

**IN THE COURT OF HON'BLE CHIEF JUDICIAL
MAGISTRATE, AMRAVATI**

R.C.C. NO. 847 OF 2002

STATE OF MAHARASHTRA

//VERSUS//

VASANTRAO + 22 ORS.

**APPLICATION ON BEHALF OF ACCUSED NO. 21 (SANJAY
HARIRAM AGARWAL) SEEKING TO RECALL THE ORDER
DATED 01.07.2024 BEING NON-EST AND VOID IN VIEW OF
THE JUDGEMENT OF HON'BLE SUPREME COURT IN THE
CASE OF DELHI RAISED CLUB (1940) LTD. ANR V/S STATE
OF UTTAR PRADESH AND ORS. REPORTED IN 2024 IN SC
626 (NEUTRAL CITATION).**

The Accused No. 21 name above most respectfully submit
as under:-

1. That the Applicant is constrained to file the present Application is being filed by the applicant who is Accused No. 21 (A-21) seeking recall of the order dated 1st July 2024 by which the charges have been framed against the accused in RCC No. 847/2002 by the Ld. Court of chief judicial magistrate, Amravati.
2. The present application seeks to emphasis the following aspects of the matter which are without prejudice to the rights of the applicant to challenge the order framing charge or any other order that may be passed in the present trial proceeding on any grounds including the grounds mentioned herein: -



CHARGES BOTH UNDER SECTION 406/409 AND 420 CANNOT BE FRAMED

- a. From the bear perusal of the order framing charge, it is apparent that the charges have been framed U/S 406, 409 and 420 read with section 34 of Indian PenalCode, 1860. The said order is ex-facie contrary to the settled legal principal laid down by Hon'ble Supreme Court in the case of **Delhi Raised Club (1940) Ltd. Anr v/s State of Uttar Pradesh and Ors. reported in 2024 INSC 626(Neutral citation)** in which it has been clearly held that offences u/s 406 and 420 are independent and distinct. The two offences cannot coexist simultaneously in same set of facts. They are antithetical to each other. The copy of the said judgement of Hon'ble Supreme Court is filed as **ANNEXURE-1**. The relevant paras of the aforesaid judgment is quoted hereinbelow: -

"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.

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."



b. In the aforesaid judgment the Hon'ble Supreme Court has frowned upon the casual approach of the courts below while dealing with such cases. In fact, the Hon'ble Supreme court has gone to the extent to state the "*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 visa vis criminal breach of trust*". The relevant paragraphs in this regard are quoted herein below: -

"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 or 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.”

- c. The aforesaid judgment of The Hon’ble Supreme Court is only reiteration of already settled legal position that offences u/s 406/409 and 420 cannot coexist together and that is the reason why the Hon’ble Supreme Court came heavily on the Police and Courts below to not able to consider the settled position of law.
- d. In view of the above on the ground that charges cannot be framed both u/s 406/409 and 420 of IPC, the order framing charge is ex-



facie contrary to law and non-est and is a mistake and accordingly the same is required to be corrected in exercise of inherent power of the court and in the interest of justice by either modifying or recalling the order dated 1st July 2024 by which charges have been framed.

THE ORDER FRAMING CHARGE IS BASED ON THE MANIFEST ERROR OF FACT AS APPARENT FROM THE EVIDENCES ON RECORD

- e. The order framing charge is also flawed for the reason that the evidences which have been filed along with the charge sheet have not even been considered to see whether prime facie any offence has been made out against the applicant. The narration of fact in order framing charge is "on the face of the records "erroneous" as there is no company in the name of *Giltej Management Co-operative Ltd* who is either a complainant or an accused. From the order its look as if *Giltej Management Co-operative Ltd* is a complainant whereas the complainant is "*Amaravati People co-operative bank Ltd*" which is nowhere been mentioned in the order framing charge which suggest that no offence on a complaint by "*Amaravati People co-operative bank Ltd*" which is purportedly the basis of the FIR and Chargesheet has been made out against the accused and a new case has been set up in an order framing charge where a new company *Giltej Management Co-operative Ltd* becomes the complainant and letter dated 25th January 2002 (which is not even an agreement) becomes the source on which the charges have been framed.

- f. It may be relevant to note that in the order framing charge, the office bearer of M/s *Giltedge Management services Ltd* has been



made as an accused although in the order framing charge, *assuming without admitting*, Giltej Management Co-operative Ltd is to be read as M/S Giltedge Management Services Ltd, yet the Company have been referred to or understood as a complainant in the order framing charge. The aforesaid error is apparent of the face of the record and also shows that no proper opportunity of hearing has been given to the accused and the order framing charge is based upon no reason and is based on complete misreading or misunderstanding the facts of the case.

THE APPLICANT CANNOT BE MADE AS AN ACCUSED ON THE GROUND THAT THEY ARE VICARIOUSLY LIABLE AS THERE IS NO PROVISION IN IPC, 1860 TO DO SO.

- g. It is pertinent to mention that order framing charge is against the settled principle that IPC does not contain any provision for attaching vicarious liability on the part of the office bearers of the company. Since in the order framing charge the allegation is by one company against another and therefore there can be no question of charging the accused, as an individual, by attributing vicarious liability of being the office bearers of the company i.e. Home Trade Ltd.(although even this is not the case setup against the applicant while framing charge). The said position of law as settled in the aforesaid referred judgement on this aspect is quoted herein below: -

"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."

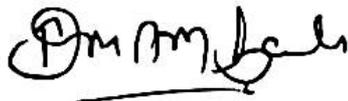
- h. The aforesaid para also requires that the evidence on record should show anything regarding direct allegation against the



office bearers of the company. There is no evidence which could demonstrate even remotely that act of criminal breach of trust or cheating has been practiced by the applicant.

3. The aforesaid submission goes to the very root of the matter and impinges on the excises of jurisdiction of the Magistrate while framing charge against the accused.
4. In view of the above submissions the order dated 1ST July 2022 may be modified/ recalled and matter may be listed for fresh hearing on discharge or framing charge.

PRAYER:- It is therefore most respectfully prayed that this Hon'ble court may kindly be pleased recalled/modified order dated 01/07/2024 and matter may be listed for fresh hearing on discharge or framing charge.



COUNSEL FOR ACCUSED



ACCUSED No.21

SOLEMN AFFIRMATION

I SANJAY HARIRAM AGRAWAL, Age 58 years, Occ: Business Residing at 7 Hari Sava Street, Kidderpore, Kolkata, 700023 do hereby takes an oath and states on this Solemn Affirmation that the contents of the above said paras of Revision are true and correct to the best of my

