(2012) 03 AP CK 0121

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 9724 of 2010

BMW India Private Limited and Others APPELLANT

Vs

State of A.P. 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), 170
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A
Penal Code, 1860 (IPC) — Section 120A, 120b, 149, 34, 405

Citation : (2013) 2 ALT(Cri) 159

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

Bench : Single Bench

Advocate : B. Mayur Reddy, for the Appellant; Diljit Singh Ahuwalia Assisted by Ms. Shrireen Sethna Baria, Advocate, for the Respondent

Final Decision : Dismissed

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. 94 of 2010 of Trimulgherry police station, Hyderabad. The second respondent/defacto complainant lodged a complaint against the petitioners/A. 1 to A. 5 stating as follows.

A. 1 company appointed the second respondent as its dealer in the state of Andhra Pradesh. A letter of intent was executed initially on 27.11.2005, Thereafter, dealership agreements were executed on 13.06.2007, 05.02.2008 and 05.01.2009. In addition to the above, Deferred Payment Agreement (DPA) was executed between the company, signed by A. 2 and A. 3, and the defacto complainant. Under the DPA, a credit line is given to a dealer by the Financial Services Division of A. 1 company against which the dealer may then purchase vehicles from the Sales Division of A. 1 company. The Dealer is liable for usage against the limit and therefore once set, this limit is the property of the dealer. The dealer pays back Financial Services and the limit is replenished for fresh issue. Periodic interest payments are to be made against the amounts utilized. In terms of the said agreement, A. 1 agreed for deferred payments for delivery of BMW group products to the defacto complainant under the terms mentioned therein up to the amount of the credit line. The credit line was determined by BMW based on the estimated sales of products of the company and depending upon the risk classification of the complainant''s business. It is incumbent for the accused to obtain confirmation, acceptance and acknowledgement of their offer for increasing the credit line. As per the DPA, a dealer is supposed to pay back on the date of sale or after the expiry of the gain credit period, and non-payment by the due date, would lead to levy of penal interest and cancellation of credit facilities.

A. 1 increased the credit line of the complainant based on the stupendous performance and keeping in view the targets achieved by the complainant, firstly on 14.06.2007, for which the complainant signed its acceptance on 19.06.2007. On 18.12.2008, again the credit rating of the complainant was reviewed and enhanced vide letter dated 18.12.2008 and the same was accepted/ acknowledged by the complainant vide letter dated 29.12.2008.

In the end of year 2008, the complainant noticed that many cars were being invoiced to the complainant against the allocated credit limit/credit line which were not indented by it and therefore the said action of dumping cars and mis utilising and misappropriating the credit limit was illegal. When the complainant raised this issue with the accused, it was told to contact sales unit, and all the requests and reminders by the complainant were intentionally ignored and illegal dumping of cars continued with the active connivance of Financial Services Division of A. 1 company, and the Financial Services Division conspired with the Sales unit so that both could earn wrongful gains at the expense of the complainant. The accused was made to pay illegal interest on the dumped cars amounting to more than Rs. 46,00,000/-. The complainant needed to borrow externally to pay the amounts on time as the inventory was piling up causing the complainant additional loss. The complainant was put to tremendous pressure and inestimatable loss was caused to it. There came a point that the complainant was not able to move its inventory and therefore the credit limit was exhausted. The accused, unilaterally, without any request from the side of the complainant, increased the credit limit so as to continue further dumping of cars. The complainant sent letters requiring the complainant to acknowledge and consent to the enhancement of the credit limit, for which the complainant refused to do so. The complainant was harassed to make payments and when it could not do so, illegal penal interest was charged and recovered from his account.

Without the acceptance of the complainant, the accused enhanced the credit limit and illegally allowing usurping of the credit limit for dumping unrequisitioned cars which caused illegal gain to accused and wrongful loss to the complainant. The complainant signed DPA due to inducement of the facility of interest free credit, and had it known the result at the time of agreement, it would never have entered into such an agreement. All the accused have jointly and severally colluded and criminally conspired to cause wrongful loss to the complainant and to gain wrongfully to themselves at the expenses of the complainant. The Financial Services unit of the accused person willfully allowed its sales unit to dishonestly misappropriate the credit limit account of the accused and used the same to get wrongful gains and acted in criminal concert. The Financial Services unit of the accused was entrusted and had dominion over the credit limit amount of the complainant which they allowed to be misappropriated and thereby committed criminal breach of trust. Further, without the dealer accepting and agreeing to the terms, credit limit was enhanced illegally. Therefore, it is apprehended that the accused may have also forged the signature of the complainant since the document would have had to stand up to scrutiny and audit of BMW Germany. Hence, the complaint.

