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Reserved.

Case :- APPLICATION U/S 482 No. - 39907 of 2013**Applicant :-** K.L. Agarwal**Opposite Party :-** State Of U.P. And Another**Counsel for Applicant :-** Ajay Bhanot**Counsel for Opposite Party :-** Govt. Advocate, Anil Kumar Verma, Anil Srivastava**AND****Case :- APPLICATION U/S 482 No. - 40200 of 2013****Applicant :-** Ashok Agrawal**Opposite Party :-** State Of U.P. And Another**Counsel for Applicant :-** Ajay Bhanot**Counsel for Opposite Party :-** Govt. Advocate, Anil Kumar Verma, Anil Srivastava**AND****Case :- APPLICATION U/S 482 No. - 39908 of 2013****Applicant :-** Arun Agarwal**Opposite Party :-** State Of U.P. And Another**Counsel for Applicant :-** Ajay Bhanot**Counsel for Opposite Party :-** Govt. Advocate, Anil Srivastava**Hon'ble Bharat Bhushan, J.**

1. All the three aforesaid applications, filed by three different applicants arise out of the same facts in the same complaint case, therefore all the three applications are being disposed of by a common order.
2. In all the three applications, the applicants have prayed for quashing of the order dated 22.9.2012 passed by learned Judicial Magistrate-II, Varanasi in Misc Case No. 151 of 2012 whereby the the application filed under Section 156(3) Cr.P.C. was treated as complaint and cognizance taken and also the summoning order dated 20.4.2013 passed by learned Judicial Magistrate-II, Varanasi in Complaint Case No. 2063 of 2012 as well as proceedings of said Complaint Case under Sections 406, 420 IPC.
3. The encapsulated facts of the case are that the complainant/opposite party no. 2, is proprietor of a firm in the name and style of M/s Radhika Inter Prises having its

registered office at Varanasi, which deals into the business of food products as Consignment Sale Agent (herein after referred as CSA). It is alleged that the opposite party no. 2 entered into a business of food processing and trading of food products with the firm namely K.L.A. Foods India Limited, having its registered Head Office at 2nd Milestone, Kichha Road, Rudrapur-261153, District Udham Singh Nagar, Uttarakhand and its office at 21/4 Geeta Mandir Marg, New Rajendra Nagar, New Delhi-110060. The applicant namely K. L. Agarwal is said to be Chairman of the said firm. Applicant Arun Kumar Agarwal is Director of the said firm and applicant Ashok Kumar Agarwal is authorized signatory of the firm. It is alleged that the Regional Sales Manager and Regional Manager of applicant's firm approached the complainant at its firm and offered to appoint the complainant's firm as a Consignment Sale Agents after depositing a sum of Rs. 5 Lacs as a security money in favour of applicant's firm which was accepted by complainant no. 2. It is alleged that the opposite party no. 2, thereafter, issued a cheque for Rs. 1.21 Lacs vide Cheque No. 025637 dated 27.8.2011 of Federal Bank, Branch Mahmooorganj, Varanasi which was encashed by the applicant's firm. It is further alleged that the complainant is also said to have issued a cheque of balance amount of security money being Cheque No. 025638 dated 07.09.2011 and requested the applicant's firm to keep the said cheque as a security deposit and prepare an agreement for appointment of complainant's firm as Consignment Sale Agents. It is alleged that on 5.9.2011 **Consignee Sales Agent Agreement** was prepared at Rudrapur between the complainant and applicant's firm whereby the complainant was appointed as Consignee Sales Agent. The complainant is said to have paid the balance amount of security money through RTGS facility in the account of applicant's firm at Rudrapur. It is alleged that the food products sent to the complainant's firm by

the applicant's firm were sold by the complainant's firm and the sale proceeds were deposited with the applicant's firm but the applicant's firm failed to pay the commission, rent etc of the food products to the complainant as per the terms and conditions of the agreement deed and also stopped to send further the consignment of food products to the complainant in contravention to the business agreement entered into between them.

