



MONTHLY NEWSLETTER

The Law Desk

March 2022 / TLD-12

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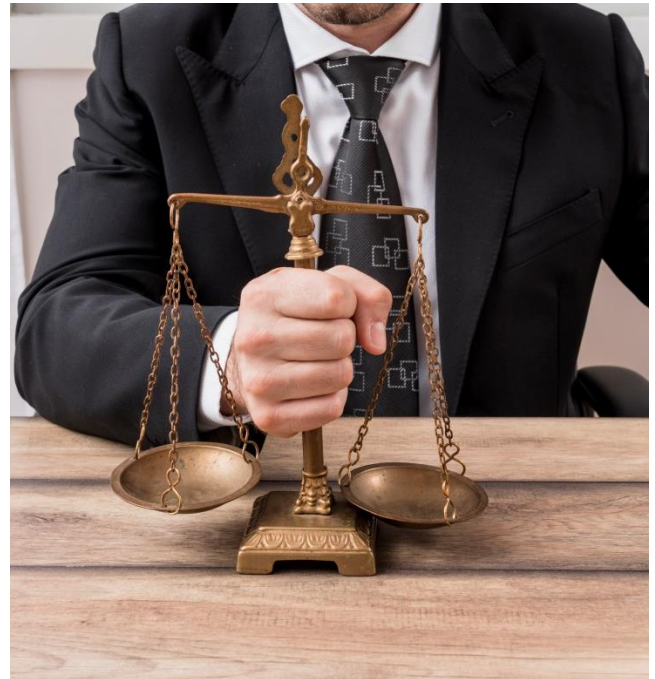
SARFAESI ACT TO HAVE AN OVERRIDING EFFECT OVER OTHER STATUTES

In the matter titled as *Punjab National Bank vs. Union of India & Ors.*, the Commissioner of Customs and Central Excise, Ghaziabad had ordered confiscation of land, building and machinery of M/s Rathi Ispat Ltd. (*hereafter referred to as "RIL"*) under Rule 173 Q(2) of the Central Excise Rules of 1944. In The present case, RIL has availed the credit facilities under various scheme from the Appellant Bank i.e Punjab National Bank and has hypothecated all its movable and immovable properties. Further, it defaulted in making payments of a loan amount and has also failed to liquidate outstanding dues. The Appellant thereby issued notice to RIL under section 13(2) & 13(4) of the SARFAESI Act, 2002.

That the respondent contented that the movable and immovable

Properties that were used in connection with manufacture, production, storage or disposal of goods of the RIL stood confiscated by the order passed by the Commissioner of Customs and Central Excise and possession of the assets in question cannot be taken by the Appellant Bank.

Being aggrieved by the order of confiscation, the Appellant Bank preferred a Writ Petition before the Hon'ble Allahabad High Court, wherein, the writ petition was dismissed on the ground that the debt cannot be recovered from the assets that are confiscated by the Customs and Central Excise Authorities while stating that the property which has been confiscated vested in the state and no other person can claim any right, title or interest over it.