2. The first respondent-police filed counter affidavit stating as follows:

The present case was registered in pursuance of a private complaint lodged by the second respondent. After registration of the crime, notices were sent to the accused company seeking information and the company responded vide letter dated 15.12.2010. With regard to the stand of the accused, ''mutually accepted practice'', the accused submitted only ''retail target charts''. In industry parlance, ''retail'' is sale to a customer by a ''dealer'' whereas purchase by the dealer from the manufacturer is ''wholesale''. The evidence gathered indicates no other mutual understanding in regard to retail targets. The dealership and Deferred Payment Agreements require that all cars be sent subsequent to orders by dealers, and the investigation discloses that the Purchase Order system was followed in practice for CKD cars. Besides obvious inference of the respective designations of accused, the evidence gathered indicates that the accused had responsibilities in day-to-day functioning of the accused company, and they were intimately involved in the functioning of their various departments.

The credit limits were enhanced from time to time and in a manner contrary to their normal practice, the accused company did not even seek additional collateral. The evidence gathered indicates prima facie that the credit limit of the complainant company was misused in violation of the agreement between the parties, and that the complainant was protesting the actions of the accused company. The accused attempted to misuse the investigation. The counter affidavit stated the correspondence between the investigating agency and the accused during the course of investigation. The letter addressed by the accused state that for CKD card, the company does not maintain records of purchase orders. Since purchase order is an important document and a legal requirement, the claim of ''non-maintenance'' of such vital record leads to suspicion that potentially incriminating evidence is being tampered with and may be disposed off. The preliminary investigation of the case revealed that there is a prima facie evidence against the accused persons. Hence, it is prayed to dismiss the Criminal Petition.

3. Learned counsel for the petitioners contended that in pursuance of the representation by the defacto complainant, the petitioner company entered into a Deferred Payment Agreement (DPA), and clauses of the said agreement provide credit line for deferred payment, interest payments, and that the amount of credit line is to be determined by the company basing on the planned sales and target plans of BMW group targets by the dealer; that, as per the agreement, credit line has to be determined by the company on the basis of the signed target to be given to the dealer by the manufacturers and therefore the parties are bound by the terms and conditions laid down in the agreement and it does not amount to cheating; that as per the requirements of the dealer only, cars have been sent and there is no illegal dumping of cars; that the alleged dumping of cars in violation of DPA and levying of illegal interest and the amount thereon by the petitioner is the subject matter of arbitration in Delhi by the second respondent-dealer, and therefore, there is no misappropriation of property or forgery of any document or criminal conspiracy, and so, continuation of the impugned proceedings is nothing but abuse of process of Court and hence, he prays to quash the impugned proceedings.

4. On the other hand, learned counsel for the second respondent contended that A. 1 to A. 5 conspired with each other and enhanced the credit limit of the second respondent without his concurrence and started dumping cars without any purchase orders thereby misusing the ''credit line with mens rea to cause unlawful gain for themselves and causing wrongful loss to the complainant as the complainant bore burden of interest at Rs. 46,00,000/- by virtue of dumping of the cars; that for that purpose, the petitioners forged signatures of the complainant to signify its acceptance for enhancing the credit line to pass audit of A. 1 company; that the allegations in the First Information Report prima facie made out the offences alleged and so the investigation cannot be interdicted at threshold stage, and therefore, he prays to dismiss the Criminal Petition.

5. 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 clearly make out a prima facie case for the offences alleged, and when once there is a 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.

6. Learned counsel for the petitioners relied on the following decisions with regard to the prima facie ingredients of cheating.

(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 Section 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.

7. 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 over-act. 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.

8. 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. In this case, investigation has already commenced.

9. 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 though 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 taw. 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, SCJ 34 : (2008) 11 SCC 670 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.

10. 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 u/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 u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 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 u/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.

Certain guidelines have been prescribed in the above decision, though not exhaustive, but those guidelines have to be borne in mind in exercising the powers u/s 482 Cr.P.C.

11. Learned counsel for the respondents relied on the following decisions.

(a) In a decision in Mahesh Choudhary Vs. State of Rajasthan and Another, it is held thus: (para 12)

It is also well settled that save and except very exceptional circumstances, the court would not look to any document relied upon by the accused in support of his defence. Although allegations contained in the complaint petition may disclose a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue. For the purpose of exercising its jurisdiction, the superior courts are also required to consider as to whether the allegations made in the FIR or Complaint Petition fulfill the ingredients of the offences alleged against the accused.

