

**IN THE GAUHATI HIGH COURT**  
**(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**  
**ITANAGAR BENCH**

**Crl. Petition No. 05(AP)/2017**

Shri. Paksing Malling,  
 S/o. Lt. Tapak Malling,  
 Sigin Colony, Daporijo,  
 District Upper Subansiri,  
 Arunachal Pradesh.  
 Phone - 918413068527

**.....Petitioner**

***-Versus-***

Smti. Rubu Meena,  
 W/o Rubu Tasser,  
 H. Sector, Itanagar, P.O & P.S Itanagar,  
 District- Papum pare (AP)

**.....Respondent**

**-BEFORE-**  
**HON'BLE MR. JUSTICE S.SERTO**

For the petitioner	: Mr. M. Pertin, Sr. Adv. Mr. K. Dabi, Mr. L. Perme, Mr. K. Dubey, Mr. W. Sawin Mr. L. Kamsi, Mr. D. Tatak, Mr. H. Tayo, Advs.
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For the respondent	: Mr. R. Sonar, Mr. L. Tapa, Mr. P. Tatam, Mr. T. Shiva, Advs.
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Date of hearing & Date of judgment	: <b>10.11.2017</b>
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**JUDGMENT & ORDER (Oral)**

Heard Mr. M. Pertin, learned Sr. counsel for the petitioner and also heard Mr. R. Sonar, learned counsel who appears on behalf of the sole respondent.

2. The facts and circumstances leading to the filing of this petition under section 397 read with section 482 Cr. PC, 1973, are briefly stated as follows;

On 25.11.2009, the petitioner and the respondent entered into an agreement for Sale of one BL-(H of BEHL maker Backhoe loader (equipment) costing Rs. 19,31,114/- out of which the petitioner was to pay Rs. 7,00,000/- in advance and the rest by monthly instalment with interest @ 13.75 % p.a. After the agreement was signed the petitioner paid the advance amount to the respondent. On the receipt of the same the respondent handed over the Earth Mover Vehicle to the petitioner. However, thereafter, the petitioner failed to pay the remaining amount by monthly instalment with interest in spite of the agreement. Therefore, the respondent filed a complaint case before the learned Chief Judicial Magistrate, Yupai, and the Chief Judicial Magistrate forwarded the same to the Judicial Magistrate, 1<sup>st</sup> Class, Yupai. When the complaint petition came up before the learned Judicial Magistrate, 1<sup>st</sup> Class as per the requirement of Cr.PC the complainant i.e. the respondent herein was examined and her statement was recorded. On being satisfied that a prima facie case has been made out for proceeding against the petitioner under section 420/406 of IPC, the learned Judicial Magistrate, 1<sup>st</sup> Class took cognizance of the offences and issued proceedings as per the law. Being aggrieved by the issuance of such proceedings by the learned Judicial Magistrate, 1<sup>st</sup> Class, the petitioner filed an application under section 227 of Cr.PC praying for discharging her from the proceedings. On 09.01.2017, the learned Judicial Magistrate rejected the application of the petitioner by passing the order as follows;-

*“Accused person namely Shri. Paksing Maling is present before the Court along with the learned counsel Mr. K. Dabi.*

*The complainant is represented by her learned counsel Mr. T. Neema.*

*Seen the application filed under section 227 of Cr.PC praying for discharging of the accused person. Perused the same. The discharge application No. 01/17 filed on behalf of the accused person is rejected on two grounds ; firstly, an application under section 227 of Cr. PC is application when the matter is pending before a Court of Session and secondly, that even if it is considered to be an appropriate application filed under section 239 of Cr.Pc than also it is liable to rejected on the ground that the instant case is complaint case and in respect of cases institute otherwise than on police report (a complaint case in the present situation) that next step is o proceed with evidence of prosecution. After taking all the evidence of the prosecution witnesses the accused person can be discharged with reasons to be recorded.*

*In view of the above, the application No. 01/17 is dismissed accordingly.*

*Fixing 09.02.17 for evidence before charge.”*

Being aggrieved by the order of the learned Judicial Magistrate, 1<sup>st</sup> Class, the petitioner has approached this Court under section 482 of Cr.PC praying for quashing and setting aside the above order dated 09.01.2017 and the order dated 14.08.2015 by which the offence alleged against the accused was taken cognizance.

**3.** Mr. M. Pertin, learned Sr. counsel for the petitioner submitted that the learned Judicial Magistrate had committed illegality by taking into consideration only the statement of the respondent recorded on 14.08.2015 which by itself was never sufficient to come to a conclusion that there was prima facie case against the petitioner under section 420/406 of IPC. Therefore, the order taking cognizance of the offence under section 420/406 of IPC against the petitioner is liable to be quashed and set aside.

