
(2012) 08 BOM CK 0019

In the Bombay High Court

Case No : Criminal Application No's. 431, 564 of 2011

Harinarayan G. Bajaj

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 115, 227, 228, 300, 397
Evidence Act, 1872 — Section 40, 41, 42, 43, 43
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 17(2), 17(4)
Penal Code, 1860 (IPC) — Section 109, 114, 120B, 34, 344

Citation : (2013) ALLMR(Cri) 1557

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : Zal Andhyarujina with Ms. Sonal instructed by Mr. Vivek M. Sharma in Cri. application No. 431 of 2011 and Mr. I.A. Bagaria in Cri. application No. 564 of 2011, for the Appellant; Zal Andhyarujina with Ms. Sonal instructed by Shri Vivek M. Sharma for Respondent No. 1 in Cri. Application No. 564 of 2011, Shri I.A. Bagaria for Respondent Nos. 2 and 3 in Cri. Application No. 431 of 2011 and Shri Y.M. Nakhwa, Additional Public Prosecutor, for the Respondent

Judgement

R.C. Chavan, J.—These applications arise out of proceedings in Criminal Case No. 125/SW/2005 pending before the learned Metropolitan Magistrate, 40th Court, Girgaon, Mumbai, and the orders passed by the learned Additional Sessions Judge Mumbai on 16-7-2010 in Criminal Revision Application Nos. 481 of 2010 and 590 of 2010 filed by the parties. Before adverting to the challenges raised by the parties before this Court, it may be useful to briefly recount facts leading to the present proceedings. The applicant in Criminal Application No. 431 of 2011 is the original complainant and the applicants in Criminal Application No. 564 of 2011 are the original accused Nos. 1 and 2 in Criminal Case No. 125/SW/2005. For the sake of convenience, hereinafter they are referred to as the complainant and the accused. Accused No. 1 is the sole proprietor of Creative Finance Co., partner of Creative Garments Limited (accused No. 5 in the complaint) and Director of Creative Garments Limited (accused No. 4). Accused Nos. 2 and 3 are

associated with the activities of the Creative Group of Companies.

2. According to the complainant, he and his son purchased 3,07,650 shares of a company known as Sesa Goa Limited at the Bombay Stock Exchange (for short "BSE") over a period of four Settlements bearing Nos. 23, 24, 25 and 26 of 1997/98 from 25-8-1997 to 19-9-1997 through some share brokers including the company of Shri Anil Shah by name AAFSL. The BSE prescribes a schedule of trading periods and settlement periods. The payment for shares which are purchased during a settlement period has to be made by a pay-in-date and only thereafter the shares are delivered by the pay-out-date. Since the book closing for Sesa Goa Limited was on 17-9-1997, the BSE had declared the period from 26-8-1997 to 19-9-1997 as no delivery period and so the payment and delivery of shares purchased was postponed. Since the complainant and his son did not have the money to pay for the shares purchased, they borrowed a sum of Rs. 5,62,50,000/- from accused Nos. 4 and 5 in September 1997 and secured the loan by pledging 3,07,650 shares of Sesa Goa Limited, purchased by them. The complainant claimed to have also deposited with accused Nos. 4 and 5 certain other securities and shares worth Rs. 1,00,00,000/-. Accused Nos. 1 to 5 also obtained signatures of the complainant and his family members on documents like an Agreement to Sell a flat at a building known as Dar-ul-mulak, an Agreement of Leave & License in respect of the same flat, and an Agreement confirming that loan would be secured by a flat at Bharatiya Bhavan, as and by way of additional security. The payment for the shares and delivery was routed through AAFSL. On 6-1-1998, when the complainant met accused No. 1 and offered to repay the loan, the accused told him that he had not advanced loan of Rs. 5,62,00,000/-, but had in fact paid the price for purchasing those shares. He also refused to return the Agreements signed in respect of the two flats. Accused No. 1 eventually claimed to have purchased the flat at Dar-ul-Mulak. The complainant therefore filed a civil suit on 25-5-1998 against the accused persons and seven others concerned with the transaction. He also filed a complaint with the police on 20-2-1998. It transpired that AAFSL had issued purchase bills for those 3,07,650 shares in the name of accused Nos. 4 and 5. The complainant alleges that the accused persons in furtherance of their common intention and by hatching a criminal conspiracy misappropriated the 3,07,650 shares pledged with them, as also the Share Certificate in respect of the flat. The complainant therefore wanted that the accused persons be punished for offences punishable under Sections 120B, 406, 417 r/w Section 420 r/w Sections 34, 109 and 114 of the Indian Penal Code (for short, "IPC").

3. After initial hassles about issue of process, filing of two rounds of revisions, the learned trial Magistrate issued process against accused Nos. 1 to 3 for the offences punishable under Sections 403 and 406 of the IPC, and dismissed the complaint against the others. Revision by accused No. 3 was allowed and he, too, was discharged. The complainant had approached this Court too which directed that the trial be conducted in a time bound manner and to complete it by June 2007, which was extended from time to time. Ultimately the recording of pre-

charge evidence began and the learned Magistrate recorded evidence of the complainant and two other witnesses. Only after the parties had made a detour to the Sessions Court on the range of offences for which the accused could be considered to be charged and after hearing the parties, the learned Magistrate by his order dated 7-4-2010 directed charges to be framed against accused Nos. 1 and 2 (Vijay Agarwal and Pramod Banka) for the offences punishable under Sections 403 and 406 r/w Section 34 of the IPC. He framed charge accordingly on 3-5-2010.