4. It is further alleged that the complainant demanded the cheque No. 025638 dated 07.09.2011 kept with applicant's firm as a security deposit and the payments of commissions, rents etc as Consignment Sales Agents to be allegedly made by the applicant's firm on which threats were extended to the complainant of dire consequences. This incident is said to have been reported to the concerned Police Station but of no avail. Thereafter a complaint was filed on 25.8.2012 by way of an application under Section 156(3) Cr.P.C. which was treated as complaint and cognizance was taken vide order dated 22.9.2012 . Learned Magistrate after recording the statement of the complainant under Section 200 Cr.P.C. and his witnesses namely Sanjay Ji (P.W.-1) and Sanjay Kumar Rai (P.W-2), summoned the applicant for facing the trial under Section 406, 420 IPC vide order dated 20.4.2013. It is these orders which are subject matter of challenge before this court.

5. Heard Mr Ajay Bhanot, learned Senior counsel assisted by Mr S. K. Singh, learned counsel for the applicants, learned AGA and Mr Anil Srivastava, leaned counsel for the respondent no. 2.

6. It is contended by learned counsel for the applicants that prima facie no criminal offence against the applicants is made out and the present prosecution has been instituted with malafide intention for the purposes of harassment. It is further

contended that the dispute between the parties is purely of civil nature which have been deliberately converted into criminal case with a view to pressurize the applicants to settle the dispute. It is further submitted that the allegations levelled against the applicants at best be termed as breach of contract for which the appropriate remedy would be before the competent civil court. It is further submitted that under the Consignee Sales Agent Agreement, it has been agreed between the parties that in case of any dispute arisen between the parties out of or in connection with the agreement same shall be finally settled through an Arbitration proceedings under the Arbitration and Conciliation Act, 1996.

7. It is further submitted that the courts at Varanasi had no jurisdiction to deal with the dispute which had arisen between the parties as no cause of action has arisen at Varanasi. It is further submitted that essentially the dispute between the parties is with respect to refund of Security deposit and payments allegedly to be made by the applicant's firm and it is admitted fact that the security deposit was submitted as well as agreement was executed at applicant's firm at Rudrapur, Uttarakhand.

8. It is further contended that that even if the uncontroverted allegations in the complaint are to be read as a whole, and accepted in its entirety as true, no case is made out against the applicants. It is further submitted that while non-payment of the amount due would, at best, result in a civil liability, in the absence of any specific allegation in the complaint that the accused had, at the very inception, induced the complainant with dishonest intention and further the inability of the accused to make payment of the amounts due would not attract the ingredients of Sections 406 and 420 IPC. In support of his argument, learned counsel for the applicants has relied upon

the cases of **V.P. Shrivastava Vs Indian Explosives Ltd., (2010) 10 SCC 261; V.Y. Jose Vs State of Gujarat, (2009) 3 SCC 78.**

9. To the contrary, learned counsel for the opposite party no. 2 and learned AGA have contended that the points argued by learned counsel for the applicants cannot be seen at this initial stage being a disputed question of facts. From the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. All the submissions made at the bar relates to the disputed question of facts, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in various decisions.

10. It is further argued by learned counsel for the opposite party no. 2 that the argument of learned counsel for the applicants is not sustainable for the simple reason that there cannot be any agreement which blocks right to initiate criminal proceedings. If any financial or business transaction involves criminality, the victim always has right to initiate criminal proceedings. Whether the criminal proceedings is justified or not is a question of fact which cannot be adjudicated under inherent jurisdiction of court provided under Section 482 Cr.P.C. Moreover, it is further contended that some times a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes. In support of his argument, learned counsel for the complainant has relied upon the cases of **Mohammed Ibrahim and others Vs State of Bihar and another, (2009) 8 SCC 751 and Arun Bhandari Vs**

State of UP and others, (2013) 2 SCC 801.

11. I have considered the respective arguments of learned counsel for the parties but looking to the growing tendency on the part of mischievous litigants to file vexatious and frivolous complaints, it is necessary to examine the credibility of the complaint to see whether any criminal offence under Sections 406, 420 IPC is made out or not.

12. Section 405 IPC deals with criminal breach of trust. A careful reading of the Section 405 IPC 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 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.

13. Section 406 IPC prescribes punishment for criminal breach of trust as defined in Section 405 IPC. For the offence punishable under Section 406 IPC, 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.

14. 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 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 use amounts to 'criminal breach of trust'.

