

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 04<sup>th</sup> JANUARY, 2022

IN THE MATTER OF:

+ **CRL.M.C. 736/2021**

M/S. HERO FINCORP LIMITED

..... Petitioner

Through: Mr. Sanjeev Singh, Ms. Kajal Bhatia,  
Mr. Deepank Anand, Mr. Dashmeet  
Singh, Advocates.

versus

THE STATE (NCT OF DELHI) & ANR.

..... Respondents

Through: Ms. Meenakshi Chauhan, APP for the  
State.

Mr. Ashok Kumar Goyal, Advocate  
for the respondent No.2.

**CORAM:**

**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

**SUBRAMONIUM PRASAD, J.**

1. The present petition is filed under Section 482 CrPC praying for setting aside the order dated 22.01.2021 passed by the Learned Principal District & Sessions Judge, Patiala House in Criminal Revision No. 369/2020 whereby, the Ld. PDJ dismissed the Revision and upheld order dated 10.11.2020 passed by the Chief Metropolitan Magistrate which had rejected the application for registration of an FIR under Section 156(3) CrPC.

2. The Petitioner herein is a Non-Banking Finance Company(NBFC), incorporated under the Companies Act,1956 and registered with the Reserve Bank of India as an institution providing financial assistance. The

Respondent No. 2 is Sunil Sharma, Director of M/s Benlon India Ltd. The facts leading upto the present case are given as hereunder-

- i. Mr. Balbir Sharma, Mrs. Sudesh Sharma and Mr. Balbir Sharma in their capacity as Directors of M/s Benlon India Ltd. approached the Petitioner in October 2014 for grant of a loan of Rs. 12.25 Crores stating that their company required to purchase 18 winding machines with standard accessories. Three agreements, namely the Master Facilities Agreement, Supplementary Agreement and Personal Guarantees were executed between both the parties. The loan was sanctioned by the Petitioner vide sanction letter reference No. HFCL/MTL/1007/2014 dated 24.10.2014.
- ii. Mr. Balbir Sharma, Mrs. Sudesh Sharma and Mr. Sunil Sharma in their capacity as Directors of M/s Benlon India Ltd. again approached the Petitioner in December 2014 for the grant of a loan of Rs. 10 Crores stating that their company required to purchase 12 sets of Spinning (Winding) Machine, Model- TH-9C. Three agreements, namely the Master Facilities Agreement, Supplementary Agreement and Personal Guarantees were executed between both the parties. The loan was sanctioned by the Petitioner vide sanction letter reference No. HFCL/MME/01-07/20145 dated 06.02.2015.
- iii. Mr. Balbir Sharma, Mrs. Sudesh Sharma and Mr. Sunil Sharma in their capacity as Directors of M/s Benlon India Ltd. again approached the Petitioner in October 2014 for the grant of a loan of Rs.15 Crores stating that their company required to

purchase further equipment i.e. 6 Chennile Machines- PAFA SPIRAFIL 2FR (2) 1 PET FDY Production Spinning Line with JWA 15/1500. Three agreements, namely the Master Facilities Agreement, Supplementary Agreement and Personal Guarantees were executed between both the parties. The loan was sanctioned by the Petitioner vide sanction letter reference No. HFCL/MME/02-04/2016 dated 13.2.2016.

- iv. The Respondent No. 2, Mr. Balbir Sharma and Mrs. Sudesh Sharma agreed to create a first pari passu charge on fixed assets in favour of the Petitioner on the land and building at Plot No. 122, 123, 124, 506, 508, 509, 510 HSIDC Industrial Area, Kundli, Sonipat, Haryana. Further, it was agreed that Mr. Balbir Sharma will create an equitable charge on a property situated at Punjabi Bagh in favour of the Petitioner and a Memorandum of Deposit of Title Deed dated 13.2.2016 was executed in the Petitioner's favour.
- v. The Respondents made payments of their loan installments to the Petitioner until May 2018 when the Respondents started defaulting on their payments. It is indicated that the Respondents' business/company suffered a huge financial loss in a fire at their official premises and they were not in a position to repay their debts/liabilities. The company was liquidated and proceedings were initiated before the NCLT and a liquidator was appointed. The Petitioner also filed their claim before the NCLT and the Committee of Creditors. The Petitioner took possession of the Flat at Punjabi Bagh that was

mortgaged in their favour. The Petitioner further invoked the arbitration clause in the agreement against the Respondents on 11.1.2019. Respondent No. 2 filed a securitization application (No.4/2019) before the Debt Recovery Tribunal which is pending.

