
(2012) 03 AP CK 0074

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 11025 of 2009

BMW India Private Limited (A1), Building No. 8, Tower B, 7th Floor, DLF Cyber City, Phase 2, Gurgaon - 122001 (Haryana) and four Others APPELLANT

Vs

The State of A.P. and another RESPONDENT

Date of Decision : 22-03-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 155(2), 156(1), 156(3), 161
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14
Penal Code, 1860 (IPC) — Section 120, 120B, 138, 141, 149

Citation : (2012) 2 ALD(Cri) 73 : (2012) 2 ALD(Cri) 211 : (2013) 2 ALT(Cri) 134

Hon'ble Judges : K.C. Bhanu, J

Bench : Single Bench

Advocate : B. Mayur Reddy, for the Appellant; Public Prosecutor Counsel for Respondent1 and Sri A. Ramesh assisted by Sri C. Raghu Counsel for Respondent 2, for the Respondent

Final Decision : Allowed

Judgement

K.C. Bhanu, J.—This Criminal Petition is filed u/s 482 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") seeking to quash the proceedings in crime no.336 of 2009 of C.C.S., D.D., Hyderabad. Basing on the report lodged by the second respondent/defacto complainant against the petitioners, who are A.1 to A.5, and against A.6, police registered the aforesaid crime for the offences punishable under Sections 418 and 420 of the Indian Penal Code, 1860 (for short, "IPC"). The allegations in the report, in brief, may be stated as follows:

A.2 is the Managing Director, A.3 to A.5 are Directors, and A.6 is the authorized dealer, of A.1 company. On 25.09.2009, he purchased a BMW 7 series car bearing engine No. 2007095 and Chassis No. WBAKM42010C232054 from A.6. On 29.09.2009, when he was driving the car on his way from Khammam, suddenly, wheels of the car turned at an angle and the steering wheel instead of

being level, turned to another angle and a loud noise was heard. With great difficulty, he managed to bring the car to Hyderabad upon advice of the workshop staff of A.6 and sent the car to workshop on the same day. The workshop staff informed that the problem was occurred due to negligence of the driver and there is no such fault with the car and that due to warranty, the repairing work was undertaken by them. He was very upset that a car near about a Crore, has a major problem and that too in a short span of delivery. On 11.10.2009, he was constrained to take delivery of the car due to persistent requests of accused.

On 13.11.2009, again, the car had similar problem and he escaped unhurt due to message came up on the display screen and this was checked by nearest BMW service, and A.6 sent a representative to bring the car to workshop. On suspicion, he enquired with friends and relatives across the country and shocked to learn that problems were common to many others with Dynamic Drive Package and also revealed that A.6 had at the time of first repair, fit into the car as Custom Parts, and it is learnt that these cars were having similar problems and the same was known to the accused well before the date of purchase by him. The defect of the car was well known to the accused and this was proved by fitting of the Special party amongst the others, but with full knowledge and with a view to cheat, the complainant was lured and induced by the accused to purchase the said faulty vehicle and caused wrongful loss, which the accused company was bound to project after having received more than a crore of rupees. Hence, the report.

2. Learned counsel for the petitioners contended that neither in the original complaint nor in the additional complaint, it is stated as to how and in what manner the Directors of the first petitioner company cheated and induced the de facto complainant to buy BMW 7 series car and the alleged defect stated in the First Information Report is, at best, a consumer defect for which the proper forum is Consumer Forum, but not a Criminal Court; that the erstwhile dealer of BMW viz. Delta Motors, had set up the de facto complainant in connivance with police with the sole objective of ruining reputation and good will of the first petitioner company; that the petitioners had already made an offer to the second respondent that they are ready to give second respondent a brand new BMW 7 series car with dynamic drive package, and the refusal thereof by the second respondent clearly shows a nexus between the second respondent and the erstwhile dealer, who propped up the second respondent to wreck vengeance on petitioner company for having discontinued his dealership; that the allegations with regard to the alleged defect in the car are so absurd and inherently improbable, on the basis of which no prudent person can ever reach a just conclusion that there is a sufficient ground to proceed against the petitioners. He finally argued to adjourn the case for a period of eight weeks on the ground that a reference is pending before the Hon'ble Supreme Court of India as to whether u/s 154 Cr.P.C., a police officer is bound to register a First Information Report when a cognizable offence is made out or he has some latitude of conducting a

preliminary enquiry before registering the First Information Report.

