



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2562 OF 2019

(AWADHESH KUMAR PARASNATH PATHAK V. THE STATE OF MAHARASHTRA AND ANOTHER)
AND

CRIMINAL APPLICATION NO. 1987 OF 2019

(JAYESH S/O. AMBADAS DUDEKAR VS. THE STATE OF MAHARASHTRA AND OTHERS)

CRIMINAL APPLICATION NO. 1988 OF 2019

(DEVENDRA RAMCHANDRA JAIN VS. THE STATE OF MAHARASHTRA AND OTHERS)

CRIMINAL WRIT PETITION NO. 947 OF 2019

(ARUN S/O SHRIRAM TIDKE VS. THE STATE OF MAHARASHTRA AND ANOTHER)

AND

A.C.B. NO. 58 OF 2019

(GRIND MASTER MACHINES PVT. LTD. VS. THE STATE OF MAHARASHTRA AND OTHERS)

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CORAM : **MANGESH S. PATIL,**
R.G. AVACHAT &
SHAILESH P. BRAHME, JJJ.

RESERVED ON : **23 FEBRUARY 2024**

PRONOUNCED ON : **15 APRIL 2024**

JUDGMENT (MANGESH S. PATIL, J.) :

We have heard both the sides extensively.

2. In view of conflict between a division bench which decided ***Gagan Harsh Sharma Vs. State of Maharashtra and others; (2019) Cri.L.J. 1398*** and a division bench dealing with ***Awadhesh Kumar Parasnath Pathak Vs. The State of Maharashtra and another*** and connected matters (Criminal Application 2562 of 2019, Aurangabad Bench - order dated 26-02-2020), the latter being unable to concur with the former, following questions have been referred to us for answers :

1) *Whether Section 43 read with Section 66 of I.T. Act covers the cases:-*

a) *Involving the obtaining of permission, by cheating the owner or any other person, who is incharge of computer, computer system or computer network, and thereby induced the owner or person in charge of the computer, computer system or comuter network for doing the act enumerated in Section 43 of the I.T. Act ?*

b) *The expression fraudulently or dishonestly covers the cases in which permission is obtained from the owner or person who is incharge of computer or computer system or computer network by cheating him ?*

c) *Whether Section 72 of the I.T. Act covers all the ingredients of Sections 406, 408, 409 of the Indian Penal Code especially cases in which access is secured dishonestly to any electronic correspondence, information, document or other material and the said electronic record correspondence, information, document or material in misappropriated or converted for one's own use?*

d) *Whether the acts done under Sections 43 or 72 of the I.T. Act cover the criminal acts done with common intention ?*

3. By relying upon the decision of the Supreme Court in the matter of ***Sharat Babu Digumarti V. Government of NCT of Delhi; AIR 2017 SC 150***, the division bench in ***Gagan Harsh Sharma*** held that even a dishonest and fraudulent act falls within the scope of

section 66 of the Information Technology Act, 2000 (**IT Act**). Sections 79 and 81 give overriding effect and the offences pertaining to electronic record, covered by the IT Act being punishable under section 43 read with section 66 would take out the provisions of the Indian Penal Code. In **Awadhesh Kumar Parasnath Pathak** (supra), the division bench expressed, for the reasons mentioned in the order, that it was not agreeable with the observations in **Gagan Harsh Sharma**.

4. Incidentally, it is a matter of record that the decision in the matter of **Gagan Harsh Sharma** was challenged before the Supreme Court but the Special Leave Petition was dismissed. In the context of a similar interplay between the provisions of Legal Metrology Act, 2009 and the relevant offences under the Indian Penal Code, was dealt with by the Supreme Court in **State of Uttar Pradesh V. Aman Mittal and another; (2019) 19 SCC 740**. Similar issues were raised and even **Gagan Harsh Sharma** was cited before the Supreme Court together with the decision in the matter of **Sharat Babu Digumarti**. However, considering the fact situation in the matter of **Gagan Harsh Sharma** and observing that dismissal of the Special Leave Petition against the order would not amount to merger of the order passed by the High Court in the Supreme Court order, the issue was left open to be decided in an appropriate case with following observations in paragraph no. 25 :