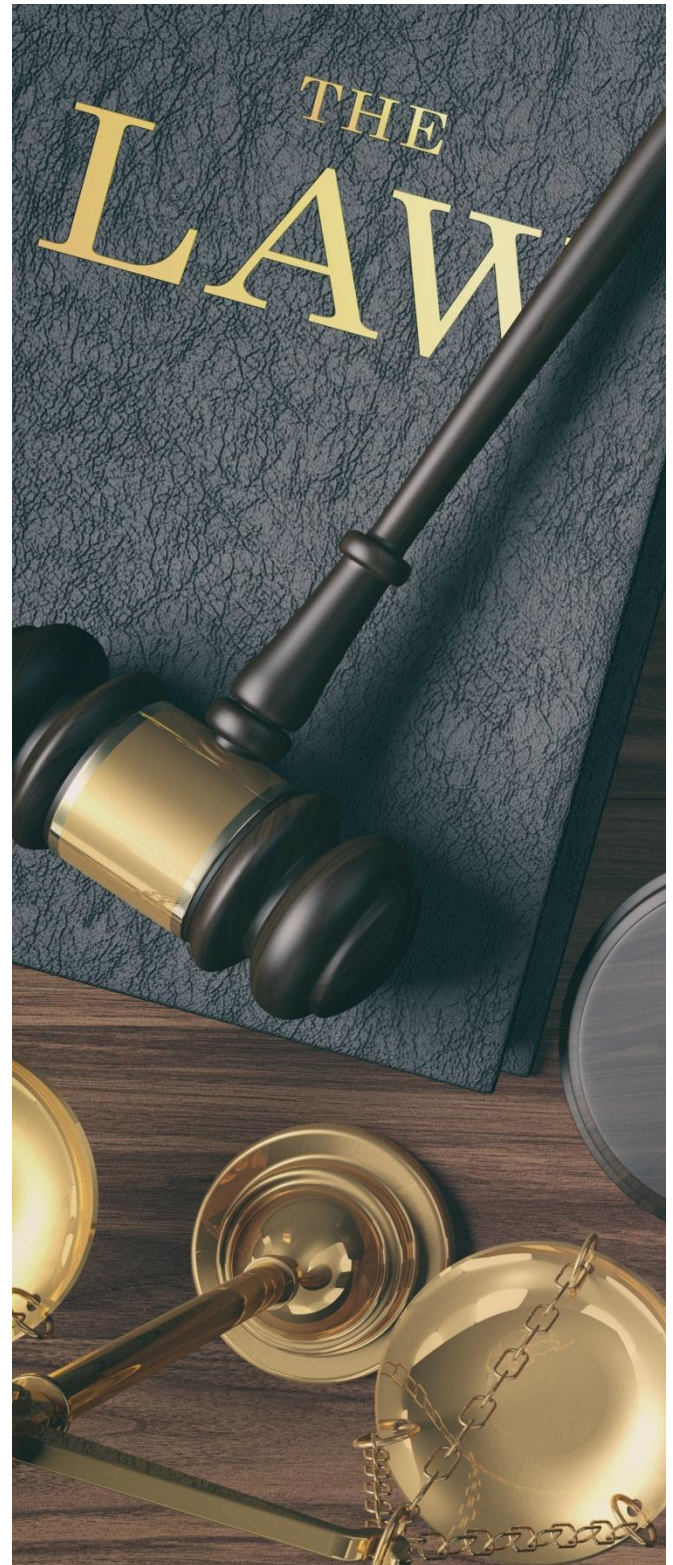


Pursuant, to which the Appellant Bank approached the Apex Court to assimilate whether the dues of the Custom Central Excise Authorities would have priority over the dues of Secured Creditors or vice versa. The Apex Court ruled out that the dues of the Secured Creditors, i.e. the Appellant Bank will have

priority over the dues of the Central Excise Authorities, as the provisions of the SARFAESI Act, 2002 shall have an overriding effect on the provisions of the Central Excise Act, 1944. Furthermore, the Court also remarked that the confiscation order lacked statutory backing, as they were rooted in a provision that stood omitted on the day of passing of orders. Therefore, it is this inherent defect in the confiscation orders that paves way for its quashing and not merely the fact that a security interest is created in respect of the very same property that the confiscation orders dealt with.

In light of aforesaid, it is concluded that where the assets are mortgaged/hypothecated to a Secured Creditor, having regard to the provisions contained in SARFAESI Act, 2002, the Secured Creditor will have a first charge on such assets.

The instant judgment by stating that the Secured Creditor shall have a first charge on assets has surpassed the observations laid down in the landmark judgment of *International Coach Builders Ltd. vs. Karnataka State Financial Corporation Ltd & Ors.*, wherein the Apex Court while analyzing the Principle of *Pari Passu* held that rights of the holder of the *Pari Passu* fees shall operate equally, temporarily and in power, thereby recognizing the rights of unsecured creditors as well.