3. On the other hand, learned counsel for the second respondent contended that the complainant was lured and induced by the accused to purchase faulty vehicle having full knowledge about the defect, with a view to cheat the complainant and cause wrongful loss to him; that the accused cannot take a defence shelter in the warranty clause since it is applicable only if the accused had no prior knowledge of the defect of the car; that as investigation in the crime is at early stage, it is not permissible to interfere with the same; that if the allegations in the complaint are taken at their face value and accepted in their entirety, do not constitute the offence alleged, then only interference is called for; that the allegations in the complaint would clearly made out a prima facie case of the offences alleged, and so there are no grounds to quash the complaint at threshold, and hence, he prayed to dismiss the Criminal Petition.

4. The learned Additional Public Prosecutor contended that inherent powers have to be exercised with extreme circumspection in the rarest of rare cases; that the allegations in the complaint would go to show that whole batch of cars was defective and the accused company had full prior knowledge of the defect prior to the sale; that once there is prima facie truth in the allegations in the complaint relating to a cognizable offence, the complaint cannot be quashed, and hence, he prayed to dismiss the Criminal Petition.

5. Section 482 Cr.P.C. envisages three circumstances under which inherent jurisdiction can be exercised viz. (1) to give effect to an order under the code; (2) to prevent abuse of process of court; and (3) to otherwise secure ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. The petition is filed to quash a First Information Report. In order to quash a First Information Report under this Section, the High Court has to see whether prima facie case in question against the accused person is made out or not. If that is not made out, the court can quash the First Information Report. When the contents in the First Information Report did not disclose the essential ingredients of the offences alleged, quashing of the First Information Report is just and proper. At this stage, it is not proper for the High Court to analyze the complainant's case in the light of probabilities of the case.

6. When the allegations in the First Information Report made out a prima facie cognizable offence, it is the statutory duty of police to conduct investigation. The power u/s 482 Cr.P.C. should not be exercised to interdict a legitimate prosecution and it has to be exercised very sparingly to render real and substantial justice to the parties. It is to be exercised in the initial stage sparingly with circumspection in rare cases to prevent abuse of process of Court or to otherwise secure ends of justice. At this stage, uncontroverted allegations cannot be tested or weighed. But, it has to be seen whether the allegations in the First Information Report made out a prima facie case or not. A prima facie case is presented that will prevail on the fact of it pertaining to a fact that is presumed

to be true until disproved by some evidence to contradict.

7. The words "abuse of process of court" have not been defined under the Code. The words would mean an improper use of legal process with a view to obtain unfair advantage or undeserving benefit. It should be considered having due regard to the provisions of the Code and keeping in mind the underlying object for which the provision has been enacted with a view to preventing courts from being rendered impotent by any omission in the Code. Though the phrase "ends of justice" has not been defined anywhere, it may be stated that the connotation may mean full and complete justice between the parties. In other words, the ends of justice will be achieved when a matter is decided on the basis of a material available on record. What would mean "ends of justice" would always depend upon the facts and circumstances of each case and the requirements of justice.

8. When the allegations in the First Information Report prima facie indicate some omissions on the part of the accused, which require further investigation, then, ordinarily, the High Court in exercise of its inherent powers, would not interfere with such investigation. Inherent powers should be used sapiently and perspicuously and while exercising the jurisdiction, the High Court would not ordinarily enter upon an enquiry whether the offence in question is worthy of confidence. Inherent powers of the court are complementary to those powers and the court is free to exercise them in the ends of justice or to prevent abuse of process of court. Power under this Section is judicial power which has to be exercised judiciously and upon well established precedents.