- vi. The Petitioner on 13.12.2018 filed a complaint to Deputy Commissioner of Police, Economic Offences Wing stating that the Respondent No.2 hatched a criminal conspiracy whereby they defrauded the Petitioner by taking loans on the pretext of purchasing machines and equipment, and actually utilized the money for illegal purposes and caused a wrongful loss to the Petitioner of Rs.37.25 Crores. It is stated therein that before sanctioning of the loans the Respondent No.2 had agreed to a contract whereby he would utilize the loan amount only towards purchase of machines and would further timely send invoices to the Petitioner showing purchase of machinery. It was alleged by the Petitioner that the Respondents in order to keep availing of the loans fabricated and forged documents to substantiate their end of the agreement and gave incomplete documentation regarding the machinery.
- vii. The Assistant Commissioner of Police, EOW sent a letter dated 08.07.2019 to the authorized representative of the Petitioner, Mr. Kisalay Kartikey which stated that the complaint of the petitioner could not be established and intimated that they were closing the complaint.

viii. The Petitioner addressed a complaint dated 11.7.2019 to the Commissioner of Police, EOW intimating in greater detail the allegations as were stated in the letter dated 11.7.2019 and annexed allegedly forged proforma invoices, showing the buying of machines, that were sent to the petitioner by Respondent No.2 as per their agreement.

3. The Petitioner filed an application under Section 156(3) Cr.P.C before the Magistrate calling upon her to direct the Police to register a FIR against the Respondent No.2 on the charges of cheating, forgery, criminal breach of trust and misappropriation for a sum of Rs. 7,35,22,719/- which Respondent No.2 and his parents Mr. Balbir Singh and Mrs. Sudesh Singh induced the Petitioner to grant them as a loan for buying machinery instrumental for their business. It was stated therein that the Respondent No.2 stopped paying the interest installments and failed to adhere to the repayment schedule as per their agreement and when the Petitioner's went to inspect the factory site of the Respondent No.2 they were not allowed to inspect the premises out of there. It is stated that the respondent No.2 and his parents in furtherance of the criminal conspiracy dishonestly misappropriated the loan amount for their own gains in complete contravention in specified terms of the loan agreement.

4. The learned CMM, Patiala House Court vide order 10.11.2020 dismissed the application under Section 156(3) Cr.P.C of the petitioner and held that the commission of a cognizable offence shall require the registration of an FIR, but every cognizable offence does not require investigation by the police.

5. Aggrieved by the above order, the petitioner filed a revision before the learned Principal District and Sessions Judge, Patiala House Courts, New Delhi challenging the order dated 10.11.2020, passed by the learned CMM, Patiala House Courts, New Delhi. The Revisionist Court by a detailed order dated 22.01.2021 analyzed the scope of Section 156(3) Cr.P.C and powers that are conferred on the Magistrate to take cognizance of a complaint under Section 190 Cr.P.C or direct the police to conduct an investigation of a cognizable offence, after due application of mind under Section 156(3) Cr.P.C. The learned Revisionist Court upheld the order the ld. CMM dismissing the prayer for the registration of an FIR and held that the said order did not suffer from any infirmity, impropriety or illegality.

6. Heard the parties and perused the material placed on record.

7. Mr. Sanjeev Singh, appeared for the petitioner. Ms. Meenakshi Chauhan, learned APP appeared for the State. Mr. Ashok Kumar Goyal appeared for Respondent No.2.

8. Mr. Sanjeev Singh, learned Counsel, submits that the orders passed by the revisionist court and the ld. CMM suffer from a non-application of judicial mind. He submitted that the respondent No.2 has usurped the loan amounts granted to him for his own purposes and has gone violated the loan agreements dated 25.10.2014, 11.02.2015 and 13.02.2016 under which bona fides large sum of monies were disbursed for the purposes of procuring machinery and appliances for the business of respondent No.2.

9. He submits that the respondent No.2 consciously deviated from the terms agreed upon in the master facility agreements and the supplementary agreements, and in furtherance of his motives to use the money for extra-legal purposes, to show a perfunctory compliance of the terms of the

contract submitted concocted and fabricated purchase invoices to show that the loans were being utilized only towards purchase of machinery.

