

**AFR**

**Reserved on 12.12.2024**

**Delivered on 08.01.2025**

**Neutral Citation No. - 2025:AHC:3365-DB**

**Court No. - 42**

**Case :-** CRIMINAL MISC. WRIT PETITION No. - 22470 of 2024

**Petitioner :-** Vuenow Infotech Pvt. Ltd. Through Its Director Sh. Nitin Srivastava

**Respondent :-** State Of Uttar Pradesh And 2 Others

**Counsel for Petitioner :-** Anubhav Singh, Mohd Haider

**Counsel for Respondent :-** G.A.

**Hon'ble Mahesh Chandra Tripathi, J.**

**Hon'ble Prashant Kumar, J.**

1. Heard Shri G.S. Chaturvedi, learned Senior Advocate assisted by Mr. Mohd. Haider, learned counsel for the petitioner alongwith Shri Akshay, Advocate and Shri Shashi Dhar Pandey, learned A.G.A. for the State.

2. The present writ petition is preferred inter-alia with following reliefs:-

*(a) Call for records and issue order, direction or writ in the nature of certiorari or any other similar writ, thereby quashing the impugned FIR dated 24.11.2024 registered as Case Crime No.463 of 2024 under Sections 318(4), 61(2) and 316(2) BNS 2023 registered at P.S. Sector 58, Noida District Commissionerate.*

*(b) Issue any other writ, order or direction which this Hon'ble Court may deems fit and proper in the circumstances of the case.*

*(c) Award the cost of the writ petition to the petitioner.*

**Facts of the Case:**

3. A First Information Report was lodged on 24.11.2024 in P.S. Noida Sector-58, District Gautam Buddh Nagar under Section 318(4), 61(2), 316(2) BNS 2023. As per the FIR, against the petitioner- M/s Vuenow Infotech Pvt. Ltd. and other related companies and individuals, the Enforcement Directorate conducted a search and seizure on 17.10.2024 at various places including the premises of petitioner as well as related companies, which are M/s Vuenow Marketing Services Pvt. Ltd.<sup>1</sup>, M/s Zebyte Infotech Pvt. Ltd.<sup>2</sup> and M/s Zebyte Rental Planet Pvt. Ltd.<sup>3</sup> and persons associated with the said entities. During the course of investigation, it was revealed that M/s VMSL under its MyCloudParticle brand, was offering various customers an investment opportunity by which the investors were induced to invest

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1. in short 'M/s VMSL'

2. in short 'M/s ZIPL'

3. in short 'M/s ZRPPL'

by buying Data Centre Asset or Cloud Particle servers through Sale and Lease Back model, whereby, a customer buys a cloud particle, which is a storage space in cloud and the same would be leased back for a term of 10 years to M/s ZRPPL and M/s ZIPL, which are marketing affiliates of M/s VMSL, and in response the customers/buyers were offered minimum guaranteed rent for ten years. Each Cloud Particle comprises of 1 TB of cloud storage space.

4. The FIR further discloses that the business model of these companies was that M/s VIPL used to purchase Servers (Data Storage Facility) and IT equipments, M/s VMSL, who thereafter sell it to different individuals/investors and M/s ZIPL and M/s ZRPPL were the marketing companies for lease back policy, however, M/s ZIPL and M/s ZRPPL receives money from M/s VIPL and not from its end customers and the same is being paid to the investors/individuals in the form of rent. During the search it was found that as on 18.10.2024 the total storage capacity for cloud with the petitioners was only 553 TB and out of which only 1.9 TB was being used and the balance 551.1 TB remained unused. In the premises there were 1119 servers, which were not connected to any power source, which means they were not in working condition. It was also found that M/s ZRPPL had earned Input Tax Credit (ITC) by purchasing goods and services from bogus suppliers. The total invoice value of such purchase transactions is Rs.66,23,58,209/-.
5. In the FIR it is mentioned that during the Course of investigation, the statement of members of M/s VIPL were recorded, wherein, it is stated that total live data storage capacity is 2701 TB across various data centres. The total quantum data facility provided by ZRPPL to its clients is substantially low in comparison with the quantum of cloud particle leased by M/s ZRPPL to individuals/investors. The Statement of Nitin Srivastav, Director of M/s VIPL reveals that individual investors were being paid from the investments received from new investors. As per the balance sheet of M/s VMSL, the total revenue received by the Company was Rs.5,33,38,06,158/- and M/s VMSL has received the total amount of Rs.2236.07 crores as credit. Perusal of different tables goes to show that M/s VMSL has sold cloud particles to individuals/investors beyond the actual capacity. M/s VMSL only had server capacity of 2701 TB in all its

data centres. Against this available capacity, they have already sold 1,29,294 TB of cloud space.