“25. The Bombay High Court in Gagan Harsh Sharma v. State of Maharashtra, 2018 SCC OnLine Bom. 17705 has found that even a dishonest and fraudulent act falls within the scope of Section 66 of the IT Act. We are not called upon in the present appeals to examine whether an accused can be tried for an offence under IPC in view of Section 66 of the IT Act. Such question can be raised and decided in an appropriate case.”

5. However, the decision in **Sharat Babu Digumarti** was commented in following words :-

“28. Sharat Babu Digumarti v. State (NCT of Delhi), (2017) 2 SCC 18 is a judgment dealing with obscenity in the electronic form. This Court has held that the IT Act is a special enactment. Since the offence has nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. Section 292 IPC makes sale of obscene books as an offence which cannot be made out in view of special provision made in the IT Act. The said judgment is, that an offence pertaining to electronic record falls within Section 67 of the IT Act, whereas, Section 292 IPC deals with an offence of obscenity in the printed format, therefore, two offences operate in different fields.”

6. With this preface, we turn to the questions referred to us. There are plethora of judgments wherein the Supreme Court and the High Courts have been called upon to face similar fact situations concerning interplay between the provisions defining the acts which amount to the offences contained in the special statute *vis a vis* the offences defined under the general law i.e. the Indian Penal Code, where these offences under different statutes are similar.

7. In the matter of **Sharat Babu Digumarti**, the allegations were in respect of transmission of obscene material in electronic form wherein section 292 of the Indian Penal Code was invoked and by

referring to the provision fo section 79 and 81 of the IT Act, it was held that since IT Act is a latter enactment and section 67 of the IT Act makes publication and transmission of the obscene material in electronic form punishable, the accused would come out of the net of section 292 of the Indian Penal Code. The issue before the Supreme Court was as to whether the appellant who was discharged of section 67 of the IT Act could be proceeded under section 292 of the Indian Penal Code. In the context of such an issue, following were the observations :-

“32. Section 81 of the IT Act also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply.”

8. By referring to paragraph no. 10 from the ***Solidaire India Ltd. Vs. Fairgrowth Financial Services Ltd.; (2001) 3 SCC 71,***

following conclusion was drawn in paragraph no. 37 :

*“37. The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. **Once the special provisions having the***

overriding effect do cover a criminal act and the offender, he gets out of the net of IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission are covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.” (emphasis supplied)

9. It is thus apparent that **Sharat Babu Digumarti** was a matter where the issue under consideration was whether offence under section 67 of the IT Act and the one under section 292 of the Indian Penal Code are the same. It is in this context, the decision in **Sharat Babu Digumarti** will have to be understood.

10. It would be necessary to understand as to how the division bench in **Gagan Harsh Sharma** has referred to & relied upon **Sharat Babu Digumarti**. Following paragraphs are relevant :

“27. Applying the aforesaid principles to the facts involved in the case, perusal of the complaint would reveal that the allegations relate to the use of the data code by the employees of the complainant company by accessing the Code and stealing the said data by using the computer source code. The Act of accessing or securing access to computer/computer system or computer network or computer resources by any person without permission of the owner or any person who is in charge of the computer, computer system, computer network or downloading of any such data or information from computer in a similar manner falls within the purview of Section 43 of the Information Technology Act, 2000. When such Act is done dishonestly and fraudulently it would attract the punishment under Section 66 of the Information Technology Act, such Act being held to be an offence. The ingredients of dishonesty and fraudulently are the same which are present if the person is charged with Section 420 of the Penal Code, 1860. The offence of Section 379 in terms of technology is also covered under Section 43. Further, as far as Section 408 is concerned which relates to criminal breach of trust, by a clerk or servant who is entrusted in such capacity with the property or with any dominion over property, would also fall within the purview of Section 43 would intents to

