

(2007) 09 MP CK 0089
In the Madhya Pradesh High Court

Mallika Srinivasan and Others

APPELLANT

Vs

Mani Prakash Sharma and Others

RESPONDENT

Date of Decision : 21-09-2007

Acts Referred:

Arbitration Act, 1940 — Section 9
Arbitration and Conciliation Act, 1996 — Section 11, 20
Criminal Procedure Code, 1973 (CrPC) — Section 173, 196, 204, 210, 250
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 153B, 406, 409, 420

Citation : (2008) 1 BC 504

Hon'ble Judges : B.M. Gupta, J

Bench : Single Bench

Judgement

B.M. Gupta, J.—Both the petitions are arising out of the same dispute between the same parties, M/s. Mani Agro Industries Station Road, Datia, respondent No. 1/complainant represented through its proprietor Mani Prakash Sharma at one side (complainant in short) and the petitioners being office bearers of M/s. Eicher Ltd. Industrial Area Mandideep, Bhopal at the other side (hereinafter petitioners will be referred to as accused and M/s. Eicher Ltd. as company), hence both have been heard and are being disposed of together.

2-A. The facts in brief, as revealed from complaint dated 31.7.2006 filed by the complainant against Smt. Mallika Srinivasan, MD, Rajiv Sharma, Regional Manager, Sunil Panel and Samir Garg, Area Managers of the company are, that complainant, a proprietor firm was appointed as dealer by the company in May 1999 on depositing Rs. two lacs as security amount. The terms of the agreement included, complainant was to receive old tractors from the customers and sell the new tractors to them for which an incentive was to be paid by the company. In order to complete fix target company was billing the tractors in the months of March every year in the name of the complainant without actual delivery thereof. The amount was adjusted in the account of the complainant thereafter. The complainant was to purchase spare parts from Yashdeep Enterprises, a

distributor of the company. The cost price was being paid by the complainant through cheques. However, the company was also charging the cost price directly from the complainant, but the same was credited subsequently in the account of the complainant. As per the accounts maintained by the complainant Rs. 16,70,386.45 excluding Rs. two lacs as security amount were due on the company. Despite demands the same was not paid. The company was obtaining blank cheques from the complainant for purchase of Hundis in order to raise funds for its business and the said amount was to be credited in the account of the complainant. For the purpose, on 23.9.2002 accused Samir Garg, the Area Manager of the company, received two blank cheques Nos. 533554 and 533555 from the complainant for raising the amount on Hundis, but no such amount was raised on those cheques. When the said cheques were demanded back by the complainant, he was informed by accused Samir Garg that the same have been lost. It was assured by the accused persons, that if those cheques are found, they will not be used. On this assurance the complainant did not take any step.

2-B. On 8.6.2006 complainant received information that the accused persons in conspiracy, filled an amount of Rs. 86 lacs in one of the two cheques No. 533555 and presented the same in the Bank for encashment. Thus, the complainant was compelled to direct the Bank to stop the payment and the payment was not made. On this complaint vide order dated 2.4.2007, passed by CJM, Datia cognizance for the offence punishable under Sections 406 and 409 of IPC has been taken against the aforementioned four petitioners.

2-C. Prior to lodging of the complaint, complainant lodged one FIR on 13.6.2006 against the accused Samir Garg, Rajiv Sharma and Sunil Pahel at Police Station Kotwali, Datia, with regard to the same cheque No. 533555 which was registered at crime No. 194/06 for the offence punishable u/s 420, IPC, on which investigation is pending. In the report specifically it is alleged against all the three accused that they filled the amount in the cheque.

3-A. Mr. Tanka, the learned Senior Advocate for the petitioners has submitted that although the dealership of complainant was started from the month of May, 1999 yet dealership agreement was executed on 15.7.2001. As per the Clause 8 of the aforesaid agreement, the complainant was to make payments for companies products either in cash or by Bank Draft or by an irrevocable letter of credit or as agreed with the company from time-to-time and the property in the company products shall be deemed to have been passed to the dealer, as soon as the same has been delivered. The company was maintaining the dealership account. On 23.3.2005 company sent a letter Annexure P/4 to the complainant for confirmation of outstanding balance as on 28.2.2005, which was the amount of Rs. 86,42,613.55. The complainant confirmed only Rs. 34.79 lacs as outstanding balance against him vide his confirmation letter Annexure P/5 of the same date. On 27.5.2006 complainant in discharge of his outstanding, issued the cheque No. 533555 in favour of the company in the amount of Rs. 86 lacs drawn on Central Bank of India, Datia. It could not be encashed as the payment was

stopped by the complainant. On 16.6.2006 the company was informed by the Bank vide Annexure P/6.