15. So far as Section 420 IPC is concerned, it deals with cheating. Essential ingredients of Section 420 IPC 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.

16. In the present case, looking at the allegations in the complaint quoted in the preceding paragraphs of the order, on the face of it, there appears a simple breach of trust of contract by either parties. The applicants and complainant were under an obligation by way of agreement entered into between them for which an effective remedy is to approach the Civil Courts for loss, if any caused due to breach of contract.

17. Though it has been alleged that the applicants are summoned for the offences of cheating and criminal breach of trust but it has not been indicated in the complaint itself that the applicants have ever entered into agreement with dishonest intention. Rather, materials on record (Consignee Sale Agent Agreement) indicate that it is the opposite party no. 2/complainant itself approached the applicant's firm voluntarily to appoint him as the CSA and the applicant's firm has agreed to the same on the terms and conditions mentioned in the agreement. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. Mere breach of contract cannot give rise to criminal prosecution for

cheating unless fraudulent, dishonest intention since inception is shown at the beginning of the transaction. In the present case, record would disclose that the opposite party no. 2 worked as Consignee Sales Agent for quite some time after the execution of the agreement i.e. 5.9.2011 to that effect with the applicant's firm.

18. In V.P.Shrivastava versus Indian Explosives limited and others, (2010) 10 Supreme Court Cases 361, criminal proceedings alleging commission of offence under Section 420,406 & 120-B IPC were unsuccessfully challenged before the High Court. The criminal complaint had emanated from a tripartite agreement between the Indian Explosives Limited, M/s Bharat Coking Coal Limited and Fertilizer Corporation of India Limited. The appellants were senior employees of Fertilizer Corporation of India Limited which had become a sick company within the meaning of Sick Industrial Companies (Special Provision) Act, 1985. While evaluating the contentions advanced on behalf of the parties, the Hon'ble Supreme Court explained the ingredients of the offence of 'cheating' within the meaning of Section 415 of IPC and of 'criminal breach of trust' as defined under Section 405 of IPC and thereafter in para No. 32 of the judgment concluded that "even if the allegations made in the complaint are taken to be correct on their face value, they may amount to breach of terms of contract by the Fertilizer Corporation of India Limited, but do not constitute an offence of 'Cheating' punishable under Section 420 IPC". Similarly, in para No.38 of the judgment, it was concluded that "there is nothing in the complaint which may even suggest remotely that Indian Explosives Limited had entrusted any property to the appellants or that the appellants had dominion over any of the properties of the Indian Explosives which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405 IPC, punishable under Section 406 IPC".

19. In **V. Y. Jose and another versus State of Gujrat and another, (2009) SCC 78**, the Hon'ble Supreme Court quashed the proceedings initiated in a case of 'breach of trust' on finding that the case essentially involved a civil dispute and that mere 'breach of trust' does not necessarily involve 'cheating' as there was no culpable intention at the time of the initial promise.

20. Coming back to the facts of the present case, record would further disclose that the arbitration clause was invoked by the K.L.A. Foods Indian Ltd as per the terms of the agreement by submitting a letter dated 8.12.2015 to the Indian Chamber of Commerce for appointment of Sole Arbitrator for adjudication of the present dispute. It has also come on record that a notice was given by the complainant to the applicant's firm on 6.6.2012 which was duly replied by the applicant's firm on 30.8.2012, copies of which are enclosed as Annexure Nos. 8 & 9 to the affidavit. Perusal of the notice given by opposite party no. 2 would further indicate that the complainant/opposite party no. 2 has itself terminated the agreement w.e.f December, 2011 without any prior notice to the applicant's firm. The applicant's firm in his reply has made counter allegations of wrongful loss to the applicant's firm by such conduct of opposite party no. 2. It appears from the perusal of the materials on record that it is simply a case of breach of contract and further in the facts and circumstances of the case, there is absolutely no scope to assert that any of the accused were entrusted with any property, or any dominion over property as contemplated under Section 405 IPC. Even the materials on record do not support the main allegation of cheating under Section 415 IPC inasmuch as there is no material to indicate that the accused fraudulently or dishonestly induced the complainant/opposite party no. 2 to deliver any property. It is well settled that to deceive is to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or

believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of entering into the contract. Admittedly, the complainant as per agreement voluntarily entered into a valid agreement and kept on doing business on the terms and conditions of the alleged agreement. There is no allegations against any of the accused to have practised fraud or to have dishonestly induced the complainant at any time. What appears from the record that there are some breach of contract and perhaps both the parties have failed to discharge their full obligations under contract.