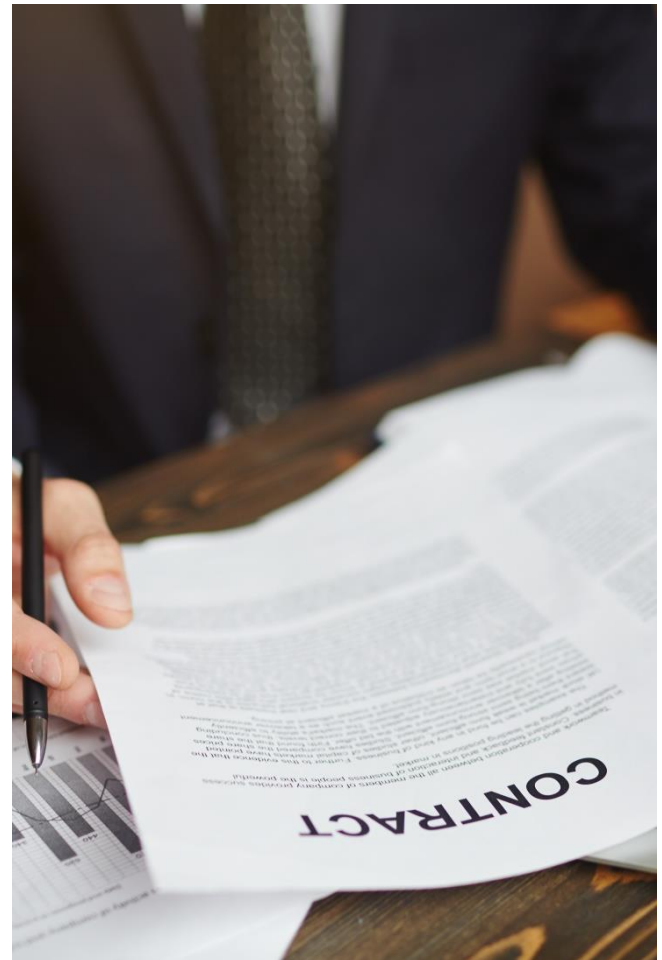


2 MERE BREACH OF CONTRACT DOES NOT AMOUNTS TO CHEATING UNDER IPC

The Hon'ble Supreme Court in the matter of Vijay Kumar Ghai & Ors. vs. The State of West Bengal & Ors.¹ held that mere breach of the terms of contract by any party does not make a case to prosecute a party for cheating, unless the complainant establishes that there was dishonest & fraudulent intention to cheat from the time the contract was made/entered into by the parties.

The brief facts of the case are that a company entered into a contract with the complainant through its Director whereby the complainant invested 2.5 Crores in the company and in lieu of that the company had to issue equity shares. However, the company failed to bring the I.P.O. & thus the shares were not issued. The investor-complainant filed various complaints for registering FIR in Delhi and Calcutta under various penal provisions *inter alia* Sections 406, 420 & 120B of the Indian Penal Code, 1860. Aggrieved by the same, the Appellant filed an Application under Section 482 of the Code of Criminal Procedure, 1973 for quashing the FIR, however, the Application was disposed of in favour of the Complainant. Aggrieved by the

said Order, the Appellant approached the Supreme Court.



The Hon'ble Apex Court while setting aside the Order passed by the Hon'ble High Court held that in order to make a case under Section 406 & 420, the complainant is duty bound to prove that the accused has the intention to deceive/defraud the complainant since the time the agreement was entered into and the said alleged illegal acts of the accused have caused wrongful loss to the complainant and has

¹ Criminal Appeal no. 463 of 2022.

simultaneously resulted in wrongful gain to the accused.

It was further held by the Hon'ble Court that Courts have to be extra cautious while issuing summons in a criminal case involving an issue of civil nature.

Furthermore, the Court observed that the Complainant cannot register multiple FIRs when the facts of the case concerns to the same cognizable offence as is provided in the registered FIR. In other words, initiating multiple simultaneous proceedings for the same cause of action is nothing but an abuse of statutory power of investigation.

The Hon'ble Apex Court while setting aside the Impugned Order, quashed the FIR against the Appellant and observed that the High Court erred by not satisfying itself whether ingredients of Section 420 were met out or not.