cover any act of accessing a computer by a person without permission of the owner or a person in charge of computer and/or stealing of any data, computer data base or any information from such computer or a computer system including information or data held or stored in any removable storage medium and if it is done with fraudulent and dishonest intention then it amounts to an offence. The ingredients of an offences under which are attracted by invoking and applying the Section 420, 408, 379 of the Indian Penal Code are covered by Section 66 of the Information Technology Act, 2000 and prosecuting the petitioners under the both Indian Penal Code, 1860 and Information Technology Act would be a brazen violation of protection against double jeopardy.

*28. In such circumstances if the special enactment in form of the Information Technology Act contains a special mechanism to deal with the offences falling within the purview of Information Technology Act, then the invocation and application of the provisions of the Penal Code, 1860 being applicable to the same set of facts is totally uncalled for. Though the learned APP as well as Shri. Gupte has vehemently argued that the prosecution under the provisions of the Penal Code, 1860 can be continued and at the time of taking cognizance the Competent Court can determine the provisions of which enactments are attracted and it is too premature to exclude the investigation in the offences constituted under the Penal Code, 1860, we are not ready to accept the said contention of the learned Senior Counsel, specifically in the light of the observations of the Hon'ble Apex Court in the case of **Sharat Babu Digumarti (Supra)**. We are of the specific opinion that it is not permissible to merely undergo the rigmarole of investigation although it is not open for the Investigating Officer to invoke and apply the provisions of the Penal Code, 1860, in light of the specific provisions contained in the Information Technology Act, 2000 and leave it to the discretion of the Police Authorities to decide in which direction the investigation is to be proceeded. The Information Technology Act, 2000 being a special enactment, it requires an able investigation keeping in mind the purpose of the enactment and to nab the new venturing of crimes with the assistance of the Technology."*

11. In the matter of **Awadeshkumar Parasnath Pathak**, a coordinate division bench was unable to agree with **Gagan Harsha Sharma** and has pointed out as to how the offences as defined under section 43 read with section 66 and section 72 are not the same

offences as defined and made punishable under section 406, 408, 420 of the Indian Penal Code.

12. It, therefore, becomes imperative that ingredients of all these relevant offences are examined carefully in juxtaposition.

COMPARISON OF INGREDIENTS OF VARIOUS SECTIONS

No.	S.43(b) IT Act	S.66 IT Act	S.72 IT Act	S.405/406 IPC	S.408 IPC	S.409 IPC	S.420 IPC
1	Unauthorized downloading or copying or extraction from a computer	Unauthorized downloading or copying or extraction from a computer	Disclosure without consent of the person concerned, to any other person	Entrustment of property or of dominion over property	Entrustment of property or of dominion over property	Entrustment of property or of dominion over property	Dishonest or fraudulent deception of a person
2	Of any data or computer database or information	Of any data or computer database or information	Of electronic record, book, register, correspondence, information, document or other material	Dishonest misappropriation or conversion to his own use of the said property OR Dishonest use of willful suffering of any other person to do so in violation of (a) any directions of law prescribing the mode in which such property is to be discharged, or (b) any Legal contract made touching discharge of such trust	Dishonest misappropriation or conversion to his own use of the said property OR Dishonest use of willful suffering of any other person to do so in violation of (a) any directions of law prescribing the mode in which such property is to be discharged, or (b) any Legal contract made touching discharge of such trust	Dishonest misappropriation or conversion to his own use of the said property OR Dishonest use of willful suffering of any other person to do so in violation of (a) any directions of law prescribing the mode in which such property is to be discharged, or (b) any Legal contract made touching discharge of such trust	Inducement of person so deceived to (a) deliver any property to any person, or (b) to make, alter or destroy any valuable security or anything which is sealed or capable of being converted into a valuable security
3		With dishonest or fraudulent intention (Mens Rea)	Accused secures access in pursuance of powers conferred under this act		The accused was a clerk or a servant	The accused was a public servant or a banker, merchant, broker, attorney or agent	
4					The accused was entrusted with that property in such capacity		