9. For an offence u/s 420 IPC, it has to be shown that not only a person has cheated someone, but also that by doing so, he has dishonestly induced a person who was cheated to deliver any property, etc. A person can be said to have done an act dishonestly if he does so with the intention of causing wrongful gain to one person or wrongful loss to another person. "Wrongful loss" is the loss by unlawful means of property to which a person losing it, is legally entitled, while "wrongful gain to a person" means a gain by unlawful means of property to which the person gaining is not legally entitled. These are the two facets of definition of "dishonestly". A reading of Section 415 IPC, which defines "cheating", it is manifest that two different classes of acts are set forth which the person deceived may be induced to do so. In the first class, he may be induced fraudulently or dishonestly to deliver any property to any person. Second class of facts set forth in the section are that doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, inducement must be fraudulent or dishonest. In the second class of acts, inducement must be intentional but not fraudulent or dishonest. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making promise. In a case of mere failure to keep up promise subsequently, such culpable intention right at the beginning i.e. when he made a promise, cannot be presumed.

10. The offence u/s 418 IPC is an aggravated form of cheating which is punishable by the Section when the person who cheats stands in some relation of trust or confidence to the person cheated either as a clerk, etc. and cheating with the knowledge that he is likely thereby to cause a wrongful loss to a person whose interest in the transaction to which cheating relates, he was found either by law or by legal contract to protect, shall be punishable.

11. Learned counsel for the petitioners relied on the following decisions so as to justify quashing of the criminal proceedings :

(a) In State of Kerala Vs. A. Pareed Pillai and Another, , it is held thus:

".. To hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise. Such a dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfil the promise."

(b) In Ramautar Choukhany Vs. Hari Ram Todi and Another, it is held thus: (para 6)

"What are the essential requisites of the offence u/s. 420 I.P.C. ? A trite question but it needs reiteration, Failure to honour a promise does not by itself amount to an offence u/s. 420 read with s. 415 I.P.C. The essential requisites of the offence are - (1) Deception of any person; (2) (a) fraudulently or dishonestly inducing that person (i) to deliver any property to any person, or, (ii) to consent that any person should retain any property, or (b) intentionally inducing that person to do or omit to do anything which that person would not do or omit to do but for the deception, and which act or omission causes damage or harm to that person in body, mind or property."

(c) In Mahadeo Prasad Vs. State of West Bengal, it is held thus:

"The High Court observed rightly that if the appellant had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But, if on the other hand, he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods then a case of cheating would be established."

12. Guilty intention is an essential ingredient of offence of cheating. In order, therefore, to show a person guilty of the offence of cheating, mens rea on the part of that person must be established. Latin maxim *actus non facit reum nisi mens sit rea* - An act does not make a criminal unless there be also criminal intention. Essential of the crime is the criminal intention with which the act has been committed. What would be criminal if the intention was present, might not be so if that intention did not exist. No one is punished for thought or intention alone unless it is followed up by some act; both act and intention are necessary to constitute an offence or crime. A crime is committed through *dole*. *Dole* which is the evil or criminal intention is an essential of a crime and where this is

wanting, there can be no crime and no punishment. Dole is presumed in a greater or lesser extent from the circumstances of each particular act. Intention, generally, is an operation of the will directing an overact. Mens rea is mental intention or state of mind of the accused at the time of the offence, sometimes called guilty mind. The essential of charge of cheating is that the complainant should have been deceived. Deception is only one element of the offence of cheating and not the only element. There could be no cheating unless by reason of deception, the person deceived is induced to part with any property or omit to do anything that he would not do or omit to do but for the deception. Explanation to Section 415 IPC reads that dishonest concealment of a fact is deception within the meaning of the Section.