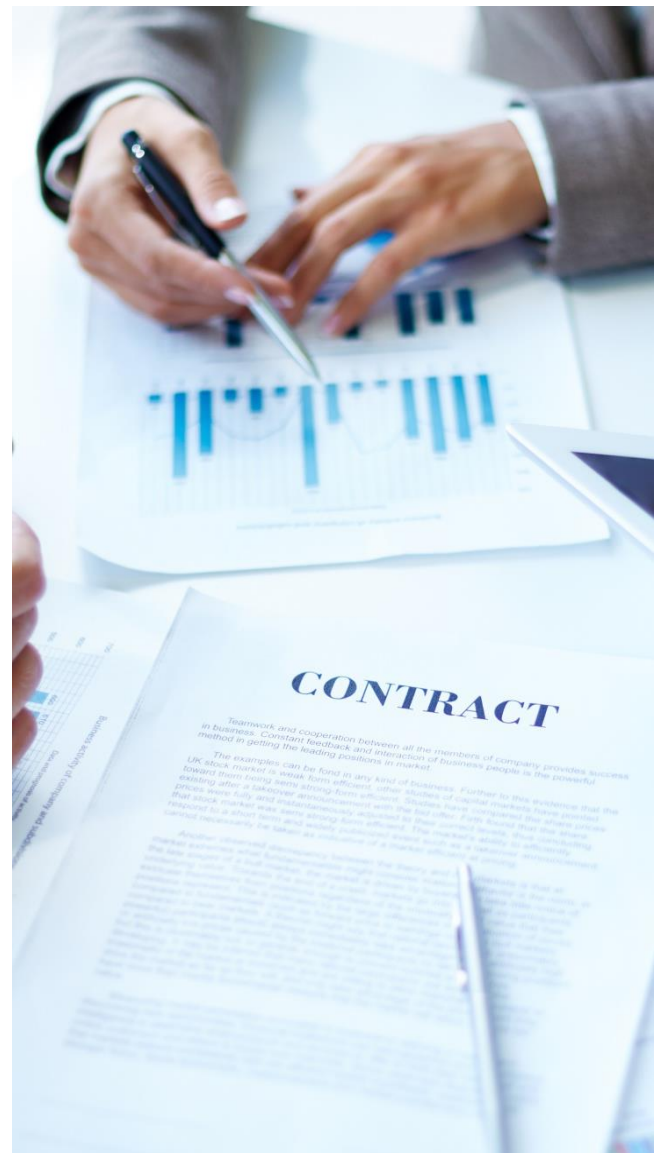
Analysis

The Order passed by the Hon'ble Apex Court has once again made the position clear w.r.t. filing of multiple FIRs/Complaints against the same person involving same cause of actions.

For proper implementation of this order in letter and spirit and for practical purposes, it will be fruitful if this Order is informed to police officials at ground level so that the police

officials can decide while registering an FIR in cases where has already registered in a same case.

As such, the said Order will restrict the Complainant from abusing the process of law to carry out personal vendetta and create undue pressure on the accused.



3 VIOLATION OF A WOMAN'S BODILY INTEGRITY AMOUNTS TO RAPE, EVEN IF THE PERPETRATOR IS HUSBAND : KARNATAKA HIGH COURT

In a recent verdict of *Hrishikesh Sahoo vs. State of Karnataka*², the Hon'ble High Court of Karnataka held that a person cannot be absolved from the charges in a rape case merely because he is the husband and an exception with respect to the same has been carved out under the Section 375 of the Indian Penal Code, 1860 (IPC), and hence by the said pronouncement recognized a woman's right to integrity and bodily freedom, her autonomy over her body, her right to live with dignity and her right to privacy.