3-B. Apprehending filing of a complaint against the complainant u/s 138 of Negotiable Instruments Act (hereinafter referred to as the Act), the complainant lodged the aforementioned FIR on 13.6.2006 at Police Station Kotwali, Datia, with the sole intention to pre-empt filing of the complaint. FIR was lodged after concocting a false story with regard to obtaining of blank cheques by the accused as security for the purpose of obtaining loan on hundies. The sole intention of the complainant was to coerce the accused or the company to avoid legal proceedings u/s 138 of Act. On 1.7.2007 a legal notice Annexure P/7 u/s 138 of the Act was issued by the company with regard to dishonouring of the cheque and demanding the payment within 15 days. On 28.7.2006 company received a letter Annexure P/8 dated 20.5.2006 from the complainant, in which it was mentioned that dealership agreement was executed in the year 1999 and at the time of providing dealership, aforementioned two blank cheques were obtained by the company from the complainant. An amount of Rs. 18,70,386.45 lacs is due on company. It was also mentioned by the complainant, that he wants to refer the matter for arbitration as per Clause 24 of the agreement. On 26.7.2006 company filed a complaint Annexure P/9 against the complainant u/s 138 of the Act in the Court of JMFC, Goharganj.

3-C. Instead of choosing to attend and defend the Court at Goharganj, the complainant has chosen to lodge the FIR and thereafter filed the complaint dated 31.7.2006. The company vide its letter dated 23.8.2006, Annexure P/10 has consented the proposal of arbitration for resolving the disputes. Thereafter the complainant has filed an application Annexure P/13 dated 6.9.2006 u/s 11 of the Arbitration and Conciliation Act. Mr. Tanka has further submitted that all the three accused could get anticipatory bail vide order dated 17th November, 2006 and 21st November, 2006 passed by Sessions Judge, Datia on the observation that the case is of a civil nature. When the complainant came to know that the three accused in the case, based on FIR, were able to escape the harassment, he filed the complaint with regard to the same incident, with a view to harass and exert pressure on company, hiding the fact that a case based on FIR is already in existence. In the case of complaint the fourth accused Smt. Mallika Srinivasan has also been included mentioning as Managing Director while she is only a Director of the company. Vide order dated 2.4.2007 CJM, Datia took cognizance and issued warrant of arrest against all the four accused persons. Complainant being local resident of Datia and an influential man, with the connivance of the complainant officer in-charge of the Police Station, Datia issued a letter to accused Samir Garg on 22nd May, 2007, after filing the complaint and issuance of warrant, informing him that he is required to give sample of his hand writing for the purpose of investigation in the case of FIR. Being unaware of the fact of issuance of warrant, he appeared at police station where he was detained under custody in execution of the arrest warrant. He was ill-treated and humiliated by police and threatened that he should have his company to settle the dispute with

the complainant by making payment of Rs. 18 lacs as claimed by him. Thus, the complainant was able to abuse the machinery of law by using the same to harass and humiliate the accused. The accused Samir Garg was released on bail by the Sessions Judge, Datia on 6.6.2007 with specific observation that the complaint moved by the complainant is ex facie and based on ulterior motive and malicious intention because there is a deliberate omission of material facts relating to lodging of the FIR by him.

3-D. While highlighting the aforementioned factual scenario, Mr. Tanka has further submitted that apparently the criminal proceedings are abuse of the process of law for satisfying personal vendetta with the company and its officers, the accused. As alleged no offence punishable under Sections 420, 406 and 409 of IPC are made out. It is simply a commercial/civil transaction and this fact is also supported by the application filed by the complainant u/s 11 of the Arbitration Act. With regard to delivery of blank cheque at different places different stands have been taken by the complainant. At one place complainant is admitting Rs. 34.79 lacs as outstanding balance against him, at the other he is claiming Rs. 16.70 lacs from the company. The order taking cognizance on a complaint is not a speaking order. As mandated by the Apex Court in para 28 of the Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , such order is required to reflect that the learned Magistrate has applied his mind to the facts and the law applicable therein.