13. The learned counsel for the petitioners also relied on a decision in *Guruduth Prabhu and Others Vs. M.S. Krishna Bhat and Others*, it is held thus:

"If every complaint filed u/s 200, Cr.P.C., is referred to the police u/s 156 (3) without application of mind about the disclosure of an offence, there is every likelihood of unscrupulous complainants in order to harass the alleged accused named by them in their complaints making bald allegations just to see that the alleged accused are harassed by the police who have no other go except to investigate as ordered by the Magistrate. Therefore, it is mandatory for the Magistrate to apply his mind to the allegations made in the complaint and in only cases which disclose an offence, the Magistrate gets jurisdiction to order an investigation by the police if he does not take cognizance of the offence. In the present case, the learned Magistrate without applying his mind has blindly ordered the investigation u/s 156 (3) and the said order is, therefore, without jurisdiction."

A complaint to a Magistrate revealing a cognizable offence may well prove to be correct in sending it to the police for investigation u/s 156 (3) Cr.P.C. when primarily it is the duty of police to investigate such cases. At the same time, it is imperative for the Magistrate to apply his mind to the allegations made in the complaint.

14. The learned counsel for the petitioners also relied on a decision in *Indian Oil Corporation Vs. NEPC India Ltd. and Others*, it is held thus: (para 13)

"While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which, do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged. In *G. Sagar Suri and Another Vs. State of*

U.P. and Others, , this Court observed:

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction u/s 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice" .

He also relied on a decision in *Suneet Gupta Vs. Anil Triloknath Sharma and Others*, it is held thus: (para 17)

"The record further reveals, as stated by respondent Nos. 1, 2 and 3 in the counter-affidavit, that it was contended by the accused that the matter was civil in nature and based on commercial transactions and there was a dispute between the parties and as such there was no element of mens rea. It was also submitted by the accused that the complainant, with an ulterior motive and mala fide intention, used pressure tactics and was harassing them in connivance with local police and filed a complaint on May 2, 2003. The police authorities were convinced about the nature of dispute and after seeking legal opinion from District Attorney closed the proceedings. Subsequently, however, the complainant "after making cosmetic changes in the earlier complaint" and using undue influence filed FIR No. 266 of 2003 on September 16, 2003 for commission of offences punishable under Sections 468, 406 read with 120b, IPC. According to the accused, it was motivated and the police authorities obliged the complainant by helping him."

There cannot be any controversy that when a dispute is purely civil in nature, a party cannot be permitted to resort to the criminal prosecution. If the allegations in the complaint disclose a criminal offence, police are not prevented from conducting investigation merely because on the same facts, a civil suit or consumer case can be filed. It should not be dismissed merely because civil liability also arises.

15. Learned counsel for the petitioners also placed reliance on a decision in *State of Haryana and others Vs. Ch. Bhajan Lal and others*, it is held thus: (para 102)

"In the backdrop of the interpretation of the various relevant provisions of the Code under Ch. XIV and of the principles of law enunciated by this court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under S. 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(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 S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S. 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(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."

16. On the other hand, the learned counsel for the second respondent relied on the following decisions.

(a) In *Rajesh Bajaj Vs. State NCT of Delhi and Others*, it is held thus:

"The complainant has stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that respondent after receiving the goods have sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.

The High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients u/s 415, IPC. Such an endeavour may be justified during trial, but certainly not during the stage of investigation."

(b) In *M.L. Bhatt Vs. M.K. Pandita and Others*, it is held thus:

"...that FIR made some allegations against the respondent of commission of offence u/s 420/120-B, IPC, in relation to certain allotment of land in Delhi. While the matter was under investigation, the respondent having invoked jurisdiction of the High Court under Article 226 of the Constitution in CrI. W.P. No. 969/1999, the division bench of Delhi High Court on a detailed examination of the entire materials including the statement recorded in course of investigation quashed the FIR on a conclusion that the allegations in the FIR do not constitute an offence.