21. In **S.W.Palanitkar versus State of Bihar, 2002 (1) SCC 241**, there was an agreement dated 21.2.1995 appointing the appellant as a consignment stockist of respondent No.2-Company. The afore-mentioned agreement contained an arbitration clause. As there was a dispute regarding certain payments between the parties that a complaint alleging offence under Sections 406 & 420 read with Section 120-B IPC was filed. The appellant was summoned and their petition for quashing of the summoning order was dismissed by the High Court. Consequently, they approached the Hon'ble Supreme Court where it was held that in order to constitute an offence of 'cheating' the intention to deceive should be in existence at the time when inducement was made and it was necessary to show that a person had fraudulent or dishonest intention at the time of making the promise and that a mere failure to keep the promise subsequently cannot be presumed as an act leading to cheating.

22. Bare perusal of the agreement would reveal that the complainant who had approached the company to appoint them as CSA and the company had infact agreed to the same on terms and conditions mentioned in the agreement itself. Agreement further indicates that the material was sent to the

CSA but the ownership of the material remained with the company. There was certain obligation on CSA such as providing adequate warehousing space for storing the company's products. CSA was required to receive goods and store them in warehouse. CSA was also required to dispatch the goods as per the orders received by the distributor appointed by the company etc. But the ownership of the material never shifted. There were obligations on the company as well but primarily all these obligations related to the payments of various amounts in various heads including the cartage to the distributors and the transporters. CSA was required to present the claim to the company supported by invoices raised by the distributor during the month in question. The company was obliged to settle the claim within 30 days of the submission of the claim. Here, it would be appropriate to recapitulate the terms and conditions of the agreement, as under:-

“1. The CSA has made a token security deposit of Rs. 1,21,000 (Rupees One Lacs Twenty One Thousand Only) vide cheque 025637 dated 27.8.2011 drawn on Federal Bank a further security deposit of Rs. 379000/- (Rupees Three Lacs Seventy Nine Thousand) towards security deposit has been paid vide Cheque No. 025638 dated 3.5.2011 drawn on Federal Bank. The total security deposit of Rs. 5,00,000/- (Rs Five Lacs) will attract an annual interest as per RBI norms to be paid to the CSA by KLA at the end of each financial year ending in March. Depending upon the development of Business the Company may increase the security deposit and the CSA has agreed to provide additional security/deposit when called upon to do so. The CSA has agreed to enhance the total security deposit to Rs. 700000/- (Rupees Seven Hundred Thousand) within three months of commencement of operations.

SERVICES AND ARRANGEMENTS TO BE PROVIDED BY THE CSA

The CSA will provide adequate warehouse space for storing of the company's products. The CSA will arrange to receive goods unload and store the same in the warehouse space provided for the company's goods. The CSA will dispatch the goods as per orders received from distributors appointed. Goods to distributors will be dispatched on freight to pay basis and the value of the freight will be deducted in

the invoice raised by the CSA. All payments received by the CSA from distributors will be transferred to the Company's Bank Account through Bank Transfers. The Company's Bank Account is KLA Foods India Ltd, Punjab National Bank, Main Branch, Rudrapur, 0833008700018521, RTGS Code PUNB083300. The CSA will open a separate Bank Account for transactions with KLA preferably in the same Bank in which the Company has its account. Funds would be transferred on a weekly/fortnightly basis NET of VAT. VAT payment details will be submitted by the CSA promptly each month along with a copy of the payment challan. The CSA will submit at the ends of each month a bank statement to the company. All payments from distributors will be accepted either by way of Cheque/Draft. No cash payments from distributors will be accepted by the CSA from distributors in case the CSA does so it will be at their own risk. The CSA will not engage themselves in any money transactions with the company employees.

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The Company shall also reimburse the following expenses to the CSA.