**4.** For better appreciation of the submission of the learned counsel, it is felt necessary to reproduce the statement of the respondent/petitioner given on oath before the learned Judicial Magistrate. As such, the same is reproduced here below;-

**“ ON OATH**

*I am the manager of the Rubu Construction, authorized dealer of BEML Ltd. having head office head office to RK Mission Hospital, Ganga.*

*The accused namely Pasking maling was my customer. In the year 2009, on 25<sup>th</sup> November 2009, one sale agreement was entered between me and the accused person to buy one BL-(H of BEHL maker Backhohe loader (equipment) which the price was Rs. 19,31,114/- only inclusive of transportation and transit insurance upto Banderdewa, A.P on the basis of the agreement the accused had paid Rs. 7,00,000/-, the remaining due amount of Rs. 12,31,114/- to be paid by the accused person by way of monthly instalment within 5 months. Thereafter the accused person had never paid any instalment amount.*

*In the year 2013, a legal notice was served to the accused person. Thereafter the accused had never tried to re pay the due amount. I had tried to convey the message through verbally and over phone but the response of the accused person was not good.*

*My prayer before the court is that I want to recover back the due amount.”*

**5.** Thereafter, Mr. M. Pertin went on to submit that as per the agreement the respondent has remedy to go to civil court against the petitioner but instead has approached the criminal court by charging him under the provisions of IPC which has unnecessarily caused him harassment.

The learned counsel also submitted that since the respondent has remedy otherwise than instituting the criminal case against the petitioner, in view of the law laid down by the Hon'ble Supreme Court, in catena of cases, the proceeding before the learned Judicial Magistrate may be quashed and set aside.

In support of his submission, Mr. M. Pertin drew my attention to the judgments of the Hon'ble Supreme Court passed in the following three cases. The particular paragraphs on which the learned counsel placed his reliance are reproduced here below;

(i). **Alpic Finance Ltd. -Versus- P. Sadasivan**, reported in **(2001) 3 SCC 513**, para-10 & 11.

*"10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any wilful misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.*

*11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by wilful misrepresentation. We are told that*

*the respondents, though committed default in paying some instalments, have paid substantial amount towards the consideration.”*

(ii). **Sharon Michael -versus-. State of T.N.**, reported in (2009) 3 SCC 375, para-18 & 19.

*“18. The liability of the Company is, therefore, a civil liability. It is also not a case where although a prima facie case had been made out disclosing commission of an offence, the court is called upon to consider the defence of the accused. The first information report itself refers to the documents. They can, therefore, be taken into consideration for the purpose of ascertaining as to whether the allegations made in the complaint petition read as a whole, even if taken to be correct in its entirety, discloses commission of any cognizable offence or not. As admittedly Respondent 2 was the supplier of garments which were found out to be defective in nature, we are of the opinion that the dispute between the parties is civil in nature.*

*19. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. The impugned summons issued to the appellants are quashed”.*

(iii). **RiniJohar –versus- State of M.P.**, reported in (2016) 11 SCC 703, para-28 & 29.

*“28. The controversy does not end here. Mr Fernandes, learned Amicus Curiae would urge that it was a case for discharge but the trial court failed to appreciate the factual matrix in proper perspective. As the matter remained pending in this Court for some time, and we had dealt with other aspects, we thought it apt to hear the learned counsel for the aspect of continuance of the criminal prosecution. We have narrated the facts at the beginning. The learned Magistrate by order dated 19-2-2015 has found existence of prima facie case for the offences punishable under Section 420 IPC and Section 66-A(b) of the IT Act, 2000 read with Section 34 IPC. It is submitted by Mr Fernandes that Section 66-A of the IT Act, 2000 is not applicable. The submission need not detain us any further, for Section 66-A of the IT Act, 2000 has been struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2) in ShreyaSinghal v. Union of India. The only offence, therefore, that remains is Section 420 IPC. The learned Magistrate has recorded a finding that there has been no impersonation. However, he has opined that there are some material to show that the petitioners had intention to cheat. On a perusal of the FIR, it is clear to us that the dispute is purely of a civil nature, but a maladroit effort has been made to give it a criminal colour. In Devendra v. State of U.P, it has been held thus: (SCC pp. 504-05, para 24)*