10. He submits that the Respondent no. 2 had since early 2016 willfully defaulted on the installments on the payment of loan and violated the repayment schedule as agreed upon in the terms of the contract. He further contends that when the respondents started defaulting the officials of the Petitioner company visited the factory of the respondent no.2 for a surprise inspection and the said officials were not allowed to enter the premises and later found out that the machinery had been sold and a few of the machines had been moved to another location. He submits that the shifting of machinery had to be done with prior intimation to the financier a.k.a the Petitioner, and it was an express obligation under the contract.

11. He submitted that the Respondent No.2 have admitted to this fact that machines had not been purchased with the loans sanctioned before this Court in OMP(I) (COMM.) 423/2018 and this fact has been recorded in the Court order dated 19.12.2018. He contends that the orders passed by the Ld. Courts below neglected to take into account this categorical admission of non-purchase of machinery by Respondent No.2 before this Hon'ble Court.

12. Mr. Ashok Kumar Goyal, learned counsel for respondent No.2, submitted that the orders passed the Id. PDJ and the Id. Chief Metropolitan Magistrate were reasoned orders made with the application of judicial minds and taking into account relevant factors such as the various ongoing proceedings waiting adjudication. He submitted that there was no intention to cheat or deceive the petitioner's company and loans were disbursed after a comprehensive verification by the petitioner and after furnishing of substantial personal guarantees by the respondent's company.

13. He vehemently argued that the loans were being timely repaid and the bills of machinery obtained were being submitted to the petitioner until May, 2018. He submitted that he suffered losses in his business due to a deteriorating business climate and demonetization which was aggravated by a fire that took place in his factory, destroying 180 Crore Rupees worth of machinery. He finally submitted that the total loan amount of 37.5 Crore Rupees stands fully repaid pursuant to the proceedings before the NCLT and, therefore, since the loan amount has been remitted, the contract binding the terms and conditions of the loan stands performed and no offence is made out.

14. The material on record discloses that the petitioner advanced three loans to the respondent for the sole purpose of procuring machinery and other accessories thereof and based on this understanding Loan agreements were entered into, and three loans of Rs.12.25 Crores, Rs.10 Crores and Rs.15 Crores were given by the petitioner. The relevant terms of the Supplementary Agreement have been reproduced below:-

## ***“2. Facility Terms***

### ***2.1 Disbursement***

***a. The nature of the Facility is "Machinery purchase funding". The Borrower desires to purchase certain Machineries (as specifically set forth in Schedule (I) in relation to the sanctioned Purpose and has approached HFCL vide the utilization Request to finance the Machinery); basis which HFCL has agreed to sanction the Facility, in respect thereof, pursuant to the Facilities Agreement.***



*b. Pursuant to the above, HFCL will make payment under/disburse the Facility to the borrower and/or any third party, being the supplier of Machinery in the manner as set forth in Schedule I. That any disbursement of Facility to a third party, being the supplier of Machinery (who is entitled to receive money from Borrower basis the sanctioned Purpose) shall be against the account of the Borrower, under the Facilities Agreement and accordingly shall be deemed as Disbursement made to the Borrower under the Agreement"*

15. The relevant portion of Section 405 and 406 IPC which defines criminal breach of trust and the punishment of criminal breach of trust are as under:

*"Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"*

*Illustration:*

a) xxx

b) xxx

c) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the direction and employs the money in his own business. A has committed criminal breach of trust."

*406. Punishment for criminal breach of trust.—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

17. The ingredients of the offence of criminal breach of trust is that:
- i) Entrustment of property.
  - ii) The use/discharge of such property being specified by express or implied contract.
  - iii) A dishonest misappropriation in using or disposing such property.
18. The Hon'ble Supreme Court in Jaswant Rai Manilal Akhanay Vs. State of Bombay, AIR 1956 SC 575 has interpreted the provision of Section 405 IPC as follows:

*“But when section 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust- with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers,, possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him.”*

19. The Hon'ble Supreme Court in Sardar Singh vs. State of Haryana, (1977) 1 SCC 463 has expanded the facets of the criminal breach of trust as follows:

*“The offence of criminal breach is defined in Section 405 and an essential ingredient of this offence is that the accused being in any manner entrusted with property or with dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied, which he has made touching the discharge of such trust.”*

20. The allegations made by the petitioner against respondent No.2's company in its application under Section 156 (3) Cr.P.C reveals that the loans were given pursuant to a written contract and it appears prima facie that the respondent No.2 did not conform to all the terms and conditions that they agreed to at the time of seeking loan from the petitioner. It is correct that there are multiple proceedings that are presently being adjudicated before the sole arbitrator, liquidation proceedings before the NCLT and a claim that was decided by the Debt Recovery Tribunal. It is an admitted position, which has been verified by the State that the respondent No.2 incurred losses due to a fire that broke out at the factory of the petitioner causing him financial stress.

