

IN THE COURT OF ADDL CHIEF METROPOLITAN MAGISTRATE,
47TH COURT, ESPLANADE MUMBAI.

CRIMINAL APPLN. NO. OF 2025

IN CC No. 200/PW/2005

EX D. 185

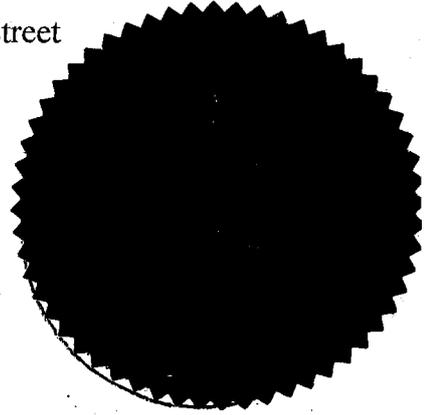
APPLICANT:

Sanjay Hariram Agarwal,
aged about 60 years, r/o 7 Hari Sava Street
Kidderpore, Kolkata – 700023.

-V/s-

NON-APPLICANT:

State of Maharashtra.
Through Santacruz P.S
District: _____.



APPLICATION U/S 216 OF THE CRIMINAL PROCEDURE CODE 1973 /
U/S 239 OF THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023.

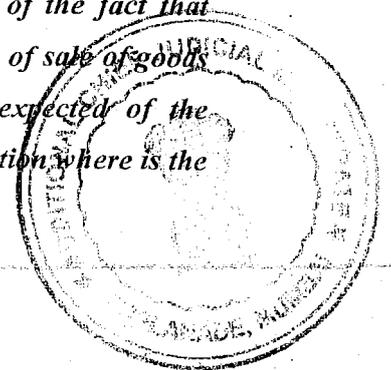
The applicant most humbly and respectfully submits as under;

1. The present application arises in a background where the trial from its very inception, has suffered from legal infirmities so fundamental that continuing the trial without rectification would amount to perpetuating a miscarriage of justice. The charges as framed are legally incompatible, the very nature of the dispute is civil and not criminal, and the accused was denied a proper opportunity to point out these defects before the charges were framed. The cumulative prejudice caused demands immediate judicial intervention.

2. That the Hon'ble Supreme Court, in a recent and strong disapproval of judicial approach towards criminal cases arising from commercial disputes, observed in M/s Shikhar Chemicals v. State of U.P., SLP (Crl.) No. 11445/2025, order dated 04.08.2025 [Annexure-A]:

“The Magistrate unfortunately remained unmindful of the fact that even as per the complainant's own say the case is one of sale of goods and recovery of some balance amount... It was expected of the Additional CJM to know that in a case of sale transaction where is the

HP
S
23.09.24



question of any entrustment of goods so as to bring the case within the ambit of criminal breach of trust punishable under Section 406 of the IPC. ... We are not taken by surprise with the Magistrate exhibiting complete ignorance of law... However, we expected at least the High Court to understand the fine distinction between the two offences... It was expected of the High Court to know the well-settled position of law that in cases of civil dispute a complainant cannot be permitted to resort to criminal proceedings as the same would amount to abuse of process of law.”

3. The prosecution case, as exhibited from the FIR and charge-sheet, in brief, is that the complainant Trusts booked certain Government Securities with M/s. Giltedge Management Services Ltd. (hereinafter “GMSL”) and made payments through. GMSL, in turn, is alleged to have booked the same securities with M/s. Home Trade Ltd. (hereinafter “HTL”) and made corresponding payments, but the securities were not delivered. On this basis, FIR No. 298/04 dated 05.08.2004 was lodged at Santacruz Police Station under Sections 409, 420 read with 34 IPC.
4. The Applicant herein was, at the relevant time, a Director of HTL. It is significant that the FIR neither mentions any direct privity between the complainant and the applicant nor does it make any allegation of entrustment or inducement by him. The allegations are confined to commercial non-delivery between GMSL and the complainants, and between GMSL and HTL.
5. Despite this, in C.C. No. 200/PW/2005 pending before the Learned Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, through an order dated 18.09.2023, [Annexure-B] charges have been framed U/s 409, 465, 468, 471 r/w 120B, and 420 r/w 34. The charges were framed without any pre-charge hearing under Section 239 CrPC as can be seen from the charge framing order and Roznama for that day [Annexure-C], and without affording the Applicant any opportunity to demonstrate that the allegations, even if taken at face value, do not make out the offences alleged.
6. That the charges framed on 18.09.2023 under Sections 409 and 420 IPC are legally antithetical and cannot co-exist, thereby violating the most basic principles of criminal jurisprudence and causing irreparable prejudice to the Applicant from the very inception of the trial and has led to complete failure of justice.