6. It is alleged in the FIR that the business model followed by the petitioner and associate companies is that the money collected from the individuals/investors is being rotated and paid to them as monthly assured income. Money received from the new individuals/investors is paid to old one as monthly assured rental income. Further it is alleged in the FIR that this business model is a fraudulent investment scheme as it is a non sustainable business model. Such type of business collapses when the new investment stops coming, therefore, there is all likelihood that investors will be cheated and their investment is at risk. The accused have dishonestly induced various individuals/investors to invest in cloud particles, which do not exist and, therefore, they have cheated the investors and clearly there is breach of trust. It is clear that the accused have committed an offence under Sections 318(4), 316(2) and 61(2) BNS 2023.

**Argument of Counsel for the petitioner**

7. Shri G.S. Chaturvedi, learned Senior Advocate submitted that it is alleged in the FIR, the petitioner alongwith its sister concern sold or leased out the cloud space. The Enforcement Directorate<sup>4</sup> took information under the Foreign Exchange Management Act 1999<sup>5</sup>, conducted search, formed an opinion that suspectedly some offence under BNS 2023 has taken place and drafted a report to bypass the proceeding, as they have no jurisdiction and they are trying to do indirectly what they cannot do directly. In the present matter there is no complaint of any investor/individual and the Authorities have proceeded on their own.
8. Shri Chaturvedi vehemently contended that there is no siphoning of money. The money invested by the investors in the Company, is Company's money to use. If investors have made investment and the Company failed to get benefit of it, it cannot be said that there is offence of cheating. He argued that Section 316(2) BNS pertains to criminal breach of trust and if there is no investor stating otherwise, the question of criminal breach of trust does not arise. In this case there is no indication as

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4. (in brevity 'E.D.')

5. (in short the 'FEMA')

- to who has been cheated. Moreover, it is evident from the order dated 02.12.2024 passed in Writ Petition (Crl) No.3765 of 2024 by the Delhi High Court that the Assistant Director of E.D. has admitted that there is no complaint against the petitioner company by any investor. The FIR has been filed mechanically and without application of mind. There is not a single investor/constituent in the entire conspectus of facts to suggest that any cheating or criminal breach of trust has ever taken place.
9. Shri Chaturvedi, learned Senior Advocate asserted that the FIR has been registered in total violation of the ratio laid down by the Supreme Court in *Lalita Kumari vs. Govt. of U.P.*<sup>6</sup>, wherein, it has been held that if the information received does not disclose any cognizable offence, then a preliminary inquiry may be conducted to ascertain if any cognizable offence is disclosed or not. A bare perusal of the FIR shows that no cognizable offence is made out. The wordings of the FIR suggests that the respondent no.3 is not sure about the commission of any offence. The information under Section 66 Prevention of Money Laundering Act 2002 shared by E.D. uses words ‘likelihood’ and ‘appears’ and when the E.D. itself is not sure, then how a drastic step of registration of FIR can be sustained. Even the police has not conducted any inquiry before registration of FIR.
10. Shri Chaturvedi, learned Senior Advocate further contended that the contents of the FIR fails to fulfill the basic ingredients of Section 316(2), 318(4), 61(2) BNS. As per Section 318 BNS, the offence of cheating happens when someone deceives another person to fraudulently induce them to deliver property or act against their interest, potentially causing harm to the victim, however, the entire FIR fails to disclose even a single instance of inducement being made by the petitioner or any of the other entities.
11. He submitted that if no complaint is made can a third person say the investment is at risk in future and an FIR can be lodged under Section 318 BNS since there is no deceitful representation. He has placed reliance on the judgement of Supreme Court in *Delhi Race Club (1940) Ltd. and others vs. State of U.P. and another*<sup>7</sup>, wherein, the Supreme Court has held that “In case of cheating, the intention of the accused at the time of

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6. 2014 (2) SCC 1

inducement should be looked into which may be judged by a subsequent conduct, but for this, the subsequent conduct is not the sole test. Mere breach of contract cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction i.e. the time when the offence is said to have been committed. Therefore, it is this intention, which is the gist of the offence. Whereas, for the criminal breach of trust, the property must have been entrusted to the accused or he must have dominion over it. The property in respect of which the offence of breach of trust has been committed must be either the property of some person other than the accused or the beneficial interest in or ownership' of it must be of some other person. The accused must hold that property on trust of such other person. Although the offence, i.e. the offence of breach of trust and cheating involve dishonest intention, yet they are mutually exclusive and different in basic concept.