4. The parties again approached the Sessions Court by filing Criminal Revision Application Nos. 590 of 2010 and 481 of 2010. The complainant was aggrieved by the failure of the learned Magistrate to charge the accused persons for the offences punishable under Sections 409, 415, 420, 463, 467, 468 and 471 of the IPC and the accused were aggrieved by their being charged. By order dated 16-7-2010 the Sessions Court dismissed both the revisions. Both the parties rushed to this Court by filing Criminal Application Nos. 3420 of 2010 and 3967 of 2010, assailing the order of the Sessions Court. On 23-11 -2010 this Court set aside the order passed by the Sessions Court and directed the Sessions Court to decide the applications afresh within three months. By the order dated 13-12-2010, passed in Criminal Application No. 5185 of 2010 this Court finally directed the trial Court to complete the trial in six months. By the impugned orders dated 25-4-2011 the Sessions Court dismissed the revision applications and stayed the trials till the final disposal of Suit No. 2256 of 1998. This is how both the parties are before this Court.

5. It appears that there was another Criminal Case bearing No. 19/S/2003 which had its roots in the same transaction, which too led the parties back and forth from one Court to another and had eventually landed them in this Court in Criminal Application Nos. 49 of 2012 and 123 of 2012. These applications too were heard, but it was pointed out that the Hon''ble Supreme Court by order dated 19-3-2012 passed in SLP (Cri) 6725-6727/2011 had stayed the trial of the said criminal case. Hence those applications are ordered to be listed after the proceedings in the Apex court get over.

6. By Criminal Application No. 431 of 2011 the complainant seeks to have the impugned order set aside and to have the matter remitted back to the Sessions Court to hear and dispose of the revision applications on merits or in the alternative to set aside the order of the Sessions Court and to direct the learned Magistrate to also charge the accused of the offences punishable under Sections 409, 415, 418, 420, 463, 467, 468 and 471 of the IPC.

7. The accused, on the other hand, by Criminal Application 564 of 2011 seek setting aside of the impugned order of the Sessions Court, discharge of the accused and dismissal of the complaint, as also action against the learned Magistrate for proceeding with application Exhibit-244 in spite of stay of the proceedings by the Sessions Court.

8. I have heard both the learned counsel for parties at sufficient length, and it must be said to the credit of both that they spared no effort in unfolding all aspects of the controversy, as also raising all imaginable points of law in the favour of their clients, all of which need not be dealt with while deciding the present proceedings.

9. The learned counsel for the accused at the outset submitted that a party playing fraud on the Court is not entitled to any relief and alleged that the complainant had sought orders of expeditious trial without disclosing that the revision was yet to be decided and had also led the trial Court to pass some orders when the Sessions Court had ordered stay of the proceedings. For this purpose, he relied on a Judgment in M.C.D. Vs. State of Delhi and Another, I do not see as to how the complainant could be said to have played any fraud on the Court to warrant complainant's challenges being thrown out without even being examined. This Court as also the trial Court were fully aware of the history of the proceedings and in any case no orders seem to have been passed *ex parte*. The accused was always there to correct any wrong information that may have been passed on to the Courts.

10. The learned counsel for the accused drew my attention to the limitations in the exercise of either inherent powers or writ jurisdiction by this Court. He submitted that so long as the lower Court could not be shown to have committed a jurisdictional error, that is, either exercised jurisdiction not vested in it or failed to exercise the jurisdiction it had, there would be no justification to interfere. It had to be shown that failure to interfere would result in failure of justice which, according to the learned counsel, was not the case. The learned counsel relied on the following judgments in support of his contentions.

11. In *The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway*, it has been held that:

5. In our opinion the High Court had no jurisdiction to interfere with the order of the first appellate court. It is not the conclusion of the High Court that the first appellate court had no jurisdiction to make the order that it made. The order of the first appellate court may be right or wrong; may be in accordance with law or may not be in accordance with law, but one thing is clear that it had jurisdiction to make that order. It is not the case that the first appellate court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction under S. 115 of the Civil Procedure Code.....

12. In *Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav*, it has been held that:

9. The first question which falls, for our decision in the present appeal is whether the High Court was justified in interfering with the decision of the District Court that the decree in question extinguished the respondents right to redeem the mortgage....

10. The provisions of S. 115 of the Code have been examined by judicial - decisions on several occasions. While exercising its jurisdiction under S. 115, it is not competent to the High Court to correct errors of fact, however, gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As Cls (a), (b) and (c) of S. 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to question of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with question of jurisdiction which fall within the purview of S.115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court cannot be corrected by the High Court under S.115.

13. I have also gone through the Judgment in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, on the question of exercise of jurisdiction u/s 482 of the Code of Criminal Procedure (for short, "Code").

14. There can be no doubt that the impugned order would have to be examined in the context of limitations on the power of this Court and the undesirability to correct every error. All the same, if the Sessions Court really had no justification for passing the impugned order and if the order interferes with the course of justice, it would have to be corrected. Therefore, first, I would deal with the question as to whether the learned Additional Sessions Judge was justified in ordering stay of the criminal trial till the civil suit itself was decided. The learned counsel for the accused submitted that the learned Additional Sessions Judge was within his jurisdiction in passing such an order, and since there is no rule of law prohibiting such a course it may not be open to this Court exercising jurisdiction u/s 482 of the Code to interfere in the said order. The learned counsel submitted that the question as to whether the transaction was a pledge or an outright sale could not have been decided by a Criminal Court and the Criminal Court would have to follow the Civil Court in this regard. He further submitted that the complainant was in fact not interested in having the civil matter decided, but only wanted to protract the trial and push the criminal case to put pressure on the accused. The learned counsel for the complainant, on the other hand, submitted that the complainant always wanted a quick disposal of the criminal case and so had approached this Court on many occasions. He wondered as to how in the face of orders of this Court directing the trial Magistrate to dispose of the case in a time bound manner the learned additional sessions judge could stay the trial after observing that there was in fact no such prayer in the revision

applications. The learned counsel for the accused submitted that orders passed by this Court expediting the trial did not extinguish the substantive remedies open to the parties, and expeditious disposal did not imply rushing through the matter trampling upon all procedural safeguards.