Question no. 1(a) & 1(b) :-

Submissions :

13. Learned advocates for the applicants would argue that the provisions of IPC cannot be invoked when provisions of the IT Act are

applicable. They would rely upon Supreme Court's decision in ***Sharat Babu Digumarti*** (supra) to submit that when the special provisions, which have a superior effect, encompass a criminal act and the offender, the latter is exempted from the Indian Penal Code. The legal principle is clear; a special law will take precedence over the general and earlier laws. Further, relying on the decision of this Court in ***Gagan Harsh Sharma*** (supra) they would submit that the unauthorized access or securing access to computer/computer system or computer network or computer resources by any person without permission of the owner or any person who is in charge of the computer, computer system, computer network or downloading of any such data or information from computer is covered by section 43 of the IT Act. If such acts are conducted with dishonest and fraudulent intentions, they become punishable by invoking section 66 of the IT Act. Additionally, the technological equivalent of the offence under section 379 is also covered by section 43 of IT Act. Moreover, section 408, which deals with criminal breach of trust by an entrusted clerk or servant, falls under the ambit of section 43 of IT Act. Any act of accessing a computer by a person without permission of the owner or a person in charge of computer and/or stealing of any data, computer data base or any information from such computer or a computer system including information or data held or stored in any removable storage medium, if done with fraudulent and dishonest intent, constitutes an offence

invoking greater punishment in view of section 66 of IT Act. The ingredients of offences under sections 420, 408, and 379 of the Indian Penal Code are subsumed under section 66 of the IT Act. Therefore, prosecuting individuals under both, the Indian Penal Code and the IT Act for the same offence would contravene the legal protection against double jeopardy. In situations where the Information Technology Act provides a specific framework for addressing offences applicable of provisions of the Indian Penal Code to the same facts is unsustainable. The IT Act's specialized mechanisms are designed to supersede the general statutes in such cases.

14. They would submit that reliance placed by the respondents in the case of **Sayyad Hassan Sayyed Subhan** (supra) is not relevant to the current matter due to the explicit ruling in **Sharat Babu Digumarti** (supra).

15. They would further submit that in **Aman Mittal** (supra), it is held that **Gagan Harsh Sharma** (supra), recognized that dishonest and fraudulent acts are covered by Section 66 of the IT Act. Therefore, it would not be apt to rely on the decision in the matter of **Aman Mittal** (supra). Moreover, the issue involved in **Aman Mittal** (supra) was regarding weights and measures to which a specific Chapter in IPC is provided and Legal Metrology Act, 2009 explicitly makes it clear that the provisions of IPC which relate to offences with regard to weight and

measure from Chapter XIII of IPC will not apply. Similar provision is absent in IT Act therefore again it would not be relevant to rely **Aman Mittal** (supra). Therefore, they submitted that the questions (a) & (b) be answered in affirmative.

16. The learned advocates for the respondents and the learned PP specifically submit that Section 43 of the Information Technology Act, 2000 does not address the scenarios involving inducement to defraud, which would lead a person to act or refrain from acting in a way they otherwise would not, as described in Section 415 of the IPC nor does it cover the induced delivery of property, as in Section 420 of the IPC. Section 43 pertains to unauthorized computer usage for certain listed actions. If a complainant is deceived into copying data or handing over property (which should also encompass data), due to the fraudulent actions of the accused, he would be liable under Sections 415, 417, and 420 of the IPC, along with Section 43 of the IT Act. Additionally, Section 43 could apply if the accused is alleged to have committed the specified acts via another person, who might be completely unaware with or without invoking abetment provisions. Therefore, it was submitted that question no. 1(a) be answered in the negative.