...At this stage, the High Court would be entitled to only examine the allegations made in the FIR and would not be entitled to appreciate by way of shifting the materials collected in course of investigation including the statement recorded u/s 161 of the Code of Criminal Procedure.

...But by no means, the court would be justified in quashing an FIR by appreciating and sifting the materials collected during the investigation."

(c) In *Smt. Chand Dhawan Vs. Jawahar Lal and others*, it is held thus:

"This Court has in various decisions examined the scope of the power u/s 482 Cr.P.C., and has reiterated the principle that the High Court can exercise its inherent jurisdiction of quashing a criminal proceeding only when the allegations made in the complaint do not constitute an offence or that he exercise of the power is necessary either to prevent the abuse of the process of the court or otherwise to secure ends of justice. No inflexible guidelines or right formula can be set out and it depends upon the facts and circumstances of each case wherein such power should be exercised. When the allegations in the complaint prima facie constitute the offence against any or all of the respondents in the absence of materials on record to show that the continuance of the proceedings would be abuse of the process of the court or would defeat the ends of justice, the High Court would not be justified in quashing the complaint."

(d) In *Ravindra Kumar Madhanlal Goenka and Another Vs. Rugmini Ram Raghav Spinners P. Ltd.*, it is held thus:

"While entertaining a petition u/s 482 CrPC, the materials furnished by the defence cannot be looked into and the defence materials can be entertained only at the time of trial. It is well settled position of law that when there are prima facie materials available, a petition for quashing the criminal proceedings cannot be entertained. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Preemption of such investigation would be justified only in very extreme cases."

(e) In *M. Krishnan Vs. Vijay Singh and Another*, it is held thus:

"Right from the case of *R.P. Kapur Vs. The State of Punjab*, , this Court has held that revisional or inherent powers for quashing the proceedings at the initial

stage can be exercised only where the allegations made in the complaint or the first information report, even if taken at their face value and accepted in their entirety, do not prima facie disclose the commission of an offence or where the uncontroverted allegations made in the FIR or complaint and the evidence relied in support of the same do not disclose the commission of any offence against the accused, or the allegations are so absurd and inherently improper that on the basis of which no prudent person could have reached a just conclusion that there were sufficient grounds in proceeding against the accused or where there is an express legal bar engrafted in any provisions of the Code or any other statute to the institution and continuance of the criminal proceedings or where a criminal proceeding is manifestly actuated with mala fide and has been initiated maliciously with the ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge."

(f) In *T. Vengama Naidu Vs. T. Dora Swamy Naidu and Others*, it is held thus:

"It is settled law that an FIR and the consequent investigation cannot be quashed unless there is no offence spelt out from the same. The law in this respect is settled that the said FIR has to be taken on its face value and then it is to be examined as to whether it spells out the offences complained of. There was no question of considering the merits of the allegations contained in the FIR at that stage or testing the veracity of allegations. In this case, admittedly, the investigation was in progress. The police had also not reported back to the Magistrate the result of their investigation. Under such circumstances, the FIR could have been quashed only and only if there appeared to be no offence spelt out therein.

...It was not for the learned Judge at the stage of investigation to examine the nature of the transaction and further to examine as to whether any offence was actually committed by the accused persons or not. At that stage the only inquiry which could have been made was as to whether the complaint or the FIR did contain allegations of any offence. Whether those offences were made out, even prima facie, could not have been examined at that stage as the investigation was pending then. We, therefore, do not agree with the learned Single Judge that the FIR was liable to be quashed."

From the above decisions, it is clear that in order to quash a First Information Report under the provisions of Section 482 Cr.P.C., High Court has to see whether prima facie case in question against the accused person is made out or not. It is not necessary for the High Court to sift or weigh the complainant's case. Similarly, the documents filed by the accused need not be looked into unless those documents are not disputed by the complainant.