15. I have carefully considered rival submissions. There can be no doubt that directions to expeditiously dispose of the criminal case do not mean that procedural rights of the parties can be ignored. However, here was a case which this Court had repeatedly directed to be disposed of in a time bound manner. The revisions in question, which have been decided by the impugned orders themselves were remanded once. It is not that this Court was oblivious of the fact that a civil suit raising substantially the same questions was pending, when this Court directed expeditious disposal of the criminal case. In this context the order passed by the learned Additional Sessions Judge needs to be looked at as an easy escape from the requirement to deal with the questions raised. Though the order may not suffer from any, Jurisdictional error, it is passed in patent disregard of the legal position as to stay of criminal proceedings pending hearing of the civil suit.

16. The oldest Judgment on the point cited is one in *M.S. Sheriff Vs. The State of Madras and Others*, where the Court held as under:

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 inexpedient to stay it in order to give precedence to a prosecution ordered under S.476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished.

This judgment would leave no doubt about the principle that a criminal

proceeding takes precedence over a civil suit. However, the learned counsel for the accused submitted that in *Tukaram Annaba Chavan and Another Vs. Machindra Yeshwant Patil and Another*, it has been held that criminal prosecution about alleged forgery ought to be stayed till the Charity Commissioner decided the dispute about a change report sought on the basis of forged and fabricated documents which was before him. In this context the court held as under:

10. The controversy raised in the case relates to the election of the Board of Directors of the Modern Education Society, Atpadi, which is registered under the provisions of the Bombay Public Trusts Act, 1950. We were informed by the learned counsel for the parties that the matter is pending before the Assistant Charity Commissioner, Sangli, who is to determine the validity or otherwise of the change report submitted by the appellants. On perusal of the record we find that a contention that in the proceedings relating to the confirmation or otherwise of the change report a contention has been raised that the documents on the basis of which the report has been submitted have been forged and fabricated by the appellants. In all probability that question will also arise for consideration by the authority.

11. In the facts and circumstances of the case it is our considered view that in the interest of justice and for a fair trial the proceedings in the criminal case should remain suspended till the proceeding pending before the Assistant Charity Commissioner, Sangli is disposed of by him.....

I am afraid that the judgment cannot be read as an authority for the proposition that a criminal prosecution ought to be stayed till decision of a lis before a civil forum. The observations came in the wake of peculiar facts and circumstances of that case. The allegation was that a change report was submitted on the basis of forged documents. The forgery alleged was in respect of documents submitted to an authority competent to decide the dispute and so unless the authority came to the conclusion that there was forgery, proceeding with the criminal trial would have been meaningless. This is so since the authority could have also concluded that there was no forgery and could have accepted the change report.

17. The legal position is settled by the Judgment of the Supreme Court in *K.G. Premshanker Vs. Inspector of Police and Another*, The Court considered all aspects of the matter and observed as under:

3. Prosecution was launched against the present appellant which arose out of an incident which occurred because of a news item in the evening Daily "Sudinam" on 2-2-1988.....

6. The appellant raised additional contention, before the High Court, that the de facto complainant Madhavan had filed a suit for damages for the alleged acts, before the Sub-Court, Tellicherry against the appellant and other accused and the trial court has dismissed the suit against which he had preferred the appeal before the High Court. It was, therefore, contended that as the suit was

dismissed, the decision rendered by the Civil Court will prevail and therefore the criminal prosecution pending against the appellant and others is required to be dropped. The court rejected the said contention. Hence, this appeal.

8. Thereafter, on 12-10-1999, it was pointed out to this Court that the appeals filed against the dismissal of the suit are pending in the High Court of Kerala and therefore the Court directed that it would be appropriate to await the judgment in those appeals before proceeding further with the case. The Court adjourned the hearing of the matter and requested the High Court to dispose of the said appeals expeditiously.

9. At the time of hearing of these appeals, it is pointed out that the appeals are allowed and the judgment and decree in OSs Nos. 42 of 1989 and 235 of 1990 passed by the Subordinate Judge were set aside and the matters were remitted to the trial court to try the suit from the stage of framing of issues.

10. The net result of the aforesaid decree passed by the High Court is that at present both criminal prosecution for the offences as stated above and civil suits for damages are pending at trial stage.

12. Further, the learned Senior Counsel Shri Dholakia appearing for the appellant submitted that apart from the aforesaid judgment, this Court (three Judge Bench) in Karam Chand Ganga Prasad and Another Vs. Union of India (UOI) and Others, held thus:

.... It is a well-established principle of law that the decisions of the civil courts are binding on the criminal courts. The converse is not true.

15. Learned Additional Solicitor General Shri Altaf Ahmed appearing for the respondents submitted that the observation made by this Court in V.M. Shah case (supra) that

the finding recorded by the criminal Court, stands superseded by the finding recorded by the civil court and thereby the finding of the civil court gets precedence over the finding recorded by the criminal court

is against the law laid down by this Court in various decisions.....

16. In our view, the submission of learned Addl. Solicitor General requires to be accepted.....

24. Further, in M.S. Sheriff Vs. The State of Madras and Others, the Constitution Bench of this Court dealt with an exactly similar situation, where two sets of proceedings arising out of the same facts were pending, namely, two civil suits for damages for wrongful confinement and another two criminal prosecutions u/s 344, Indian Penal Code for wrongful confinement. In that context, it was contended that simultaneous prosecution of these matters will embarrass the accused and the Court considered the question whether criminal prosecution should be stayed. In that context, it was held thus:

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.