17. The learned advocates for the respondents and the learned PP would submit that the terms 'dishonestly' and 'fraudulently'

in Section 66 of the IT Act are not meant to encompass all scenarios. Section 43 imposes liability for a defined set of actions performed personally, which subject the individual to penalties but not criminal prosecution. However, when these actions are carried out with a guilty state of mind or *mens rea*, as specified by 'fraudulently' or 'dishonestly' in Section 66 of the IT Act, they constitute an offence. Essentially, Section 43 addresses the act itself, while Section 66 concerns the mental state behind the act, establishing it as an offence. If the actions of the accused equate to 'cheating', as defined in Sections 415 and 420 of the IPC, then those offences are separately applicable. Section 43 does not account for inducement to defraud or causing someone to act or refrain from acting due to deception, which is covered under Section 415 of the IPC. section 420 of the IPC would also cover induced delivery of property. Section 43 solely pertains to unauthorized computer use for specific actions. If permission has been deceitfully obtained, then the offence falls under section 415 of the IPC, and if it results in the induced delivery of property, section 420 of the IPC can be invoked as well. Therefore, they prayed that question no. 1(b) be answered in negative.

Analysis :

18. As can be understood, section 43 makes various acts punishable wherein a person without permission of the owner or any

other person incharge of the computer, computer system or computer network either accesses, downloads or introduces virus or damages the computer, computer system network data or creates disruption or refuses access, destroys or deletes the information or steals, conceals or alters the computer source code.

19. By virtue of section 66, additionally, any act as is defined under section 43 is done dishonestly and fraudulently attracts a greater punishment. However, neither section 43 nor section 66 take within its sweep a situation where the acts done thereunder as done by resorting to inducement, which is an additional ingredient for the offences under section 415 and 420 of the Indian Penal Code, if a person accesses or secures access to computer, computer system or downloads something, by inducing the owner or any other person who is incharge. The offence under section 43 read with section 66 only contemplates a situation where someone dishonestly or fraudulently does any act under section 43. However, if it is done with permission accorded, labouring under some inducement, in our considered view, such an act would be an offence under section 415 and 420 of the Indian Penal Code and section 43 read with section 66 of the IT Act fall short to cover such offences. It is in this context, the definition of cheating under section 415 will have to be understood, simultaneously, with the definitions of 'dishonestly' contained in section 24 and 'fraudulently' contained in section 25 of the Indian Penal Code.

20. Sections 24, 25 and 415 of the Indian Penal Code read thus:-

“24. “Dishonestly”.—Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing “dishonestly”.

25. “Fraudulently”.—A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

Explanation.— A dishonest concealment of facts is a deception within the meaning of this section.”

21. The use of word ‘deceiving’ in section 415 is in addition to the words ‘fraudulently’ or ‘dishonestly’ used therein. A plain reading would clearly indicate that in order to constitute ‘cheating’ as defined under section 415, element of deceit is an additional requirement, over and above the intention of the person resorting to such deceit being fraudulent and dishonest. It is, therefore, apparent that though section 66 of the IT Act covers the ingredients of ‘fraudulently’ and ‘dishonestly’, it does not cover the element of ‘deceit’ which is an additional concomitant for constituting the act as ‘cheating’ as defined under section 415 of the Indian Penal Code.

22. It would be necessary to emphasize that though some ingredients of offence punishable under section 43 read with section 66 of the Indian Penal Code are overlapping with the offence of cheating defined under section 415 and the one punishable under section 420, those are not exactly the same offences.

23. As we have indicated herein-above, the observations which we emphasized from paragraph no. 37 of **Sharat Babu Digumarti** (supra) comprehend the situation where the offence under the special act having a overriding effect and the one under the general law are the same.