(g) In *Emperor v. Khwaja Nazir Ahmad* AIR 1945 18 it is held thus:

"...Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that

the judiciary should not interfere with the police in matters which are within their province and into which the law imposed upon them the duty of enquiry. In India, as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, at their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court."

(h) In *M.C. Abraham and Another, A.K. Dhote and J.F. Salve and Another Vs. State of Maharashtra and Others*, it is held thus: (para 18)

"In the instant case, the investigation is in progress. It is not necessary for us to comment on the tentative view of the investigating agency. It is the statutory duty of the investigating agency to fully investigate the matter and then submit a report to the Magistrate concerned. The Magistrate will thereafter proceed to pass appropriate order in accordance with law. It was not appropriate for the High Court in these circumstances to issue a direction that the case should not only be investigated, but a charge sheet must be submitted. In our view, the High Court exceeded its jurisdiction in making this direction which deserves to be set aside. While it is open to the High Court, in appropriate cases, to give directions for prompt investigation, etc., the High Court cannot direct the investigating agency to submit a report that is in accord with its views as that would amount to unwarranted interference with the investigation of the case by the inhibiting the exercise of statutory power by the investigating agency."

(i) In *Adri Dharan Das Vs. State of West Bengal*, it is held thus:

"The role of investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence."

Investigation means search for material and facts in order to find out whether or not an offence has been committed. It is confined to proceedings taken by the police. In other words, it is to ascertainment of facts, sifting of materials and search for relevant data. Police, in order to proceed further, it must be shown that a cognizable offence is made out from the allegations in the complaint. When the First Information Report did not disclose the necessary ingredients of cheating, the question of exercising statutory duty by police may not arise.

Bearing the above principles in mind, it has to be seen whether the uncontroverted allegations in the First Information Report made out a prima facie case for the offence alleged against the petitioners.

17. The second respondent/ de facto complainant lodged a complaint to police alleging that A.2 is the Managing Director, A.3 to A.5 are Directors and A.6 is the authorized dealer, of A.1 company; that on 25.09.2009, he purchased a BMW 7 series car bearing engine No. 2007095 and Chassis No. WBAKM42010C232054

from its dealer-A.6 in Hyderabad; that on 29.09.2009, when he was driving the car on his way from Khammam, suddenly, wheels of the car turned at an angle and the steering wheel instead of being level, turned to another angle and a loud noise was heard; that with great difficulty, he managed to bring the car to Hyderabad upon advice of the workshop staff of A.6 and sent the car to workshop on the same day; that the workshop staff informed that the problem was occurred due to negligence of the driver and there is no such fault with the car and that due to warranty, the repairing work was undertaken by them; that he was very upset that a car near about a Crore, has a major problem and that too in a short span of delivery; that on 11.10.2009, he was constrained to take delivery of the car due to persistent requests of accused; that on 13.11.2009, again, the car had similar problem wherein luck favoured him and he escaped unhurt due to message came up on the display screen and this was checked by nearest BMW service, and A.6 sent a representative to bring the car to workshop; that on suspicion, he enquired with friends and relatives across the country and shocked to learn that problems were common to many others with Dynamic Drive Package and also revealed that A.6 had at the time of first repair, fit into the car as Custom Parts, and it is learnt that these cars were having similar problems and the same was known to the accused well before the date of purchase by him; that the defect of the car was well known to the accused and this was proved by fitting of the Special party amongst the others, but with full knowledge and with a view to cheat, the complainant was lured and induced by the accused to purchase the said faulty vehicle and caused wrongful loss, which the accused company was bound to project after having received more than a crore of rupees.