12. He lastly submitted that there is a distinction between criminal breach of trust and cheating. For cheating, criminal intention is necessary at the time of making a false or misleading representation i.e., since inception. In criminal breach of trust, mere proof of entrustment is sufficient. Thus, in case of criminal breach of trust, the offender is lawfully entrusted with the property, and he dishonestly misappropriated the same. Whereas, in case of cheating, the offender fraudulently or dishonestly induces a person by deceiving him to deliver any property. In such a situation, both the offences cannot co-exist simultaneously.” He vehemently contended that from bare reading of the FIR no offence under Section 318(4), 61(2), 316(2) BNS 2023 is made out. In this backdrop, he contends that the FIR is only based on assumption and the same is liable to be quashed.

#### **Argument of Counsel for the respondent**

13. Per contra Shri Shashi Dhar Pandey, learned A.G.A. appeared for the State and submitted that the petitioner and its promoters are accused of sharing information of the company and other related persons and operating investment schemes through Data Center Cloud by giving wrong information to the investors and manipulating/cheating the investors' money by making them invest, in respect of which investigation is underway. During the investigation statements of various officials of the petitioner company were

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7. 2024 0 Supreme (SC) 689

recorded regarding the evaluation of hardware installed in the premises. In the statement of these officials, currently only 1.9 TB space is utilized and storage capacity of 551.1 TB is available or vacant. No service, like customer care service, is being provided by the petitioner company. There were 1119 servers in the premises, which were not connected to any power source, even then it was sold at various people. During the search conducted at a different data center in Mohali, Punjab between 17.10.2024 to 18.10.2024, it was found that the total live data storage capacity of all the data centers is 2701 TB. He submitted that the essence of the matter is that the amount of data storage facility is much less than the space sold to individuals. The total server capacity is 2701 TB cloud space and the petitioner company and others have already sold 1,29,294 TB as per MCA data or to a total capacity of 5,42,274 TB as per bank account deposits, excluding 18% GST.

14. He asserted that the model used by the said entities is apparently a cycle circulation ponzy scheme and a non-sustainable business model. Such a scheme depends on a continuous flow of fresh investments to sustain itself. Therefore, it is established that M/s Vuenow Marketing Services Ltd., in connivance with other entities i.e. M/s Viewnow Infotech Pvt. Ltd., M/s Zebyte Infotech Pvt. Ltd. and M/s Zebyte Rental Planet Pvt. Ltd. have dishonestly induced various individuals/investors to invest in Cloud Particles by selling them Cloud Particles, which do not exist and thereby defrauded these individuals/investors and breached their trust.
15. He further submitted that as far as the proceedings of E.D. is concerned, the same has been challenged by the petitioner by means of Civil Misc. Writ Petition No.30014 of 2024 before Hon'ble the Panjab and Haryana High Court. Apart from it, one of the sister concerned of the petitioner namely M/s ZIPL has also filed writ petition before the Hon'ble High Court of Delhi seeking quashing of the entire seizure proceedings carried out by respondent no.3 on 07.10.2024, which is still pending consideration. He asserted that the petitioners are running ponzi scheme. The entire business model, as suggested and professed by the accused persons, is based on principle of fraud and cheating. The Company has no substantial earning as reflected from the balancesheet but on a contrary the accused persons are taking huge investments from the gullible investors promising them high return.

16. He lastly submitted that the petitioner and other entities are continuing the said business knowing fully well that this is not a sustainable business, as the money paid to the earlier investor is from the money received from the new customers. The entire business is, therefore, a big bubble. The day it would burst, thousands of people/investors will lose all their investments. He further submitted that the genesis of the business model and transactions are with a pre-planned intention to defraud with dishonest intention, which is present right from the very beginning. He further submitted that the judgement passed by the Supreme Court in the Delhi Race Club (supra) would not be attracted in the present case, as there is credible evidence of manipulating act of fraudulent misappropriation and in such case, breach of trust would be applicable being a penal offence. The entire business of the accused comes under the ambit of fraud under Section 316(2), 318(4), 61(2) BNS. It is a befitting case where the investigation should be carried out so that the hard earned money of investors may not be manipulated.