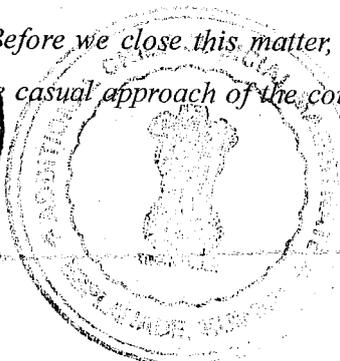
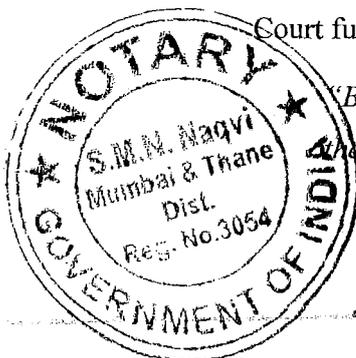


7. That Section 420 IPC requires proof of dishonest intention at the inception of the transaction, i.e., when inducing the delivery of property through deceit. Conversely, Section 409 IPC applies when property is lawfully entrusted to the accused, who subsequently develops a dishonest intention and misappropriates it. These two offences cannot arise from the same act or transaction as they are antithetical to each other.
8. Further, Section 409 IPC can be invoked only against a person who is a public servant, banker, merchant, agent, or someone acting in such a capacity entrusted with property. In the present case, no such relationship exists between the complainants and the Applicant. The Applicant, being a Director of HTL, never stood in any fiduciary or agency capacity vis-à-vis the complainants. Moreover, there is no privity of contract between the complainants and the Applicant. The complainants' dealings were exclusively with GMSL, and the Applicant or HTL was not a party to those transactions. The absence of entrustment or any qualifying relationship makes the very foundation of the charge under Section 409 IPC unsustainable.
9. That the Hon'ble Supreme Court has repeatedly and emphatically cautioned against such casual and legally untenable approach by courts. Recently, in *M/s Shikhar Chemicals v. State of U.P., SLP (Crl.) No. 11445/2025, order dated 04.08.2025, [Annexure-A]* the Court observed with concern:

"This very Bench in a very recent pronouncement in the case of "Delhi Race Club (1940) Ltd. and Others v. State of U.P. and Another", reported in (2024) 10 SCC 690 has exhaustively explained what constitutes criminal breach of trust. However, it appears that the judgment was not looked into so as to understand what constitutes criminal breach of trust punishable under Section 406 of the IPC."

10. In the said *Delhi Race Club Ltd. v. State of U.P. [(2024) 10 SCC 690]* [Annexure-D], the Supreme Court explicitly clarified this distinction, holding: "*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... Both the offences cannot co-exist simultaneously.*" The Court further observed that

"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

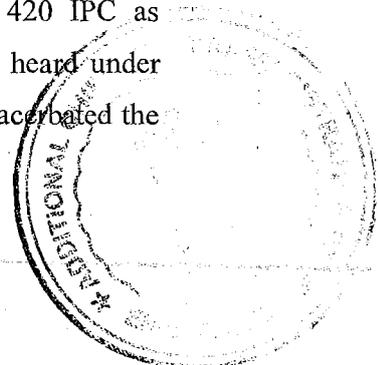


Indian Penal Code (IPC) was the official Criminal Code in the Republic of India inherited from the British India after independence. The IPC came into force in the sub-continent during the British rule in 1862. The IPC remained in force for almost a period of 162 years until it was repealed and replaced 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.

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.