18. A.2 is the Managing Director, A.3 to A.5 are Directors, of A1 company. The complaint does not show as to how and in what manner the Directors of A.1 company made dishonest or fraudulent misrepresentation to the second respondent and induced the second respondent thereby to purchase the car. A.2, who is said to be the Managing Director of A.1 company, resides in New Delhi. A.3, who is one of the Directors of A.1 company, resides in Chennai; A.4, another Director, resides in New Delhi, and A.5, another Director, resides in Australia. It is not the case of the de facto complainant that he met any one of the Directors before purchasing the car or that they induced the complainant to purchase the car knowing fully well that there was some defect in the vehicle. Merely because, after use of the car for some time, some defect was found in the vehicle, it cannot be presumed as an act of cheating. At best, it is a consumer defect, for which the proper forum is Consumer Court. Even according to the learned Additional Public Prosecutor, the defect was found in 2 cars in 7 series. Therefore, it is, at best, a commercial or civil dispute relating to a possible defect on the sale of goods. Under no stretch of imagination, it can be converted into a criminal prosecution when the underlying requirement in criminal proceedings mens rea which has to be entertained from the very inception, is not present. Further, the alleged defect is within the warranty period of the car for which the

new part with regard to dynamic drive suspension has already been fitted.

19. It is not brought to the notice of this Court that all the BMW 7 series cars sold through out India are having defect with regard to dynamic drive package or that similar complaints have been lodged before the concerned police stations in any part of India. Simply stating in the complaint that the accused were having knowledge about the defect in the car with regard to dynamic drive package, it is not sufficient to hold them guilty of the offence of cheating because none of the Directors induced the complainant to purchase the car. No other material is filed to show that BMW 7 series cars have a defect with regard to dynamic drive package.

20. The second respondent, on his own volition, might have purchased the car. Having invested about a crore of rupees for purchasing the car, he must have taken technical assistance from qualified persons. As a prudent man, he ought to have exercised proper care and caution in choosing to purchase a particular brand of vehicle. As the second respondent, on his own volition, purchased the car, it cannot be inferred that there was fraudulent or dishonest intention on the part of the petitioners. Further, there is no allegation in the complaint that the intention to cheat the second respondent was entertained by the petitioners at the time of starting of manufacturing of BMW 7 series cars. There is no misrepresentation or deception made by the accused to the de facto complainant to purchase the car. So, necessary ingredients to constitute the offences under Sections 418 and 420 IPC are absent.

21. Learned counsel for the petitioners made an unconditional offer across the bar to the second respondent that the first petitioner company is ready to give him a brand new BMW 7 series car with dynamic drive package. The offer may entail substantial loss to the first petitioner company since the car purchased by the second respondent is of the make of 2009 and there will be depreciation with regard to value of the car of said make. Without assigning any reasons, the second respondent refused to receive new BMW 7 series car with dynamic drive package. Therefore, in the facts and circumstances of the case, it is a fit case where the second respondent ought to have accepted the new car as offered by the petitioner company so that the litigation can be put to an end.

22. After the case is registered, the second respondent sent additional complaint stating that inflated sales of cars given by the accused company induced him to buy BMW 7 series car. In the complaint, the second respondent makes elaborate differentiation between retail and wholesale. According to the petitioners, they sold cars directly to certain end users without involvement of the dealers, and therefore, the sale figures set out by the company are bound to be at variance to the sales figures as set out by the dealers. Sale figures set out by the company and the figures set figures by its dealers would certainly be at variance because the dealers would not know about the sales of cars directly by the manufacturers to certain end users. Therefore, the said contention cannot be accepted and it is wholly untenable.

23. One of the contentions raised by the learned counsel for the petitioners is that a reference is pending before the Hon''ble Supreme Court of India as to whether u/s 154 Cr.P.C., a police officer is bound to register a First Information Report when a cognizable offence is made out or he has some latitude of conducting a preliminary enquiry before registering the First Information Report, and therefore he prays to delay judgment in this Criminal Petition for about eight weeks. The question of reference before the Hon''ble Supreme Court is as to the point whether the police office is bound to make a preliminary enquiry before registering a First Information Report. In this case, case is registered long back and investigation is started in pursuance of the First Information Report. In these circumstances, the question of postponing the judgment is not proper and unwarranted, and the said contention cannot be countenanced.

