC i.e. cheating but in any circumstances no case of criminal breach of trust is made out. The reason being that indisputably there is no entrustment of any property in the

case at hand. It is not even the case of the complainant that any property was lawfully entrusted to the appellants and that the same has been dishonestly misappropriated. The case of the complainant is plain and simple. He says that the price of the goods sold by him has not been paid. Once there is a sale, Section 406 of the IPC goes out of picture. According to the complainant, the invoices raised by him were not cleared. No case worth the name of cheating is also made out.

32. Even if the Magistrate would have issued process for the offence punishable under Section 420 of the IPC, i.e., cheating the same would have been liable to be quashed and set aside, as none of the ingredients to constitute the offence of cheating are disclosed from the materials on record.

33. It has been held in ***State of Gujarat* v. *Jaswantlal Nathalal*** reported in **(1968) 2 SCR 408**, *"The term "entrusted" found in Section 405 IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter—see* ***Velji Raghvaji Patel v. State of Maharashtra*** *[(1965) 2 SCR 429]. Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trust — see* ***Jaswantrai Manilal Akhaney v. State of***

Bombay *[1956 SCR 483]. The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an "entrustment"".*

34. Similarly, in ***Central Bureau of Investigation, SPE, SIU(X), New Delhi v. Duncans Agro Industries Ltd., Calcutta*** reported in **(1996) 5 SCC 591** this Court held that the expression "*entrusted with property*" used in Section 405 of the IPC connotes that the property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or that the beneficial interest in or ownership thereof must be in the other person and the offender must hold such property in trust for such other person or for his benefit. The relevant observations read as under: -

> *"27. In the instant case, a serious dispute has been raised by the learned counsel appearing for the respective parties as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression "entrusted with property" or "with any dominion over property" has been used in a wide sense in Section 405 IPC. Such expression includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted' appearing in Section 405 IPC is not necessarily a term of law. It has wide and different implications in different contexts. It is, however, necessary that the ownership or beneficial interest in the*

> *ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The expression 'trust' in Section 405 IPC is a comprehensive expression and has been used to denote various kinds of relationships like the relationship of trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee. When some goods are hypothecated by a person to another person, the ownership of the goods still remains with the person who has hypothecated such goods. The property in respect of which criminal breach of trust can be committed must necessarily be the property of some person other than the accused or the beneficial interest in or ownership of it must be in the other person and the offender must hold such property in trust for such other person or for his benefit. In a case of pledge, the pledged article belongs to some other person but the same is kept in trust by the pledgee. [...]*"
>
> (Emphasis supplied)

35. The aforesaid exposition of law makes it clear that there should be some entrustment of property to the accused wherein the ownership is not transferred to the accused. In case of sale of movable property, although the payment may be deferred yet the property in the goods passes on delivery as per Sections 20 and 24 respectively of the Sale of Goods Act, 1930.

> ***"20. Specific goods in a deliverable state.*** *— Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods, or both, is postponed.*
>
> *xxx xxx xxx*
>
> ***24. Goods sent on approval or "on sale or return".*** *— When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—*

> *(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;*
>
> *(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time."*

36. From the aforesaid, there is no manner of any doubt whatsoever that in case of sale of goods, the property passes to the purchaser from the seller when the goods are delivered. Once the property in the goods passes to the purchaser, it cannot be said that the purchaser was entrusted with the property of the seller. Without entrustment of property, there cannot be any criminal breach of trust. Thus, prosecution of cases on charge of criminal breach of trust, for failure to pay the consideration amount in case of sale of goods is flawed to the core. There can be civil remedy for the non-payment of the consideration amount, but no criminal case will be maintainable for it. [See : ***Lalit Chaturvedi and Others v. State of Uttar Pradesh and Another*** : **2024 SCC OnLine SC 171** & ***Mideast Integrated Steels Ltd. (MESCO Steel Ltd.) and Others v. State of Jharkhand and Another*** : **2023 SCC OnLine Jhar 301**]

37. The case at hand falls in category No. 1 as laid in ***Smt. Nagawwa*** (supra) referred to in para 7 of this judgment.

38. If it is the case of the complainant that a particular amount is due and payable to him then he should have filed a civil suit for recovery of the amount against the

appellants herein. But he could not have gone to the court of Additional Chief Judicial Magistrate by filing a complaint of cheating and criminal breach of trust.

39. It appears that till this date, the complainant has not filed any civil suit for recovery of the amount which according to him is due and payable to him by the appellants. He seems to have *prima facie* lost the period of limitation for filing such a civil suit.

40. In such circumstances referred to above, the continuation of the criminal proceeding would be nothing but abuse of the process of law.

FINAL CONCLUSION

41. Before we close this matter, we would like to say something as regards the casual approach of the courts below in cases like the one at hand. The Indian Penal Code (IPC) was the official Criminal Code in the Republic of India inherited from the British India after independence. The IPC came into force in the sub-continent during the British rule in 1862. The IPC remained in force for almost a period of 162 years until it was repealed and replaced by the Bharatiya Nyaya Sanhita ("**BNS**") in December 2023 which came into effect on 1st July 2024. It is indeed very sad to note that even after these many years, the courts have not been able to understand the fine distinction between criminal breach of trust and cheating.

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.

44. In view of the aforesaid, the appeal succeeds and is hereby allowed.

45. The impugned order passed by the High Court is set aside so also the order passed

by the Additional Chief Judicial Magistrate, Khurja, Bulandshahar taking cognizance upon the complaint.

46. Pending applications, if any, shall stand disposed of.

47. We direct the Registry to send one copy each of this judgment to the Principal Secretary, Ministry of Law & Justice, Union of India and also to the Principal Secretary, Home Department, Union of India.

..... J.
(J.B. Pardiwala)

..... J.
(Manoj Misra)

New Delhi;
23rd August, 2024.