30. What emerges from the aforesaid discussion is (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of *res judicata* may apply; (3) in a criminal case, Section 300, Criminal Procedure Code makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of the Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.

18. This was reiterated by the Supreme Court, though in a different context of prayer for quashing a criminal proceeding, in *Kishan Singh (D) through LRs. Vs. Gurpal Singh and Others*, I in the following words:

2. The only question for our consideration involved in this appeal is as to whether criminal proceedings can be quashed by the High Court relying upon a finding of Civil Court on an issue involved in criminal proceedings in respect of the same subject matter.

17. In *Syed Askari Hadi Ali Augustine Imam and Another Vs. State (Delhi Admn.) and Another*, this Court considered all the earlier Judgments on the issue and held that while deciding the case in *Karam Chand (supra)*, this Court failed to take note of the Constitution Bench Judgment in *M.S. Sherrif (supra)* and, therefore, it remains *per incuriam* and does not lay down the correct law. A similar view has been reiterated by this Court in *Sh. Vishnu Dutt Sharma Vs. Smt. Daya Sagra*, wherein it has been held by this Court that the decision in *Karamchand (supra)* stood overruled in *K.G Premshankar (supra)*.

18. Thus, in view of the above, the law on the issue stands crystallized to the effect that the findings of fact recorded by the Civil Court do not have any bearing so far as the criminal case is concerned and vice-versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties

while dealing with the same subject matter and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections 41 to 43 of the Indian Evidence Act, 1872, dealing with the relevance of previous Judgments in subsequent cases may be taken into consideration.

19. As held in the above cases, some of which were also noticed by the learned Judge, there is no question of a Judgment of a Civil Court binding a Criminal Court on the question as to whether the transaction is one of sale or pledge. For the sake of argument, if the Civil Court was to decide that the transaction was one of pledge, would the accused immediately submit themselves to a conviction? The standard of proof in civil and criminal proceedings being different, the accused would insist on their complicity in the offence of misappropriation or breach of trust to be proved beyond reasonable doubt.

20. Apart from this, it is elementary that a criminal trial must receive precedence over a civil suit, not only because crime being a wrong against the society, it is in society's interest to have a criminal case decided promptly, and because civil suits have a tendency to drag on for years through a hierarchy of Courts, but also because it is always in the interest of the accused to be able to go through the ordeal of a criminal trial before he prejudices his defences at the criminal trial by statements made in the civil suit. The accused in this case strangely seem to be undesirous of a quick trial. The number of proceedings through which the parties have so far gone is a pointer to the weakness of our criminal justice system in failing to see that criminals are served with just desserts quickly, and permitting dilatory proceedings, which would make a victim chase the mirage of seeing offenders punished. The order passed by the learned additional sessions judge staying the trial of criminal case in the face of directions by this Court to complete the trial in a time bound manner is patently illegal and liable to be set aside.

21. Consequently, the challenges raised by the accused to the orders allegedly passed by the learned Magistrate after the stay of proceedings by the Sessions Court also have to be rejected. In any case, the learned Magistrate had not proceeded with the actual trial.

22. This takes me to the question as to whether the parties may once again be asked to go to the Sessions Court to have their respective revision applications decided on merits. Though the course which I propose to take may deprive the parties of one more chance to approach this Court, in the backdrop of repeated forays by the parties to this Court and the derailment in the schedule of "expedited" trial, to avoid orders of this Court expediting trial from being reduced to a meaningless babble, I have heard the learned counsel on the merits of their contentions about charge/discharge.

23. The learned Magistrate had directed issuance of process for the offences punishable under sections 403 and 406 r/w Section 34 of the IPC against three

accused persons. Of them, accused No. 3 preferred a revision and the process issued against him was set aside after hearing the complainant. The complainant does not seem to have questioned refusal by the learned Magistrate to issue process for other offences complained of against the accused persons. At least to my knowledge there is no application by the complainant after pre-charge evidence was lead to frame charges for offences punishable under Sections 415, 420, 467, 468 and 471 of the IPC, though this aspect may have been orally raised before the learned Magistrate. The learned counsel for the complainant is right in submitting that order directing issuance of process need not limit the power of the trial Court to charge such persons for such offences as may be disclosed from the evidence. To that extent the contention of the learned counsel for the accused that the trial would have to be restricted to offences for which process has been issued may not be correct. The Code enables a trial Court to alter charge at any time before a Judgment is pronounced, provided it does not cause prejudice to the accused. Therefore, there was no legal impediment for the Magistrate to consider if the evidence tendered disclosed any other offences. However merely because something is legally permissible, it would not follow that such a course may be adopted, particularly in the light of the propensity of the parties to challenge every order. Unless the learned Magistrate comes to the conclusion that the evidence tendered if unrebutted would warrant conviction of the accused, or that there was ground to presume that the accused had committed the offence, or conversely that the charge was not groundless, which are the standards fixed by the Code in relation to framing charge and discharge, the Magistrate would not be justified in travelling beyond the list of offences for which the process was issued.

24. Both the learned counsel took me through several Judgments on the question of requirements of evidence for the purpose of framing charge.

25. In *Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia and Another*, the Court observed thus:

11. Sec. 227 of the Code of Criminal Procedure having bearing on the contentions urged for the parties, provides:

227. Discharge. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

12. Sec. 228 requires the judge to frame charge if he considers that there is ground for presuming that the accused has committed the offence. The interaction of these two Ss. has already been the subject matter of consideration by this Court. In *State of Bihar v. Ramesh Singh, Untwalia, J.*, while explaining the scope of the said S. observed:

Reading the two provisions together in juxtaposition, as they have got to be, it

would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and Judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter u/s. 227 or sec. 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused.