In the present case, husband was charged under section 376 along with other sections of IPC and Protection of Children from Sexual Offences Act [POCSO]. Section 376 of IPC prescribes a maximum punishment of rape which may extend up to life imprisonment and fine. It was alleged by the wife that the husband used to touch private parts of his minor daughter, and would force her to have unnatural anal sex and oral sex by imitating pornographic films. It was also alleged by the wife that her husband did not leave her from

forceful sex even during her pregnancy. During the course of the investigation, the police dropped the charge under Section 377 (Unnatural offences) of the IPC, but added section 376 of the IPC. The husband's application seeking dropping of rape charges was rejected by the Sessions Court and hence he approached the Hon'ble High Court for the same. High Court did not agree to husband's argument that the charge cannot be framed against him due to the exception provided under section 375 of IPC. Further, rejecting the said application the High Court held that exemptions in law cannot be absolute as the same then becomes a license to commit a crime against the society. It was also held in the judgment that the said exception under section 375 of IPC is regressive and runs counter to the principle of equality. The court also propounded that from the perusal of the complaint and the charge sheet filed, it can be inferred that the petitioner had indulged in acts of unnatural sex and hence the charges framed ought to have been inclusive of section 377 of the IPC as well.

The abovementioned ruling would serve as a stepping stone in ensuring that equality remains an absolute right, and that any law that undermines equality must be brought in line with the principles enshrined in Article 14 of the Indian Constitution (Right to Equality).

²WP 48367 OF 2018

Apart from being discriminatory, the exemption provided in section 375 of the IPC considers women as subordinate to their husbands and rejects their right to consent, choice, and freedom in the social institution of marriage. Further, the purpose of the said provision is to criminalize an act violating the bodily integrity of a woman without her consent. And only because the perpetrator of the said violation is victim's husband, he cannot be exonerated from the prosecution for the said offence. Also, if all the elements of the offence under section 375 of IPC are prima facie made out, then the trial must be conducted in accordance with the due process of law, regardless of the relationship between the accused and the victim.

Since, the Hon'ble High Court was not considering the question of legitimacy of the marital rape immunity, these observations can only be considered as obiter. But the aforementioned ruling will recognize the rights of marital women and will give them courage to stand up for themselves and ensure that culprits are brought to justice. The judgment not only denounced the said acts of sexual

assault but also urged the law makers to ponder over the inequalities perpetuated by the said provision and hear the voices of silence.