### Discussion

17. Heard rival submissions and perused the record.

18. In order to appreciate the rival contentions of the parties, it would be necessary to revisit the relevant laws.

19. Law relating to quashing of FIRs has already been well-settled, as reiterated by Hon'ble Supreme Court in *State of Haryana and Ors. vs. Bhajan Lal and Ors.*<sup>8</sup>, in which it is held that:

“102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

xxxxxxxxx (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

20. It is to be noted that while considering these aspects, the Court does not have to go in detail by way of minute examination about the correctness or otherwise of the facts alleged and the Court has to examine the same by

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8. 1992 Supp. (1) SCC 335

taking a *prima facie* view of the matter based on the materials on record. If on consideration of the factual matrix of the allegations, no prima facie case is made out of commission of any offence of which cognizance can be taken, the Court would be within its power to intervene and quash any such complaint or FIR.

21. Similar view is also taken by the Hon'ble Supreme Court in ***R.P. Kapur v. State of Punjab***<sup>9</sup>, wherein, Hon'ble Supreme Court has cautioned the High Courts in interfering with the criminal proceeding at the stage of investigation but at the same time also given leverage to the extent that for preventing abuse of process of any Court or otherwise to secure the ends of justice, the Court can quash the criminal proceedings. The Hon'ble Supreme Court in the judgement in ***Neeharika Infrastructure Private Limited v. State of Maharashtra & Ors.***<sup>10</sup> had also carved out certain exceptions. For ready reference, the same are reproduced as under:-

“(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category.

(ii) Where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained.” (emphasis supplied)

22. The main plank of argument raised by learned Senior Counsel appearing on behalf of petitioner is that petitioner and its associate entities has not committed any fraud as no individual/investor made a complaint and the entire search and lodging of FIR is based on mere assumption.

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9. AIR 1960 SC 866

10. (2021) 19 SCC 401



23. For ready reference Section 316 and 318 of the BNS 2023 is reproduced as under:

**316. Criminal breach of trust**

(1) 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".

**Explanation 1**

A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

**Explanation 2**

A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

(2) Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

(3) Whoever, being entrusted with property as a carrier, wharfinger or warehousekeeper, commits criminal breach of trust in respect of such 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.

(4) 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.

(5) 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.

**318. Cheating**

(1) 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.

(2) Whoever cheats shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

(3) Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

(4) Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

24. Even as per the FIR, the business of the petitioner and its associate entities is non functional. There is rotation of money and the business model appears ambiguous and unsustainable. The Investigating Agency has come out with a case that petitioner is running a ponzi business, which would burst like a bubble and the investment made by the gullible investors, who at the present time is not coming up as complainant as they are receiving regular income, would be lost. The investors lured to extraordinary returns is typically attributed to something that sounds impressive but is intentionally vague, such as hedge fund in land, resorts, tours and travel plans, high yield investment programs. The allegations levelled in the FIR cannot be denied at this stage. Even petitioner has not placed any document to demonstrate that they are running a sustainable business and have earned substantial income from the customers.

25. The law laid down in the case of Lalita Kumari (supra) and Delhi Race Club (supra) would also not benefit the petitioner inasmuch as this Court is of the *prima facie* opinion that there appears commission of cognizable offence. Detailed search and seizure has been conducted by the E.D. and the same has resulted in lodging of FIR and the police authorities are not bound to conduct the preliminary inquiry, when *prima facie* there appears commission of cognizable offence. There are allegations of alluring the investors for investing huge chunk of money to get monthly regular income, which cannot be negated at this stage, more so, when the business model is unsustainable.

The Court must be cautious while dealing with the economic offences, which would affect the public at large.

26. In view of the above deliberation made on the basis of material placed on record, we are of the considered opinion that the allegation made in the FIR in question against the accused company and its associates are required to be thoroughly investigated.

**Conclusion**

27. In view of the discussion as well as the catena of judgements cited above, no case has been made out for interference with the impugned first information report.

28. The writ petition stands *dismissed*. No order as to costs.

**Order Date :- 08.01.2025**

**A. Pandey**