13. In *Union of India V/s. Prafulla Kumar Samal, Fazal Ali, J.*, summarised some of the principles:

(1) That the Judge, while considering the question of framing the charges u/s. 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused had been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/sec. 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however, does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

14. These two decisions do not lay down different principles. *Prafulla Kumar* case has only reiterated what has been stated in *Ramesh Singh* case. In fact, sec. 227

itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides that, "the judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The ground in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor it is necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into.

26. It may not be necessary to quote from other Judgments on the point. Though these Judgments, in the attempt to elucidate the meaning of the words used in the Code while prescribing standards of evidence for the purpose of framing charge, use phrases like, "prima facie case" or "gave suspicion", since the words themselves are pretty clear, it is not necessary to substitute those standards by any other expression. Such expression is only an illustrative attempt at explaining the content of the words used in the relevant sections of the Code. It would, therefore, have to be found out if the evidence tendered justified the framing of charges for the offences punishable under Sections 403 and 406 of the IPC and also if it showed that the accused persons could be presumed to have committed other offences for which they have not been charged and about which the complainant has a grievance, which he has aired by preferring Criminal Application No. 431 of 2011.

27. Incidentally it may be clarified that the accused persons, not having challenged the order directing issuance of process against them, are not precluded from questioning the charges framed against them. If they succeed in showing that the charges framed against them are groundless, the proceedings against them could be quashed. The learned counsel for the accused submitted that the averments in the complaint itself do not disclose any offence and in fact the complaint is mostly a copy of the civil suit filed by the complainant. He relied on a Judgment in Ram Biraji Devi and Another Vs. Umesh Kumar Singh and Another, where the Court observed as under:

9. We have given our anxious and thoughtful consideration to the respective contentions of the learned Counsel for the parties. On examination of the contents of the complaint, we find that there is not even a whisper of allegation or averment made therein constituting an offence for which cognizance has been taken by the learned Magistrate against the appellants. On the one hand, the complainant himself has stated in the complaint that oral agreement to sell the plot took place in July 2002 and on the other hand, he has alleged that he started paying the consideration amount for the purchase of the plot between 15-7-2000 and 15-12-2002. The version of the complainant is self-contradictory and, therefore, no prima facie case is made out against the appellant involving

them in the commission of the alleged offences.

28. Bearing in mind the limitations of the Court exercising the extraordinary jurisdiction u/s 482 of the Code, I have gone through about 453 pages of oral evidence of PW-1 Harinarayan Bajaj, the complainant, PW-2 Shri Panchal, the representative of Dar-ul-Muluk Housing Society and PW-3 Vishwas Mohite, an official of the Bank of Maharashtra, and a compilation of copies of the documents tendered at the trial. I would approach the questions raised without commenting upon the probative value of the evidence tendered to avoid prejudice to the parties at the trial.

29. The learned counsel for the accused also submitted that the learned trial Magistrate could have also considered the unimpeachable material placed on record by the accused while considering framing of charge and for this purpose relied on a Judgment of the Supreme Court in Harshendra Kumar D. Vs. Rebatilata Koley Etc., where the facts were noted as under:

3.On April 30, 2004, the Company issued 18 cheques....

4. In the month of December, 2004, the complainants filed 18 complaints u/s 138 read with Section 141 of the NI Act....."

6. On behalf of the Appellant, the principal contention canvassed was that the Appellant was appointed as Director of the Company on August 27, 2003. He resigned from the directorship on March 2, 2004 which was accepted by the Board of Directors on that day itself with immediate effect. The factum of his resignation is also recorded in Form No. 32 filed by the Company with the Registrar of Companies on March 4, 2004. The 18 cheques which were issued on behalf of the Company to the complainants were issued after his resignation. The dishonour of these cheques through the complainants' bankers" was also subsequent to his resignation. In other words, it was submitted by the counsel for the Appellant before High Court that at the time when the cheques were issued or when the cheques were dishonoured, the Appellant had no concern or connection with the Company.

7. The High Court,.... held that resignation by the petitioner as Director of the Company is a defence of the accused and the defence is a matter for consideration at the trial on the basis of evidence which cannot be decided by the Court in revisional jurisdiction.....

21. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction u/s 482 or for that matter in exercise of revisional jurisdiction u/s 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction u/s 482 or revisional jurisdiction u/s 397 of the Code in a

case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

(emphasis supplied)

30. This marks a welcome departure from the rule in *State of Orissa Vs. Debendra Nath Padhi*, that such material cannot be looked into. Bearing this in mind I have gone through the material before the trial Court.

31. First, I would deal with the claim of the accused that the allegations show, at worst, only a civil dispute with no criminal intent and so no offences are disclosed. It was therefore claimed that the learned Magistrate erred in framing charges for the offences punishable under Sections 403 and 406 of the IPC. The learned counsel relied on some Judgments on the point. The story of the accused is that the shares were in fact sold to the companies of the accused by Anil Shah on the instructions of the complainant himself as the complainant did not have money to complete the purchases, and therefore there was no pledge or entrustment but an out-and-out sale and consequently a civil dispute - pure and simple.

32. In *Suneet Gupta Vs. Anil Triloknath Sharma and Others*, 920, on which the learned counsel relied, the Supreme Court held as under:

18. The High Court, in our opinion, rightly considered the facts in their proper perspective and observed that the dispute related to settlement of accounts between principal and its agent....

20. The High Court, therefore, concluded that the steps taken by the complainant Suneet Gupta were in clear abuse of process of law and accordingly allowed both the petitions.

25. In the case on hand, the High Court was right in coming to the conclusion that a civil dispute - pure and simple - between the parties was sought to be converted into a criminal offence only by resorting to pressure tactics and by taking police help which was indeed abuse of process of law and has been rightly prevented by the High Court.