(b) In a decision in Kamaladevi Agarwal Vs. State of West Bengal and Others, it is held thus: (para 15)

We have already noticed that the nature and scope of civil and criminal proceedings and the standard of proof required in both matters is different and distinct. Whereas in civil proceedings the matter can be decided on the basis of probabilities, the criminal case has to be decided by adopting the standard of proof of "beyond reasonable doubt". A Constitution Bench of this Court, dealing with the similar circumstances, in M.S. Sheriff Vs. The State of Madras and Others, held that where civil and criminal cases are pending, precedence shall be given to criminal proceedings. Detailing the reasons for the conclusions, the Court held: (1954 Cri. L.J. 1019) (Paras 15 and 16):

15) As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in

the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16) Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it expedient to stay it in order to give precedence to a prosecution ordered under S. 475. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished.

(c) In a decision in S.W. Palanitkar and others Vs. State of Bihar and another, it is held thus: (para 21)

It is clear from the allegations made in the complaint and the sworn statements that the appellant No. 1 company entered into an agreement with the respondent No. 2 on certain terms and conditions. It is alleged that the appellant No. 7 went to Patna and contacted respondent No. 2 and induced him to enter into an agreement assuring him of huge profit. At the time of arriving at such an agreement, none of the other appellant either met the respondent No. 2 or induced him to enter into any agreement with a view to cheat him. The agreement was further renewed for a period of one year. It is not the case that there was no supply of goods at all as it has come on record that there was supply of 400 ton of fertilizer, may be it was far less than the required quantity. The allegations made against the appellants other than the appellant No. 7 are very vague and bald. From the material that was placed before the Magistrate, even prima facie, it cannot be said that there was conspiracy of connivance between the other appellants and the appellants No. 7. If the appellants have committed breach of agreement, it is open to respondent No. 2 to seek redressal in a competent Court or forum to recover damages, if permissible in law in case he had sustained any loss. In order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.

(d) In a decision in Lalmuni Devi Vs. State of Bihar and Others, , it is held thus:

However, it is also settled law that facts may give rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained.

From the above decisions, it is clear that simply because the acts may give rise to a civil claim, that does not mean that criminal prosecution cannot be proceeded with. In case of criminal prosecution, mens rea is essential ingredient. If the intention of the accused is to cheat the defacto complainant and induce him to entrust with the property or dominion over it and thereby dishonestly cause wrongful loss to the complainant and gain wrongfully for himself, then criminal prosecution cannot be interdicted.

12. 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.

13. 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.

14. 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.

15. 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 verily 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.

16. Section 120A IPC defines Criminal Conspiracy. Conspiracy consists not merely in the intention of two or more persons, but in the agreement of two or more persons to do an illegal act or to do an act which is not illegal by illegal means. So long as such a design rests in the intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties promise against promise, actus contra action, capable of being enforced if lawful, and punishable if for a criminal object or for the use of the criminal means. The word ''illegal'' is applicable to everything which is an offence, or which is prohibited by law or which furnishes ground for civil action.

17. Section 405 IPC defines criminal breach of trust. Necessary ingredients to constitute the offence of criminal breach of trust are (1) the accused must have been entrusted with a property or a dominion over it; (2) the accused must have misappropriated the property or disposed of that property in violation of such trust. In other words, dishonest misappropriation or conversion to his own use or dishonest use or disposal of the property in violation of any direction of law or on any legal contract is necessary ingredient of the offence of criminal breach of trust.

18. 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 loosing 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.

19. 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.

20. To constitute an offence u/s 463 IPC, the first ingredient is that the accused should have made a false document with an intent to cause damage or injury to the public or to any class of public or to any person. The expression ''intent to defraud'' implies conduct coupled with intention to deceive and thereby to injure. In other words, defraud involves two conceptions viz. deceit and injury to the person deceived i.e. infringement of some legal right possessed by him but not necessarily deprivation of property. Section 464 IPC deals with making a false document.

21. It is alleged in the complaint that two units viz. Sales Unit and Financial Services Unit in the petitioner company conspired with each other to do an illegal act by illegal means and thereby credit limit was increased contrary to the terms of the DPA and that the complainant sent protest letters to the company. He relied on a decision in Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, wherein it is held thus: (paras 38 &39)

We have considered the submissions made by the learned senior counsel. A bare perusal of the submissions would be sufficient to amply demonstrate that this cannot be said to be an ''open and shut'' case for either of the parties. There is much to be said on both sides. The entire scenario painted by both the sides is circumscribed by ''ifs'' and ''buts''. A mere reading of the 1992 PPM would not be sufficient to conclude that the entire information has been given to the prospective investors. Similarly, merely because there may have been some gaps in the information provided in the PPM would not be sufficient to conclude that the respondents have made deliberate misrepresentations. In such circumstances, we have to examine whether it was appropriate for the High Court to exercise its jurisdiction u/s 482 Cr.P.C. to quash the proceedings at the stage when the Magistrate had merely issued process against the respondents.

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 v. 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".