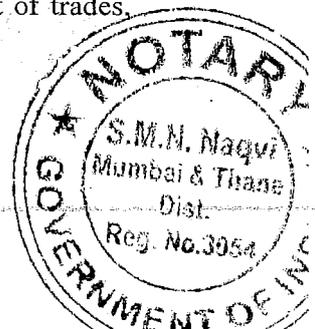
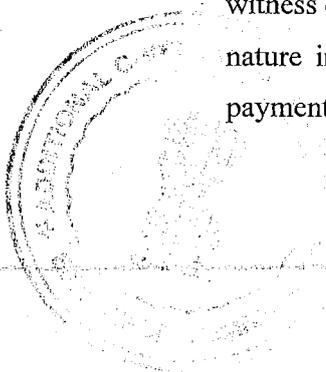
It is high time that the police officers across the country are imparted proper training in law so as to understand the fine distinction between the offence of cheating viz-a-viz criminal breach of trust. Both offences are independent and distinct. The two offences cannot coexist simultaneously in the 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."

11. Despite this well-settled legal position existing even before the *Delhi Race Club judgment*, the court framed charges under both Sections 409 and 420 IPC as co-existing. The failure to provide the accused an opportunity to be heard under Section 239 Cr.P.C. before framing these mutually exclusive charges exacerbated the



prejudice caused. Had a hearing been granted, the accused could have highlighted the legal incongruity of the charges, potentially preventing this procedural error.

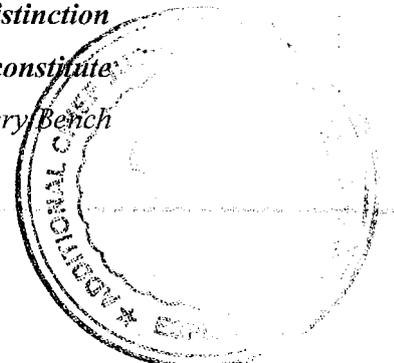
12. The framing of such antithetical charges violates the principles of criminal jurisprudence and undermines the accused's ability to prepare a coherent defence, thereby infringing upon the right to a fair trial guaranteed under Articles 14 and 21 of the Constitution. The concurrent framing of these incompatible charges, without affording the accused an opportunity to challenge them, constitutes a cumulative miscarriage and failure of justice, warranting the present application.
13. **The charges were framed without any pre-charge hearing under Section 239 CrPC, and without affording the Applicant any opportunity to demonstrate that the allegations, even if taken at face value, do not make out the offences alleged.**
14. That the absence of a hearing was not a mere technicality but a substantive failure. In *Bharat Uttam Rajurkar & Ors. v. State of Maharashtra [Criminal Writ Petition No. 1232 of 2017, Bombay High Court (Nagpur Bench)] [Annexure-E]*, the court addressed a similar lapse where the trial court assumed compliance with Section 239 Cr.P.C. merely because the accused was represented by counsel. Justice S.B. Shukre, quashing the charges, held: *"There cannot be any 'prima facie presumption' about the predecessor of the learned Magistrate having heard the accused persons before framing of the charge... Framing of charge is a serious business. When Sections 239 and 240 of Cr.P.C. mandate that charge must be framed after giving an opportunity of hearing to the accused, the mandate must be followed realistically and not presumptively."* The court in the above case further observed: *"The impugned orders clearly show that no such opportunity of being heard was ever granted to the petitioners before framing of the charge and, therefore, for this reason alone, the charge, as framed, against the petitioners deserves to be quashed and set aside."* Thus, the failure to comply with Sections 239 and 240 Cr.P.C. has in itself resulted in a miscarriage of justice, warranting the present application.
15. **Even otherwise, the present dispute is civil in nature and has been given a criminal colour, amounting to an abuse of process of law.**
16. That a perusal of the prosecution's case, including the FIR, charge-sheet and the witness depositions, demonstrates that the underlying transactions were commercial in nature involving purchase and sale of Government Securities, settlement of trades, payment of interest, and issuance of cheques for amounts allegedly due.



17. The allegations, even if taken at their highest, at best make out a claim for recovery of money, which is enforceable through civil remedies and not through prosecution under the penal code.
18. That the Hon'ble Supreme Court has repeatedly cautioned that criminal law should not be used to settle scores in commercial disputes. Recently in *M/s Shikhar Chemicals v. State of U.P., SLP (Crl.) No. 11445/2025 [Annexure-A]*, order dated 04.08.2025, the Court strongly deprecated the practice of allowing prosecution of civil disputes under the guise of criminal charges. In this case, the complainant, a yarn trader, alleged that the accused's firm purchased yarn worth ₹52.34 lakhs, paid ₹47.75 lakhs, and failed to pay the balance of ₹4.59 lakhs. The complainant, instead of filing a civil recovery suit, lodged a private criminal complaint. The Magistrate, after inquiry under Section 202 Cr.P.C., took cognizance only under Section 406 IPC. The accused's petition under Section 482 Cr.P.C. for quashing was rejected by the Allahabad High Court. The Hon'ble Supreme Court came down strongly on the High Court and the trial court for allowing a civil dispute to be prosecuted criminally. The Bench observed that:

"The Magistrate unfortunately remained unmindful of the fact that even as per the complainant's own say the case is one of sale of goods and recovery of some balance amount. It was expected of the Additional CJM to know that in a case of sale transaction where is the question of any entrustment of goods so as to bring the case within the ambit of criminal breach of trust punishable under Section 406 of the IPC. This position of law came to be explained by this Court almost six decades back in the landmark decision titled "State of Gujarat vs. Jaswantlal Nathal" reported in 1968 (2) SCR 408, wherein this Court stated that a mere transaction of sale cannot amount to an entrustment." ...

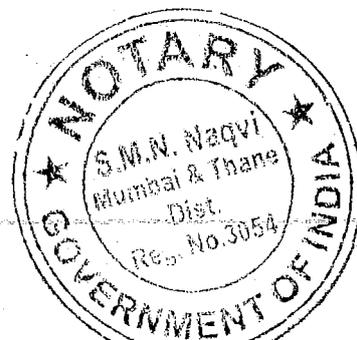
"We are not taken by surprise with the Magistrate exhibiting complete ignorance of law as regards the position of law, as to what constitutes cheating punishable under Section 420 of the IPC and criminal breach of trust punishable under Section 406 of the IPC. However, we expected at least the High Court to understand the fine distinction between the two offences and the necessary ingredients to constitute the offence of cheating and criminal breach of trust. This very Bench



in a very recent pronouncement in the case of "Delhi Race Club (1940) Ltd. and Others v. State of U.P. and Another", reported in (2024) 10 SCC 690 has exhaustively explained what constitutes criminal breach of trust. However, it appears that the judgment was not looked into so as to understand what constitutes criminal breach of trust punishable under Section 406 of the IPC." ...

"It was expected of the High Court to know the well-settled position of law that in cases of civil dispute a complainant cannot be permitted to resort to criminal proceedings as the same would amount to abuse of process of law. It was expected of the High Court to understand the nature of the allegations levelled in the complaint. In substance the High Court has said in so many words that the criminal proceedings instituted by the complainant in a case of pure civil dispute is justified because it may take considerable time for the complainant to recover the balance amount by preferring a civil suit. In such circumstances referred to above we are left with no other option but to set aside the order of the High Court even without issuing notice to the respondents."

19. That in the present case, continuing the trial on the basis of allegations which, on their own showing, arise from a commercial dispute amounts to permitting the abuse of criminal process, contrary to the law laid down by the Hon'ble Supreme Court, and causes irreparable prejudice to the Applicant.
20. That this case is the very kind that the Hon'ble Supreme Court has repeatedly warned against, the casual framing of mutually exclusive charges, the criminalization of purely civil disputes, and the denial of fundamental procedural safeguards. Each of these infirmities, individually grave, have compounded towards serious and irreparable prejudice to the Applicant and has led to failure of justice.
21. That continuing with the present charges would perpetuate the abuse of criminal process and cause further irreparable prejudice to the Applicant. The matter requires immediate correction to prevent further miscarriage of justice.
22. The applicant craves leave to add, amend or modify the submissions including submission of additional documents if required.



PRAYER

In view of the above, it is most respectfully prayed that this Hon'ble Court may be pleased to

- a) Drop/alter the antithetical and unsustainable charges framed both under Sections 409 and 420 IPC; and
- b) Direct that the trial may recommence only after amending the charges in accordance with law, after affording an opportunity to the Applicant, keeping in view the binding precedents of the Hon'ble Supreme Court prohibiting the simultaneous framing of such mutually exclusive charges and the settled principle that purely civil disputes cannot be given a criminal colour; and

Pass such other and further orders as this Hon'ble Court may deem fit and proper in the interests of justice.

Dated this 22nd day of September, 2025.