33. The learned counsel also relied on judgments in *Bay Isle Developers Private Ltd. and Others Vs. The State of Maharashtra and Others* *Shri Srinivasa Cut Pieces Cloth Shop and Mr. Bommanna Krishnamurthy Rao Vs. The State of Maharashtra and Harish Gehani*, *Pyarelal Ramkishore Prajapati Vs. State of Maharashtra and Others*, and *Sambhaji D. Hendre and Others Vs. State of*

Maharashtra and Others, where on facts the disputes were found to be Civil disputes.

34. I would also examine the facts disclosed to find out if they disclose entrustment and misappropriation or conversion and criminal breach of trust. It may be useful to first note the leading Judgments on this point on which the learned counsel for the parties placed reliance to comprehend the standards of requirement of evidence to be applied.

35. In *Jaswantrao Manilal Akhaney Vs. The State of Bombay*, Court observed:-

11. We will now deal with the legal position, apart from the terms of the contract. On the facts stated above the Exchange Bank had become the bailee in respect of the securities. The securities had been delivered by the Co-operative Bank to the Exchange Bank for the express purpose, as disclosed in the contract set out above, that they shall be disposed of in accordance with the terms contained in Ex.G set out above. By the very fact of the delivery of the securities to the bailee the latter became a trustee in terms of the contract, not for all purposes, but only for the limited purpose indicated by the agreement between the parties.

The pledgor has in the present case only transferred his possession of the property to the pledgee who has a special interest in the property of enforcing his charge for payment of an overdraft, if any, whereas the property continues to be owned by the pledgor. The special interest of the pledgee comes to an end as soon as the debt for which it was pledged is discharged. It is open to the pledgor to redeem the pledge by full payment of the amount for which the pledge had been made at any time if there is no fixed period for redemption, or at any time after the date fixed and such a right of redemption continues until the thing pledged is lawfully sold. Hence the Co-operative Bank in this case could have asked for a return of the securities at any time, because there never was any overdraft. As the pledge had been terminated neither by redemption, nor by a lawful sale on the happening of such contingencies as the parties contemplated in their agreement or the law allowed, the securities continued to be the property of the Co-operative Bank and the Exchange Bank, or the appellant as its Managing Director, had no right to deal with them.

12. It was next contended, alternatively, that assuming that the Exchange Bank had dealt with the securities in contravention of the terms of the agreement, the appellant had, as representing the bank, only committed a breach of contract, the remedy for which was a suit for damages and not a criminal prosecution. This argument assumes that the same set of facts cannot give rise both to a civil liability and a criminal prosecution. It is manifest that such an argument in its bald form cannot be acceptable. If there is no mens rea, or if the other essential ingredients of an offence are lacking, the same facts may not sustain a criminal prosecution, though a civil action may lie. We have therefore to examine whether or not there was mens rea in this case or whether the necessary element of a criminal offence have been made out.

13. It has been contended that no offence under S.409, Indian Penal Code has been brought home to the appellant for the reasons, (1) that there was no entrustment, (2) that there was no mens rea, and (3) that there was no dishonesty on the part of the appellant. For an offence under S.409, Indian Penal Code, the first essential ingredient to be proved is that the property was entrusted. It has been argued that in this case there was no such entrustment as is contemplated by that section; and that the securities were pledged with the Exchange Bank by the Co-operative Bank which was in the position of a debtor to the former. The contention is that the parties never contemplated the creation of a trust in the strict sense of the term. But when S.405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him. In the present case the Co-operative Bank entrusted the Exchange Bank with the securities for the purpose of keeping them as a security for the overdrafts if and when taken by the former. In law those securities continued to be the property of the Co-operative Bank and as it never borrowed any money from the Exchange Bank, the latter had no interest in those securities which it could transfer in any way to a third party so far as the two banks are concerned. The entrustment was to the Exchange Bank itself. But it being a non-natural person, its business had to be transacted by someone who was authorised to do so on its behalf. The appellant held the power of attorney on behalf of the directors of the bank to transact business on behalf of the bank. In that capacity the appellant had dominion over the securities. Hence the appellant can be said either to have been entrusted with the property in a derivative sense or to have dominion over the securities as a banker; and thus in either case, the first essential condition for the application of S. 409, Indian Penal Code is fulfilled.

36. In *R.K. Dalmia Vs. Delhi Administration*, the Court noted the facts and held as under:

59....The expression "funds" in the charge is used in the first sense meaning thereby that Dalmia and Chokhani had dominion over the amount credited to the Bharat Insurance Company in the accounts of the Bank, inasmuch as they could draw cheques on that account.

60. We are therefore of opinion that the funds referred to in the charge did

amount to "property" within the meaning of that term in S.405 I.P.C.

96. What S.409 I.P.C., requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression "in the way of his business" means that property is entrusted to him "in the ordinary course of his duty or habitual occupation or profession or trade". He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of S.409 I.P.C. if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in *Reg. v. Portugal*, (1885) 16 QBD 487 or in *Cooray's Case*, 1953 AC 407, and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression "in the way of his business" is used in place of the expression "in his capacity," to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned in Ss. 406 to 408 I.P.C. The criminal breach of trust by an agent would be graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent. We need not speculate about the reasons which induced the Legislature to make the breach of trust by an agent more severely punishable than the breach of trust committed by any servant. The agent acts mostly as a representative of the principal and has more powers in dealing with the property of the principal and, consequently, there are greater chances of his misappropriating the property if he be so minded and less chance of his detection. However, the interpretation we have put on the expression "in the way of his business" is also borne out from the Dictionary meanings of that expression and the meanings of the words "business" and "way", and we give these below for convenience.