24. It is in this context that a reference to section 26 of the General Clauses Act, as has been done in several matters including **Aman Mittal** (supra) would be relevant, which reads as under:-

“26. Provision as to offences punishable under two or more enactments.—Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

25. In the matter of **Aman Mittal**, reference to the decision in the matter of **Syyed Hassan** was made, which was a matter in respect of section 55 of the Food and Safety Standards Act, 2006 in juxtaposition to section 188 of the Indian Penal Code, **Sangeetaben Mahendrabhai Patel** which was a similar issue regarding section 138

of the Negotiable Instruments Act and section 406, 420 read with section 114 of the Indian Penal Code; and the doctrine of harmonious construction resorted to by referring to the decision in the matter of **Macquarie Bank Limited vs Shilpi Cable Technologies Ltd.; (2018) 2 SCC 674**. Referring to these decisions, while considering the offences punishable under the Legal Metrology Act, 2009, in comparison to the offences under section 415, 467, 468, 477 of the Indian Penal Code as also the element of common intention under section 34 or conspiracy under section 120-B of the Indian Penal Code, following conclusions in paragraph no. 35 of **Aman Mittal** were made and would be the guiding factors even for deciding the questions referred to us:-

“35. *The scheme of the Act is for the offences for use of weights and measures which are non-standard and for tampering with or altering any standards, secondary standards or working standards of any weight or measure. The Act does not foresee any offence relating to cheating as defined in Section 415 IPC or the offences under Sections 467, 468 and 471 IPC. Similarly, an act performed in furtherance of a common intention disclosing an offence under Section 34 is not covered by the provisions of the Act. An offence disclosing a criminal conspiracy to commit an offence which is punishable under Section 120-B IPC is also not an offence under the Act. Since such offences are not punishable under the provisions of the Act, therefore, the prosecution for such offences could be maintained since the trial of such offences is not inconsistent with any of the provisions of the Act. Similar is the provision in respect of the offences under Sections 467, 468 and 471 IPC as such offences are not covered by the provisions of the Act.”*

26. With respect, adopting the same line of reasoning, we have no manner of doubt in answering the issue no. 1(a) and 1(b) in the negative.

Question no. 1(c):-

Submissions :

27. They would submit that taking into account the ingredients for constituting an offence under section 72, those are covered by sections 406, 408 and 409 which are different facets of breach of trust and, therefore, an individual cannot be punished twice for the similar offences but under the different statutes. They, therefore, submitted that question no. 1(c) be answered in the affirmative.

28. As against this, learned advocate for the respondents and the learned PP would submit that section 72 of the IT Act is specifically applicable to individuals who have been granted authority under the IT Act or its rules or regulations pertaining to their acts or omissions. Section 72 does not contemplate a situation and cover the cases where such breach of trust contemplated under section 72 is additionally for one's own use when he secures access to the electronic record, book, register, correspondence, documents etc. not only without the consent of the person but for his own use and constitutes misappropriation as defined under section 403 of the Indian

Penal Code. They submitted that question no. 1(c) be answered in the negative.

Analysis :

29. A similar exercise, as we have done while answering questions no. 1(a) and 1(b) will have to be undertaken for answering even this question. Section 72 of the IT Act and section 403, 406, 408 and 409 of the Indian Penal Code would be relevant which reads as under :

S.72 IT Act	S.403 IPC	S.406 IPC	S.408 IPC	S.409 IPC
72. Penalty for breach of confidentiality and privacy.— Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be liable to penalty which may extend to five lakh rupees.	403. Dishonest misappropriation of property. - Whoever dishonestly Of criminal misappropriation of property misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.	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.	408. Criminal breach of trust by clerk or servant.— Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.	409. Criminal breach of trust by public servant, or by banker, merchant or agent.— Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

30. As can be understood, section 72 only makes punishable the act which is in breach of confidentiality and privacy and again is done without the consent of the person concerned. Section 406, 408, 409 of the Indian Penal Code are the cases of criminal breach of trust, criminal breach of trust by a clerk or servant or by public servant,

banker, merchant etc. Section 405 defines criminal breach of trust to mean whoever being in any manner entrusted with the property dishonestly misappropriates or converts to his own use that property or disposes of it in violation of the direction or contract touching the discharge of the trust. In turn, one will have to refer to definition of 'dishonest misappropriation' defined under section 403 which amounts to the dishonest misappropriation or conversion to one's own use of any movable property.