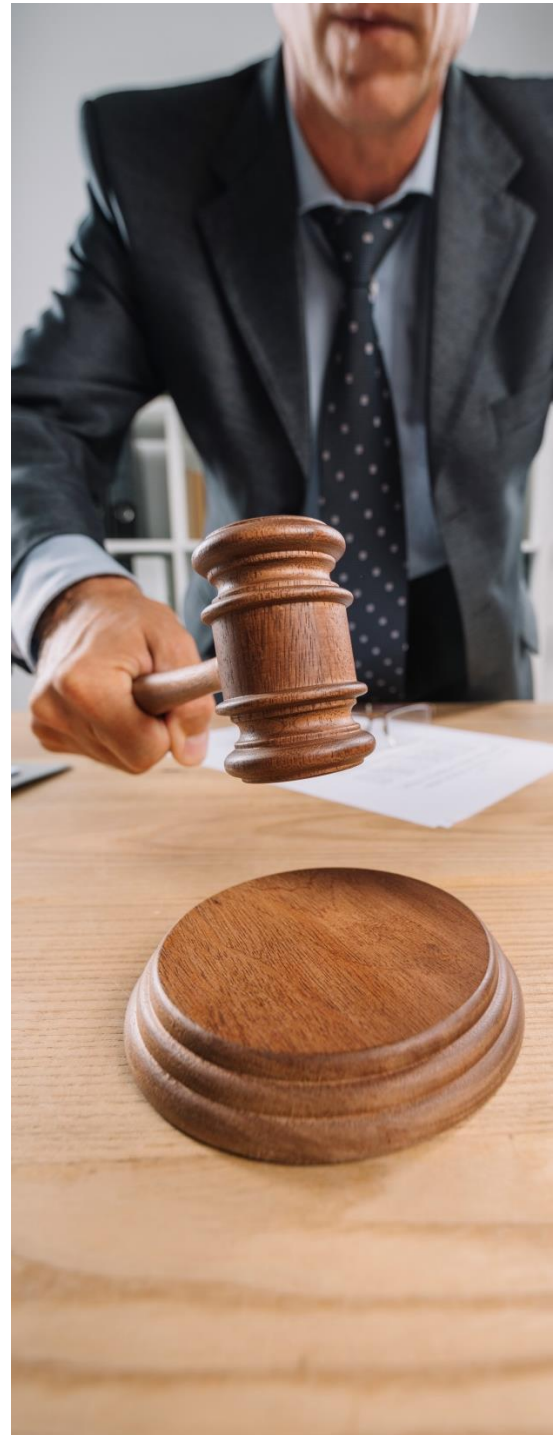


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LEGAL NEWS AND
UPDATES

- Delhi High Court imposes fine of Rs. 25 Lacs on a litigant accusing a Trial Court Judge being bias against him as the allegations made was mere apprehension without any proof.
- Law Minister Kiren Rijiju has considered proposal from Chief Justice of India for establishing National Judicial Infrastructure Authority of India (NJAI) was received for arranging adequate infrastructure of courts. NJAI would be central body for arranging and managing infrastructure of Courts in India. The proposal has been sent to States and Union Territories for their views.
- Maintenance is to be accorded from the date of application and not from the date of order observes Allahabad High Court.
- Kerala High Court drops all charges against Hindu Aikya Vedi leader K.P. Sasikala, accused of triggering protests for entry of women in Sabrimala temple in 2018.
- In a Service matter, the Kerala High Court re-affirms that the implementation of new scheme shall not mean, junior cadre

employees will draw more salary than senior in the same cadre.



- Proper Application of mind is necessary to grant Criminal Appeal and the same is not automatic. As such, the High Court need to examine first that whether prima facie the appeal is arguable or not, emphasized Kerala High Court.
- Even if tender contracts suffers from arbitrariness and entered is into with malafide intention, the Court should refrain from interfering. The Court should rather relegate parties to seek damages than to injunct for execution of contract, observes Apex Court.
- Recently, the Orissa High Court held that a government employee cannot be removed from his service without following due process of law, even though he has been prima facie held guilty of disobeying authority and remained absent from his duty for five consecutive years.
- Rajasthan High Court dismissed writ petition after imposing a cost of Rs. 2 Lacs. on the Petitioner for misrepresentation and misleading the court by firstly, not availing alternative remedy, secondly, not impleading necessary parties, and lastly, for non-disclosure about obtaining ex-parte decree amid advocate's strike.
- Rajasthan High Court re-affirms Doctrine of Election: When there are alternate remedies available under different statute, a person has to choose one forum and for obtaining the benefits it has not received, he cannot be allowed to choose another forum under some statutes.
- Karnataka High Court quashes FIR against Dream 11 Co-Founders, under Karnataka Police (Amendment) Act, 2021, which bans online gaming with stakes.
- Apex Court to hear plea challenging validity of Rs. 8 Lacs income criteria as higher limit for Economic Weaker Section.
- PIL filed in Supreme Court for establishment of Indian Work Environment, Supreme Court grants two weeks' time to Central Government and Union Public Service Commission to respond.
- Acquittal of delinquent employee in a criminal case does not debar that employer from disciplinary enquiry upholds Apex Court.
- The Apex Court on reserves order in the application filed by the Central Government seeking a time-limit for

submitting claims for COVID death compensation.

- Opinion of handwriting expert is not the only way for proving signature or handwriting of person, Section 45, 47, and 53 of the Indian Evidence Act, 1872 can be opted for proving the same, held Apex Court.
- Madras High Court exclaims that Court cannot act as Post Office for collecting and exchanging information.
- Split Verdict of Apex Court on disclosure of identity of victims for investigation under Section 23 of POCSO Act.
- Suggestions are sought from various Stakeholders on the draft guidelines for access of persons with disability in higher educational institutions, UGC informs Supreme Court.
- Non-Disclosure w.r.t to criminal antecedents by a candidate in a selection process can be overlooked in certain circumstances. However, the Selection Panel /Competent Authority must exercise its power with due diligence, held Apex Court.





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