"In the way of - of the nature of, belonging to the class of, in the course of or routine of (Shorter Oxford English Dictionary) - in the matter of, as regards, by way of (Webster's New International Dictionary, II Edition, Unabridged) "Business" - occupation, work (Shorter Oxford English Dictionary) - mercantile transactions, buying and selling, duty, special imposed or undertaken service, regular occupation (Webster's New International Dictionary, II Edition Unabridged) - duty, province, habitual occupation, profession, trade (Oxford Concise Dictionary) "Way" - scope, sphere, range, line of occupation (Oxford Concise Dictionary)

37. In *G. Sagar Suri and Another Vs. State of U.P. and Others*, the Court held as under:

14. We agree with the submission of the appellants that the whole attempt of the complainant is evidently to rope in all the members of the family particularly those who are the parents of the Managing Director of Ganga Automobiles Ltd. In the instant criminal case without regard to their role or participation in the alleged offences with the sole purpose of getting the loan due to the Finance Company by browbeating and tyrannizing the appellants with criminal prosecution. A criminal complaint u/s 138 of the Negotiable Instruments Act is already pending against the appellants and other accused. They would suffer the consequences if offence u/s 138 is proved against them. In any case there is no occasion for the complainant to prosecute the appellants under Sections 406/420, IPC and in his doing so it is clearly an abuse of the process of law and prosecution against the appellants for those offences is liable to be quashed, which we do.

38. With the principles laid down in these Judgments in mind, I would examine the facts disclosed in the evidence before the trial magistrate. The evidence shows that the complainant sought to purchase 3,07,650 shares of Sesa Goa Limited in August and September 1997 through six brokers but did not have the money to pay sum of Rs. 5,62,50,000/- towards the price. The evidence also indicates that the amount did come from accused Vijay Agarwal, who paid it directly to the brokers concerned, possibly through Anil Shah as well. The complainant alleges that this amount came by pledging these shares, some other shares, as also providing other security in the form of documents in respect of two flats. The complainant's answers in the lengthy cross-examination may not appear to be very clear. However, it may not be permissible at this stage to go into the nitty-gritty of appreciation, which must be left to the trial Court. There may be some doubts as to whether the complainant in fact provided additional security in the form of shares worth Rs. 1,00,00,000/-. But as to the pledge of the flat in Dar-ul-Mulak, there is an Agreement of Sale in respect of the flat along with necessary consent/applications for transfer of the flat and the shares in the society, and curiously there are also Agreements of Lease & Leave and License in respect of the same flat.

39. If the transaction was sale, it is enigmatic that the complainant was also required to execute documents in respect of his flats. It is not that these documents are unilateral. PW-2, the representative of the society, had produced before the trial Court the letter written by the accused on 22-1-1998 with relevant documents about the flat received by the society by registered post. If the accused had directly paid for the purchase of shares and had also received those shares, ordinarily, there would be no occasion to execute documents in respect of the flat. Execution of the documents in respect of the flat would in the normal course be consistent with the possibility of the shares having been pledged, rather than sold outright. The defence shows that the accused have

transferred the shares in their names, not after reasonably waiting for the pledge to be redeemed or after calling upon the complainant to pay the sums borrowed, but far too promptly, claiming the transaction to be outright purchase. This conduct, at least at this stage of the trial, does not rule out criminal intent.

40. The learned Magistrate therefore concluded, and possibly rightly, that there was material to charge the accused of the offences punishable under Sections 403 and 406 of the IPC as entrustment, as also misappropriation and conversion of shares entrusted was proved (subject of course to the possibility of being rebutted, with further cross-examination post-charge). The learned counsel for complainant wanted the accused to be charged for the aggravated form of breach of trust committed by persons in special relationship with the complainant, punishable u/s 409 of the IPC. It may be useful to reproduce for ready reference the section which reads as under:

409. Criminal breach of trust by public servant, or by banker, merchant or agent.- Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

41. Though the complainant may choose to characterise the accused as the agents, it was Anil Shah's company who were complainant's agents. The accused cannot even be characterised as bankers, since they seem to have simply lent money to a fellow businessman and are not in the banking business. The accused prima facie do not fall in any category listed in Section 409 of the IPC.

42. The learned counsel for the complainant next submitted that the learned Magistrate ought to have framed charges for the offences punishable under Sections 415, 418, 420, 463, 467, 468 and 471 of the IPC as well. According to the learned counsel for the complainant, the accused induced the complainant and his son to sign documents in respect of the flat at Dar-ul-Muluk, account opening form in Bank of Maharashtra, blank cheques, etc., to show that payment of Rs. 50,00,000/- was made for the said flat when even according to a Division Bench of this Court on the Original Side the record was manipulated by the accused. Before examining the evidence to find out if any of the above offences are made out, I would briefly refer to the Judgments on which the learned counsel placed reliance on the requirements to allege and prove cheating.

43. In the State of Kerala Vs. A. Pareed Pillai and Another, the oldest Judgment on the point cited, the Court held as under:

16.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.

44. In Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others, the Court observed as under:

4. We have heard Mr. Maheshwari on behalf of the appellant and are of the opinion that no case has been made out against the respondents u/s 420 Indian Penal Code. For the purpose of the present appeal, we would assume that the various allegations of fact which have been made in the complaint by the appellant are correct. Even after making that allowance, we find that the complaint does not disclose the commission of any offence on the part of the respondents u/s 420 Indian Penal Code. There is nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with Rs. 35,000. There is also nothing to indicate that the respondents induced the appellant to pay them Rs. 35,000 by deceiving him. It is further not the case of the appellant that a representation was made by the respondents to him at or before the time he paid the money to them and that at the time the representation was made, the respondents knew the same to be false. The fact that the respondents subsequently did not abide by their commitment that they would show the appellant to be the proprietor of Drang Transport Corporation and would also render accounts to him in the month of December might create civil liability for them, but this fact would not be sufficient to fasten criminal liability on the respondents for the offence of cheating.