31. Considering the ingredients of the offence punishable under section 72 in comparison to the offences under section 406, 408, 409 in the light of section 403 and 405 of the Indian Penal Code, section 72 does not comprehend a situation where the breach of confidentiality or privacy, which is *per se* made punishable having been done without consent of the owner, a situation where such breach of confidentiality is resorted to for converting the property to one's own use or access to the computer or computer system is done dishonestly. Section 72 only contemplates a situation where someone secures access to the electronic record / information. But if this act is done dishonestly for one's own use, it would be an act which would be punishable only under section 406, 408 and 409 of the Indian Penal Code and section 72 would fall short to cover this kind of offence. Hence, we answer this question also in the negative.

Question 1(d):-**Submissions :**

32. Learned advocate for the applicants would submit that section 43 covers the case of cheating and even expression 'dishonestly and fraudulently' are covered wherein the permission is obtained from the owner by cheating and even Section 72 of IT Act covers all the ingredients of 406, 408, 409 of IPC.

33. Learned advocates for the applicants also submitted that section 72 uses the word 'any person'. Though the IT Act does not define it, rule 2(i) of the Information Technology (Certifying Authorities) Rules, 2000 defines it to mean that it shall include an individual, or company or association or body of individuals, whether incorporated or not or Central Government or a State Government or any of Ministries or Departments, Agencies or Authorities of such Government.

34. They would also refer to section 11 of the Indian Penal Code containing a similar definition, to submit that even in the absence of a provision similar to section 34 of IPC where a person punishable under section 43 and 72 would impliedly cover the situation where the offences are committed by two or more persons by sharing a common intention. They, therefore, submitted that question no. 1(d) be answered in the affirmative.

35. Learned advocate for the respondents and the learned PP would submit that the acts done under Section 43 or 72 of the I.T. Act, would not cover the criminal acts done with common intention. Such common intention implies a collective liability, meaning one individual is held accountable for another's actions. These sections do not address this concept. It is only when multiple individuals act in furtherance of their common intention and there is commonality of intent and complementarity in action, that Section 34 of the IPC becomes applicable. This section ensures that all involved parties are held equally responsible, regardless of their individual roles or whether they personally executed the act. Therefore, it was submitted that question no. 1(d) be answered in the negative.

Analysis :

36. Ex facie, neither section 43 nor section 72 makes punishable an offence as defined therein when it is committed by two or more persons by sharing a common intention, neither is there any other provision in the IT Act which would demonstrate the legislature having comprehended a situation where these offences are committed by sharing a common intention as defined under section 34 of the Indian Penal Code. Independently, even this aspect, in the context of Legal Metrology Act, 2009 was considered in ***Aman Mittal***, in

concluding paragraph (supra). With respect, we follow the same line of reasoning. Hence, we answer this question also in the negative.

37. The common thread deducible from various judgments of the Supreme Court covering similar issues, where an act is an offence under a special statute having an overriding effect over the offence covered by the general law like Indian Penal Code, is that in order to exclude the general law or the offence therein, ingredients of the offence defined under the special statute and the Indian Penal Code will have to be the same. If even one ingredient of an offence under the Indian Penal Code is missing in the act which has been made punishable under the special statute, the Indian Penal Code section will not be excluded and still can be resorted to *albeit*, the provisions of section 71 of the Indian Penal Code and section 26 of the General Clauses Act will have to be borne in mind by the Courts while imposing the sentences.

38. We are alive to the fact that these observations of ours' may not be necessary for answering the questions referred to us, however, we are making these observations as an abundant precaution to enable the trial Courts faced with such a situation when they are called upon, to consider these aspects.

39. Hence, we answer all the questions referred to us in the negative.

40. Matters be now placed before the appropriate bench for adjudication.

[SHAILESH P. BRAHME]
JUDGE

[R. G. AVACHAT]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/