- a) Warehouse rental at rates mutually agreed between the Company and the CSA. Warehouse rental will commence from date of receipt of goods in the CSA warehouse. Warehouse space required for dry products is 500 sqft and the rent payable will be @ Rs 9?- per sqft amounting to Rs 4500/- per month. The rent applicable will be w.e.f. the date of receipt of goods in the FCSA warehouse.
- b) Loading and unloading charges at the warehouse will be communicated by a separate letter by the Company.
- c) Local Cartage to distributors and transporters warehouse. Rate to be determined.
- d) Up country freight on dispatches outside the CSA location.

The CSA will present claims to the Company each month supported by the invoices raised on distributors during the month in question. The claims to the CSA will be settled within 30 days of the current month for claims submitted/presented for the previous month.

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23. Bare perusal of the aforesaid agreement would reveal that the ownership of the material dispatched by the company never shifted to the CSA. The company continued to have ownership rights over the material in accordance with the instructions received from the company and remit the amount received from

the distributor to the company. This business arrangement continued for some time. Surprisingly, the complainant is silent about the termination of the aforesaid agreement. Though, witnesses during their statements under Section 200/202 Cr.P.C. acknowledged that the business relationship was terminated. The complainant himself has stated in his statement under Section 200 Cr.P.C. that the company did not give any information regarding the termination of the agreement. However, he himself has stopped working since December, 2011 of his own. This fact has been reinforced by his witnesses namely Sanjay and Sanjay Kumar Rai. Witnesses further stated that the company started sending material to other firms at Varanasi, therefore they believed that the company had terminated the agreement. The Statement of witnesses during inquiry and the contents of the complaint itself would reveal that the entire dispute is regarding the failure of business relationship and perceived dues as far as complainant is concerned. Even the applicants claim that they have outstanding dues against the opposite party no. 2. It is evident that this adjudication of claim of either parties cannot be decided in criminal proceedings. There is nothing on record to demonstrate that the business relationship soured on account of deception, fraud or dishonest intention right from the inception of agreement. The agreement was executed and the material was sent. Some material was distributed and some payments were made and other payments were adjusted. Now both the parties believe that there are outstanding dues against each other. This cannot be adjudicated in criminal case. There is no specific allegation that complainant ever met applicant K. L. Agarwal. A general averment was made that complainant made a request to applicants regarding one cheque. Other than this, role of applicant K. L. Agarwal has not been delineated at all. The agreement was signed by Ashok Agarwal who is said to

be authorized signatory of the company. Even statements recorded under Section 200/202 Cr.P.C. do not delineate the specific roles of applicants K. L. Agarwal, Ashok Agarwal and Arun Kumar Agarwal separately or jointly.

24. In view of above, this court finds that no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the accused, excepting the bald allegations that the accused did not make payment to the respondent no. 2/complainant. There is no iota of allegation as to the dishonest intention or misappropriation. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the accused rather it must be shown that the accused dishonestly retained the same. The mere fact that the accused did not pay the money to the complainant does not amount to criminal breach of trust. In the present case it appears a matter of breach of agreement between the parties hence it can not be termed as 'cheating' or 'misappropriation'. The opposite party No. 2/complainant may seek the remedy available for enforcement of contract or for realizing the money due to him or the loss if any suffered by him.

25. So far as question of jurisdiction is concerned, it is true that agreement was executed at Rudrapur but the material was sent to Varanasi and the same was distributed from Varanasi. Part of the payment was allegedly made from Varanasi. In such a fact situation, it would be very difficult to decide the question of jurisdiction without evidence. Therefore, in the instant case, question of jurisdiction cannot be raised in a petition under Section 482 Cr.P.C. and in any case, it would have been possible to take such plea at the time of final disposal of case, but it is apparent that the complaint cannot proceed for want of ingredients of any offence.

26. Even if all the allegations in the complaint are taken at the face value, in my view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a short cut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the accused persons under Sections 406/420 IPC, is liable to be quashed.

27. Accordingly, all the three applications are allowed. The proceedings of Complaint Case No. 2063 of 2012 as well as the subsequent proceedings of Complaint Case No. 2063 of 2012, under Section 406, 420 IPC, pending in the court of learned Judicial Magistrate II, Varanasi are hereby quashed.

Order Date :- 25.5.2016
RavindraKSingh