*“24. ... it is now well settled that the High Court ordinarily would exercise its jurisdiction under Section 482 of the Code of Criminal Procedure if the allegations made in the first information report, even if given face value and taken to be correct in their entirety, do not make out any offence. When the allegations made in the first information report or the evidences collected during investigation do not satisfy the ingredients of an offence, the superior courts would not encourage harassment of a person in a criminal court for nothing.”*

**29.** *In the present case, it can be stated with certitude that no ingredient of Section 420 IPC is remotely attracted. Even if it is a wrong, the complainant has to take*

*recourse to civil action. The case in hand does not fall in the categories where cognizance of the offence can be taken by the court and the accused can be asked to face trial. In our considered opinion, the entire case projects a civil dispute and nothing else. Therefore, invoking the principle laid down in State of Haryana v. Bhajan Lal, we quash the proceedings initiated at the instance of the eighth respondent and set aside the order negating the prayer for discharge of the accused persons. The prosecution initiated against the petitioners stands quashed”.*

**6.** Mr. R. Sonar, learned counsel appearing for the respondent at the very outset submitted that the learned Judicial Magistrate, 1<sup>st</sup> Class by taking cognizance of the offence under section 420 of IPC has not committed any error. But, as for the offence punishable under section 406 of IPC no material was there to take cognizance.

Mr. R. Sonar further submitted that though the principle of law as submitted by the learned counsel for the petitioner is well settled and there is no reason to disagree with it, the application of the principle of law will depend on the attending facts and circumstances of each case. Mr. Sonar, elaborating his submission, submitted that in this case, the petitioner, from the very beginning, with dishonest intention had induced the respondent to enter into agreement and let her part with her Earth Mover Vehicle, only with the advance payment of Rs. 7,00,000/- and did not continue to keep his commitment. And, by having not kept the commitment as agreed to, the same has caused a huge loss to the respondent. Therefore, the offence punishable under section 420 of IPC is well made out against him.

**7.** Mr. Sonar also submitted that the intention which is the most important ingredient of the offence under section 420 of IPC can only be gathered from the facts and circumstances of the case or the behaviour of the petitioner. In this case, the fact that in spite of the agreement signed the petitioner did not pay up the remaining amount shows that he had the intention of cheating the respondent right from the beginning.

Mr. Sonar further submitted that the petitioner's statement that he could not continue to pay the remaining amount as he could not get his bill in time for the contract works he had undertaken is not true. Because, as per the statement of payment made, given by the Executive Engineer, PWD, Daporijo, his bills for the contract work have been paid. If he ever had the intention to pay the full amount he could have done so. All these goes to show that the petitioner never had intention to

pay the whole amount from the very beginning. Therefore, the complaint of the respondent that she has been cheated by the petitioner is not without basis. Mr. Sonar in conclusion submitted that just because a civil remedy is available to a party in a business transaction that party is not bar by law from taking re-course to criminal proceedings also.

**8.** I have considered the submissions of both the learned counsels and I have also considered the facts and circumstances of the case between the parties before the learned Judicial Magistrate. From the agreement dated 25.11.2009 signed by both the parties, it is seen that Rs. 7,00,000/- has been paid by the petitioner to the respondent and the same has been receipt by the respondent as a part of the payment for the Earth Mover Vehicle purchased by the petitioner from her. This fact shows that the petitioner did not have any intention not to continue in paying the remaining amount of the agreement. Rather, it is difficult to imagine how a person who have no intention to continue to pay up the remaining amount would have ventured to pay such a huge amount that too at the risk of being deprived of the subject of the agreement i.e. Earth Mover Vehicle in case of his failure to pay the rest of the amount with interest.

Till today, it has been maintained by the petitioner that the remaining amount shall be paid and there has not been any change in his stand.

From the above stated facts and circumstances, the very important ingredient of the offence punishable under section 420 of IPC seems to be lacking in the case of the respondent before the learned Judicial Magistrate, 1<sup>st</sup> Class. Further, from the agreement to sale it appears that the case between the petitioner and the respondent is purely of business transaction and there are civil remedies provided under the law for such case. And, in case, the petitioner fails to keep his word which I hope not in view of the submission of his learned counsel, Mr. M. Pertin today, the respondent can always go for civil remedies.

From the judgments of the Hon'ble Supreme Court cited by the learned counsel for the petitioner, Mr. M. Pertin which have been the guiding lights on such matters for the Courts in the Country, I am of the view that criminal proceeding pending before the learned Judicial Magistrate, 1<sup>st</sup> Class, Yupai, is not only uncalled for but without any basis. Therefore, the same is quashed and set aside.

The petition is disposed of.

Send a copy of this order to the learned Judicial Magistrate, 1<sup>st</sup> Class, Yupia.

**JUDGE**

*Kevi*