21. It has been held by the Supreme Court of India in Trisuns Chemical Industry V. Rajesh Agarwal (1999) 8 SCC 686 invoking an arbitration clause does not preclude filing of criminal proceedings and these two proceedings can be pursued parallelly and independently, without affecting

each other. In other words, there is no bar of pursuing criminal proceedings once arbitration has commenced.

22. Section 154 Cr.P.C provides for the registration of the First Information Report in respect of cognizable offences, which the police is mandated by law to register in writing and thereafter investigate into it. If the police refuses to file a First Information Report then a complaint can be filed with the Magistrate to direct the police to probe into the commission of a cognizable offence. The remedy under Section 156 (3) Cr.P.C can only be exercised to report the commission of a cognizable offence and not non-cognizable offences.

23. The Apex Court in Lalita Kumari vs. State of U.P., (2014) 2 SCC 1 has emphatically held that the police is duty bound to register an FIR on receiving information on the commission of a cognizable offence. The police has no other option but to register an FIR when such information pertaining to a cognizable offence and has to mandatorily investigate into the allegations of the FIR.

*"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.*

*“Shall”*

50. *The use of the word “shall” in Section 154(1) of the Code clearly shows the legislative intent that it is mandatory to register an FIR if the information given to the police discloses the commission of a cognizable offence.*

53. *Investigation of offences and prosecution of offenders are the duties of the State. For “cognizable offences”, a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.*

54. *Therefore, the context in which the word “shall” appears in Section 154(1) of the Code, the object for which it has been used and the consequences that will follow from the infringement of the direction to register FIRs, all these factors clearly show that the word “shall” used in Section 154(1) needs to be given its ordinary meaning of being of “mandatory” character. The provisions of Section 154(1) of the Code, read in the light of the statutory scheme, do not admit of conferring any discretion on the officer in charge of the police station for embarking upon a preliminary inquiry prior to the registration of an FIR. It is settled position of law that if the provision is unambiguous and the legislative intent is clear, the court need not call into it any other rules of construction.*

55. *In view of the above, the use of the word “shall” coupled with the scheme of the Act lead to the conclusion that the legislators intended that if an information relating to commission of a cognizable offence is given, then it would mandatorily be registered by the officer in charge of the*

*police station. Reading “shall” as “may”, as contended by some counsel, would be against the scheme of the Code. Section 154 of the Code should be strictly construed and the word “shall” should be given its natural meaning. The golden rule of interpretation can be given a go-by only in cases where the language of the section is ambiguous and/or leads to an absurdity.*

*56. In view of the above, we are satisfied that Section 154(1) of the Code does not have any ambiguity in this regard and is in clear terms. It is relevant to mention that Section 39 of the Code casts a statutory duty on every person to inform about commission of certain offences which includes offences covered by Sections 121 to 126, 302, 64-A, 382, 392, etc. of the Penal Code. It would be incongruous to suggest that though it is the duty of every citizen to inform about commission of an offence, but it is not obligatory on the officer in charge of a police station to register the report. The word “shall” occurring in Section 39 of the Code has to be given the same meaning as the word “shall” occurring in Section 154(1) of the Code.”*

24. Applying the law to the facts of this case, undisputedly loans have been taken by the respondent No.2 for purchase of machineries. The machineries have not been purchased and the money, which had been taken for purchase of machinery, has been misappropriated for the use of respondent No.2. The facts on the face of it prima facie discloses a cognizable offence. The learned CMM and the learned PDJ have erred in not directing the registration of the FIR as the offence alleged of directly comes within the four corners of the Constitution Bench Judgment of Lalita Kumari vs. State of U.P. (Supra). The complaint of the Petitioner discloses a cognizable offence i.e. criminal breach of trust in respect of the terms of contract that was agreed upon, which requires to be investigated by the

police despite taking into account the fact that borrowed amounts stand repaid to the Petitioner or the fact that proceedings before the arbitral tribunal are ongoing. Therefore, this Court is of the opinion that a cognizable offence has been alleged against respondent No.2 and the same should be investigated after the registration of an FIR.

25. This Court directs the Economic Offences Wing to register an FIR against the respondent No.2 under the appropriate Sections.

26. This petition is accordingly disposed of along with the pending application(s), if any.

**JANUARY 04, 2022**

*S. Zakir*

**SUBRAMONIUM PRASAD, J**

नात्यमेव जयते