45. In Anil Kumar Bose Vs. State of Bihar, it was held that for proving cheating mens rea was required to be proved. Likewise, in Rama Devi Vs. State of Bihar and Others, the Court considered the absence of intention to cheat or defraud. In Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others, , the Court underlined the need to show fraudulent or dishonest intention. B. Suresh Yadav Vs. Sharifa Bee and Another, Veer Prakash Sharma Vs. Anil Kumar Agarwal and Another, on which also reliance was placed, were decided on the facts of those respective cases.

46. In All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, the Court noted earlier decisions and held as under:

19. In Anil Mahajan v. Bhor Industries Ltd. [(2005) 10 SCC 228], this Court held: (SCC p. 231, para 8)

8. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MoU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay. According to the complainant, a sum of Rs. 3,05,39,086 out of the total amount of Rs. 3,38,62,860 was paid leaving balance

of Rs. 33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainant's own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question.

20. In *Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi*, this Court opined: (SCC p. 280, para 40)

40. It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office bearers right at the time of making application for exemption. As there was absence of dishonest and fraudulent intention, the question of committing offence u/s 420 of the Indian Penal Code does not arise.

47. In *Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others*, the latest case on the point relied on by the parties, the Court held as under:

67. The next important question which needs to be examined is as to whether the averments made in the complaint if taken on their face value would not prima facie disclose the ingredients for the offence of cheating as defined u/s 415 IPC. The aforesaid section is as under:

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

Explanation - A dishonest concealment of facts is a deception within the meaning of the section.

68. A bare perusal of the aforesaid section would show that it can be conveniently divided into two parts. The first part makes it necessary that the deception by the accused of the person deceived, must be fraudulent or

dishonest. Such deception must induce the person deceived to either: (a) deliver property to any person; or (b) consent that any person shall retain any property. The second part also requires that the accused must by deception intentionally induce the person deceived either to do or omit to do anything which he would not do or omit, if he was not so deceived. Furthermore, such act or omission must cause or must be likely to cause damage or harm to that person in body, mind, reputation or property. Thus, it is evident that deception is a necessary ingredient for the offences of cheating under both parts of this section. The complainant, therefore, necessarily needs to prove that the inducement had been caused by the deception exercised by the accused. Such deception must necessarily produce the inducement to part with or deliver property, which the complainant would not have parted with or delivered, but for the inducement resulting from deception. The Explanation to the section would clearly indicate that there must be no dishonest concealment of facts. In other words, nondisclosure of relevant information would also be treated as a misrepresentation of facts leading to deception.

48. Applying the yardsticks laid down, it is difficult to hold that the evidence discloses material for framing charge of offence of cheating. Even according to the averments in the complaint, it was not the accused who had induced the complainant to deliver any securities or properties. The complainant, a businessman, had sought a loan and had executed several documents with open eyes, including documents where several blanks were left. To allege that the accused fraudulently made the complainant open an account in the bank or made him sign cheques, etc., would have been held good in the case of an ignorant farmer but not in the case of a worldly wise businessman who knows the ways of business life. Therefore, there is no question of making out the offence of cheating or forgery for the purpose of cheating, or for that matter forgery of any kind. The complainant should in fact have been more interested in a speedy trial to see that offences are proved and the miscreants are punished, if proved guilty, rather than seeking adding a long list of charges, which for a regular Court visitor does not even intimidate, for he knows that longer the list of charges, the lesser the chance of even a trial taking off. The criminal justice system suffers because of the belief in severity of punishments as the solution for avoiding crimes, rather than certainty of punishment by ensuring quick serving of just desserts.

49. The learned counsel for the accused next submitted that the transactions, if any, were with the entities, who were accused Nos. 4 and 5, and therefore, the personal criminal liability of accused Nos. 1 and 2 would be limited. For this purpose, the learned counsel relied on the Judgment in *The State of Maharashtra Vs. Anilkumar Jinabhai Patel and Darshan Anilkumar Patel In Adhiraj Amar Kannhaiyalal Sarin Director of Bunge India Private Limited and Others Vs. State of Maharashtra at the instance of Food Inspector Sandeep S. Deore, Food Inspector, Nagpur Division*, on which the learned counsel placed reliance, the Court held as under:

15. It is contended by the prosecution that a notice was issued to the company calling upon them to submit the name of person who is responsible for the business activities as contemplated by Section 17(2) of the Act. It is further contended that the company, in spite of notice, did not provide the name of the nominee and as such all the directors are required to be held responsible. However, on perusal of Section 17(4) of the Act, it is clear that only those directors against whom there is proof of commission of any offence either with the consent or connivance or attributable as a result of neglect, such director shall be liable to be proceeded. It is for the prosecution to find out as to what is the role of a director or as to who is responsible for commission of the offence. In absence of any such contention in the complaint, it cannot be taken that all the directors of the Company shall be held to be responsible.

50. Considering the allegations in the complaint as well as the evidence tendered, it would be difficult to hold at this stage that the transaction alleged was with the company of which accused No. 1 is the supremo, or with a partnership with accused No. 1 as the partner. At this stage, the prosecution would have to proceed on the allegations as made, leaving it to the learned trial Magistrate to decide as to the personal criminal liability of accused Nos. 1 and 2. To conclude, in view of the foregoing, I hold that the learned Additional Sessions Judge was thoroughly unjustified in staying the trial. Consequently, the impugned order is set aside. The complainant's challenge to non-inclusion of charges for the offences punishable under Sections 409, 415, 418, 420, 463, 467, 468 and 471 of the IPC is rejected. The claim by the accused that they be discharged for the offences punishable under Sections 403 and 406 of the IPC is also rejected. Criminal Application No. 431 of 2011 is partly allowed, as indicated above. Criminal Application No. 564 of 2011 is rejected.