For the advocates for the Applicant

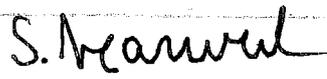
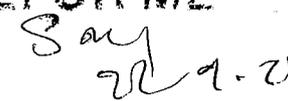

For the Applicant

SOLEMN AFFIRMATION

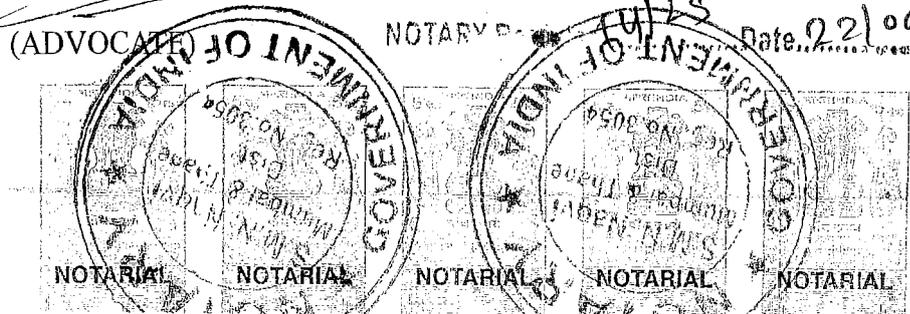
I SANJAY HARIRAM AGARWAL, aged about 60 years, Occupation: BUSINESS, residing at 7 Hari Sava Street, Kidderpore, Kolkata – 700023., above named Applicant do hereby state on solemn affirmation that the contents of above paras of affidavit are true and correct to my personal knowledge and belief and have been drafted by my counsel on my instruction and have been explained to me in vernacular and have been found to be true and correct. Hence verified and signed on this 22nd Day of SEPTEMBER, 2025 at Delhi.

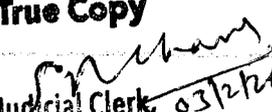
I know and identify the deponent





DEPONENT
BEFOR ME

S.M.N. NAQVI
NOTARY
Government of India
Mumbai & Thane Dist

SR No. 585 P No. 43
NOTARY S.M.N. NAQVI date 22/09/25



True Copy

Judicial Clerk, 03/2/26
Additional Chief Judicial Magistrate's
47th Court, Esplanade, Mumbai

03/09/2025
17/09/2025

IN THE COURT OF THE ADDL. CHIEF METROPOLITAN MAGISTRATE,
47TH COURT, ESPLANADE, MUMBAI
CASE NO. 200/PW/2005

E 7 D 192

STATE OF MAHARASHTRA
(THROUGH EOW, CB, CID). ... COMPLAINANT
VERSUS
KETAN KANTILAL SHETH & Ors. ... ACCUSED

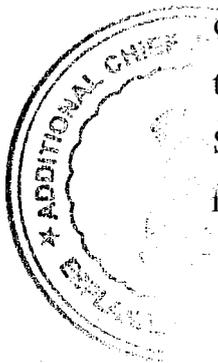
PURSIS ON BEHALF OF ACCUSED NO. 2 (SANJAY AGARWAL)

MAY IT PLEASE YOUR HONOUR:

The Accused No. 2 above named most respectfully submits as under:

1. That the Accused No. 2 has filed an Application today praying that this Hon'ble Court be pleased to decide the pending Application under Section 216 of Cr.P.C. (Exhibit D-185) regarding alteration of charges prior to recording the statement of the accused under Section 313 of Cr.P.C.
2. The Hon'ble Court was pleased to call for the say of the Ld. Public Prosecutor on the said application. The Ld. PP has filed their reply to the same today.
3. It is submitted that the issue raised in the Section 216 Application goes to the root of the matter regarding the nature of the offence (mutually exclusive charges under Section 406 and 420 IPC). Until the charges are clarified/alterd, the Accused is unable to offer his explanation or answer questions under Section 313 Cr.P.C. effectively, as he is not aware of the precise case he has to meet (whether entrustment or cheating).

0
Filed
13/11/2026



4. In view of the above, the Accused No. 2 is not in a position to record his statement under Section 313 Cr.P.C. today.

5. It is therefore requested that this Hon'ble Court may kindly take note of this.

PLACE: MUMBAI

DATED: 13/01/2026



ADVOCATE FOR ACCUSED NO. 2



True Copy

S. M. Chavan
Judicial Clerk, 03/02/26

Additional Chief Judicial Magistrate's
47th Court, Esplanade, Mumbai

Applied on
Granted on 13/01/2026
Ready on
Delivery on 03/02/2026