22. The parties are bound by the terms and conditions of the Deferred Payment Agreement and subsequent agreements, if any, entered between the parties. But, at the same time, it is alleged in the complaint that without consent of the complainant, Financial Services unit of A. 1 company increased credit limit and Sales Unit misutilised the credit limit fixed to dump cars without any purchase order for the same and thereby the complainant had to pay Rs. 46,00,000/- towards penal interest which is unlawful gain for the accused company and because of the illegal acts of A. 1 company, the second respondent sustained a corresponding unlawful loss. Prima facie, the accused were entrusted with the powers of determining credit limits of complainant and had dominion over it. It is the case of the complainant that the accused misutilised it for their own use and without prior consent or approval from the complainant, dishonestly enhanced it in violation of the procedure wherein for the enhanced credit limit, to be legal, was required to be accepted and acknowledged, and that being manner of carrying out the trust. According to the complainant, there is no such acceptance and acknowledgement by the complainant with regard to unilateral enhancement of credit limit and thereby the accused company committed breach of trust.

23. With regard to the offence of cheating, it is alleged that without consent of the complainant the accused enhanced credit limit and dumped cars. It is the case of the complainant that cars have to be sent to the second respondent as per the purchase orders signed by the complainant or his authorized agents, but not dumping of the cars based upon the targets fixed by the accused. The accused may fix targets, but, at the same time, cars have to be sent to the complainant by the accused in terms of the work orders. Thereby, the accused dishonestly and fraudulently compelled the complainant to retain the dumped cars for the purpose of making unlawful gain of Rs. 46,00,000/- on the accrual of interest on unsold cars and thereby causing unlawful loss to the complainant, which was under threat of cancellation of dealership. It is the further case of the complainant that the second respondent has not signed letter of enhancement of credit limit and as per the understanding between the parties, the credit limit whenever obtained, has to be cancelled by the dealer, and it is alleged that for that purpose, the accused forged signatures of the complainant so as to stand

scrutiny and audit of A. 1 company, thereby making a false document, and by making such a false documents, which allegedly created legal rights in favour of the accused, it is made to appear that the complainant acknowledged that it lies under the liability of enhanced credit limit.

24. The entire case of the petitioners is that filing of the First Information Report is with an intention to convert a commercial dispute into a criminal prosecution; that as per the targets fixed by the dealer himself, cars were sent and that with the consent of the dealer only, the letter of credit has been determined by the accused, and that as the complainant failed to fulfil the promise in terms of the agreement, interest has been levied, and therefore, continuation of the impugned proceedings is nothing but abuse of process of court.

25. No doubt, relationship between the accused and the complainant is governed by the contract and any disputes therein were to be resolved by Arbitration and that on going arbitration proceedings are pending between the parties. Still, it is the case of the case of the complainant that without his consent and knowledge, credit line has been enhanced which enabled the accused company to dump cars and that the complainant is unable to sell the same and that unreasonably the accused levied penal interest thereby caused wrongful loss to the complainant to a tune of Rs. 46,00,000/-. Without testing or weighing the allegations as true or false, disputed questions of fact cannot be adjudicated exercising the powers u/s 482 Cr.P.C. It is specifically alleged that as per the Deferred Payment Agreement, A. 1 is under obligation to notify the complainant the amount of credit line in writing and invoices amount has to be paid by virtue of the Deferred Payment Agreement, A. 1 increased credit line of the complainant based on his performance and dumped cars without any work orders by putting the complainant under tremendous pressure; that inspite of raising protest by the complainant, the accused intentionally ignored the same; that without any request from the complainant, the accused increased the credit line so as to continue dumping of cars; that when the accused sent letters requiring the complainant to acknowledge and consent for the enhancement of credit line, the complainant refused to do so, and so, he was harassed make payments and when he could not pay so, illegal penal interest was charged and recovered from his account.

Therefore, these allegations made out prima facie case for the offences alleged. In such circumstances, it is the statutory duty of police to conduct investigation. If the contentions of the counsel for the petitioners are to be accepted, certainly, police would file final report before the competent court u/s 170 Cr.P.C.

26. 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, 5 SCC 662 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,

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. It is a matter of investigation.

27. 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 judgment in this Criminal Petition may be postponed. 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. If the contention of the learned counsel for the petitioners is accepted, each and every case has to be stayed. But, as the things stand as on today, inherent powers u/s 482 Cr.P.C. can be exercised for the three purposes as mentioned in the said provision. If the case falls under any one of the three clauses of Section 482 Cr.P.C. then only the proceedings have to be quashed. In these circumstances, the question of postponing the judgment is not proper and unwarranted, and the said contention cannot be countenanced. As the case of the petitioners does not fall under any one of the clauses mentioned in the said Section, it is not desirable to quash the impugned proceedings. Therefore, there are absolutely no grounds to quash the impugned proceedings. The Criminal Petition is devoid of merit and is, accordingly, dismissed.