24. It is one of the contentions of the learned counsel for the petitioner that caveat emptor -let the buyer beware, principle would apply in the facts of the case. Where a purchaser has himself seen and examined the subject of his purchase, he will not be entitled afterwards to repudiate the transaction on the ground of patent fault, unless he can prove fraud on the part of the seller; the purchaser, being bound to satisfy himself, in the ordinary case, of the quality of the subject bought. If the defect be latent, and such as he could not have discovered by examination, the rule does not apply. This principle would apply in civil proceedings, but not to criminal proceedings as there is a marked difference between civil action and criminal action. Apart from the other ingredients of an offence, mens rea must be present in criminal prosecution. So, the principle caveat emptor would apply to the criminal prosecution, cannot be accepted and it is wholly devoid of merit.

25. The learned counsel for the petitioners contended that the Directors of the company cannot be held to be vicariously liable for the alleged defects in the BMW 7 series car and it alien to Indian Criminal Law. In Black''s Law Dictionary, the term "vicarious liability" is defined thus:

"The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for the acts of another, for example, the liability of an employee for the acts of an employee, or, a principal for the torts and contracts of an agent."

On this aspect, the learned counsel for petitioner placed reliance on a decision in Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, wherein it is held thus: (para 14)

"Apart from the Company and the appellant, as noticed hereinbefore, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the Directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what

manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in paragraph 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act. Our attention, however, has been drawn to the averments made in paragraphs 7 and 10 of the complaint petition, but on a perusal thereof, it would appear that therein merely allegations have been made that the cheques in question were presented before the bank and they have been dishonoured. Allegations to satisfy the requirements of Section 138 of the Act might have been made in the complaint petition but the same principally relate to the purported offence made by the Company. With a view to make a Director of a Company vicariously liable for the acts of the Company, it was obligatory on the part of the complainant to make specific allegations as are required in law.

He also placed strong reliance on a decision in S.K. Alagh Vs. State of U.P. and Others, it is held thus: (para 20)

"WE may, in this regard, notice that the provisions of the Essential commodities Act, Negotiable Instruments Act, Employees' Provident Fund (Miscellaneous Provision) Act, 1952 etc. have created such vicarious liability. It is interesting to note that Section 14a of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the explanations appended to Section 405 of the Indian Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling u/s 406 of the Indian Penal code vicarious liability has been held to be not extendable to the Directors or officers of the company. see Maksud Saiyed Vs. State of Gujarat and Others, "

26. On this aspect, it is pertinent to refer to a decision in Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, wherein it is held thus: (para 39)

"The contours within which the High Court would exercise its jurisdiction to quash the criminal proceeding has been dilated upon, and well defined by this Court in a catena of judgments. We may make a reference here only to a few representative cases. In the case of Smt Nagawwa Vs. Veeranna Supra considering the limits within which the Magistrate is required to conduct an inquiry u/s 202 of the Cr.P.C, this Court observed that the scope of such inquiry is (Para 4) "extremely limited -limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint-(i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the case may have. In fact it is well settled that

in proceedings u/s 202, the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not".

It is clear that in case of vicarious liability, it must be shown prima facie that in case of prosecution of company, the Directors of the company must come under the purview of Sections 34 IPC and 149 IPC. In the complaint and additional complaint, it is not known how the case of petitioners falls u/s 34 IPC or Section 149 IPC, which deal with vicarious liability. In view of the foregoing discussion, continuation of the impugned proceedings against the petitioners is nothing but abuse of process of Court and the same are liable to be quashed. In the result, the Criminal Petition is allowed and the proceedings in crime no.336 of 2009 of C.C.S., D.D., Hyderabad are hereby quashed. However, to secure ends of justice, it is directed that the petitioners shall deliver a brand new BMW 7 series car to the second respondent in place of the defective one.