3-E. While placing reliance on a judgment of the Delhi High Court in Escorts Yamaha Motors Ltd. Vs. State and Another, , he has submitted that in an identical case the Delhi High Court has quashed the FIR and that order has been further upheld by the Apex Court vide judgment dated 27.10.1999 passed in Criminal Appeal No. 1191/1999, Sunil Kumar Vs. M/s. Escorts Yamaha Motors Ltd. and Ors, . He has further placed reliance on a judgment of Kolkata High Court in Raymond Ltd. (JKFT Division) Vs. H.V. Doshi and Brothers Pvt. Ltd., .

3-F. In alternative Mr. Tanka/Mr. Krishna has drawn attention at Section 20 of the Act and has submitted that if a blank cheque is handed over by the complainant to a company, filling-up in the Bank an amount in the cheque and presentation of the same is not an offence. Because by that act the complainant thereby gives prima facie authority to the holder thereof to make it complete and in such case the complainant is liable upon such instrument to the company who is holder in due course, for such amount subsequently filled in by or on behalf of the company.

4-A. Countering the contentions Mr. Raja Sharma, the learned Advocate for respondent/complainant has submitted that both the cases based on FIR and on complaint are based on different allegations and facts. According to him, FIR is based on the allegation that the accused with an intention to cheat the complainant filled the amount in the cheque, forged his signatures and submitted in the Bank. While, the case of complaint is based on an amount entrusted to the accused persons in the shape of various incentives and commissions arising out

of the sale of tractors and amount of Rs. 15 lacs, which was entrusted to the petitioners at the time of starting of business. He has further submitted that the blank cheques, which were handed over to the company were not signed by the complainant. At the time of filling of the amount in the cheque, the accused persons have forged the signatures of the complainant on that cheque. He has also submitted that neither the complainant has received any notice u/s 138 of the Act before initiation of the complaint against him nor he has confirmed the balance of Rs. 34.79 lacs as outstanding. This document of confirmation is forged. According to the complainant for the sake of arguments, the contentions of the company and the accused persons are admitted to be true, although when are not to be true as per the complainant, then in that case how the complainant will hand over a cheque of Rs. 86 lacs to the company when according to the company itself he is admitting or confirming the balance of Rs. 34.79 lacs only. An amount more than Rs. 18.5. lacs is due on the company. Just to avoid this liability, the cheque has been forged for the purpose of cheating the company.

4-B. With regard to filing of an application u/s 11 of the Arbitration Act, Mr. Sharma has submitted that if two remedies are available to the complainant, he can avail both. Application has been filed for deciding the civil dispute arising out of the agreement, while the criminal cases have been filed against committing the offence of cheating and misappropriation of the amount. With regard to the notice dated 20th May, 2006, he has submitted that by mistake this date has been written in place of 20th July, 2006. With regard to inconsistencies about the time period of handing over the cheques and whether the cheques were signed or not, he has submitted that at the time of execution of the agreement i.e. on 15th July, 2001, the cheque books were not received. Immediately thereafter when the cheque books were received, these two cheques were handed over to the company. With regard to the omission of the signatures on the cheques, he has submitted that the complainant has mentioned that blank cheques were handed over, which includes that the cheques were without signatures also. With regard to subsequent act of filing of the complaint, concealing the fact of FIR Mr. Sharma has submitted that u/s 210 of Cr. P.C. the steps could have been taken by the Magistrate. That he will prove his stand by evidence during trial as such disputes cannot be decided by this Court u/s 482 of Cr. P.C. without evidence. In support, he has drawn attention on the following judgments:

1. Indian Oil Corporation Vs. NEPC India Ltd. and Others, .
2. State of Karnataka and Another Vs. Pastor P. Raju, .

5-A. Considering the contention of Mr. Tanka that the facts of the case of Escorts Yamaha Motors Ltd. (supra) are similar to the present case the fact of that case are required to be quoted. As per the facts of that case, respondent No. 2 (complainant) Sunil Kumar lodged a report on 14.4.1998 against the petitioner Escorts Yamaha Motors Ltd. (company in short) that he was authorized dealer of the company. Supply of motorcycles by the company to him was on cash payments, but on the direction of the petitioner fifty blank cheques were

entrusted by the complainant to the company so that the same may be utilized only against future supply of motorcycles and for no other purpose. Out of fifty cheques company had already encashed 28 cheques worth Rs. 1.44 crores against current supply of motorcycles. On 16.3.1998 a letter was received by the complainant from one officer of the company, informing that they shall be presenting two cheques for Rs. 75 lacs each, being the amount claimed to be due from the complainant as outstanding towards the company, on the basis of their own calculation. The complainant alleged that the amount was not due. Complainant replied the letter prohibiting the company from presenting the cheques in the Bank, as the same were not meant for the purpose other than the future supply of motorcycles after 19.1.1998 and at the same time requested to return the remaining blank signed cheques immediately. Simultaneously the Bankers were also informed to stop all payments against the cheques. It was also alleged in the report that various officers of the company in collusion with each other hatched a conspiracy and committed criminal breach of trust by using the blank cheques without permission, which were not meant for the purpose for which the same were used by these officers of the company cheated the complainant by forging the valuable security, the blank cheques.

5-B. The petition u/s 482 of Cr. P.C. was filed by the company for quashing the FIR to the affect that vide dealer sale agreement dated 1.11.1996 complainant was appointed as a dealer for sale of motorcycles manufactured by the company. On 1.9.1997 complainant owed to the company a sum of Rs. 164 lacs which is neglected to pay despite repeated demands. A joint meeting was held in which complainant undertook to clear all outstanding dues by March 1998. It was duly recorded and signed by both the parties. Despite, the complainant failed to comply, the undertaking. Instead of even paying the monthly instalment of Rs. six lacs a letter was addressed on 7.11.1997 by the complainant acknowledging his liability towards the company and promising to clear the amount immediately. Again he failed to make the payments. Another joint meeting was held on 8.11.1997, again he acknowledge his liability in it and the same was signed by both the parties. Despite, complainant failed to clear the dues. As transpired later, complainant by his false promise and assurances was misleading the company. He assured, promised and undertook to make payments against supply of vehicles for the purpose he handed over to the company fifty cheques by way of security for advance payment subject to encash the cheque in case of delay or default in payment due or as promised and induced the company to put through the supplies of the vehicle, as ordered by the complainant from time-to-time. Complainant had undertaken to keep the said moneys entrusted on behalf of the company. On the one hand he continue to take delivery of the vehicles, sold them in market and earned profit, while on the other hand he failed and neglected to pay to the company. In good faith and as a concession, the company permitted the complainant to scale down the outstanding, which stood at a staggering sum of Rs. 164 lacs as on 1.9.1997, in instalments, as proposed by complainant.

5-C. When the complainant turned dishonest and simply did not want to pay the money, on 16.3.1998 a letter was addressed to him by the company cautioning that its two cheques for Rs. 75 lacs which were being presented to their Bank for encashment. It was also the case of the company that the complainant had handed over these cheques as security, with the undertaking that in case of default in payment, the company may instantly and without any advance notice present the cheques to their Bank. On such presentation complainant would honour them. However, the cheques were dishonoured. In order to avoid companies demand for immediate payment, the complainant filed a petition u/s 11 of the Arbitration and Conciliation Act, 1996, for referring the disputes to arbitration. Another application u/s 9 of the Act was also filed seeking direction against the company to forthwith resume supply of vehicles during the pendency of the petition. In this petition complainant suppressed material fact that it owed to the petitioner a amount of Rs. 1.64 crores.

5-D. It was also the stand of the company that the subject matter of the FIR is substantially and specifically same as of the arbitration petition. When the complainant failed to obtain any interim relief in the arbitration proceedings, in its attempt to some how intimidate and pressurize the petitioner so that the petitioner may succumb to its unlawful demands, the complainant got the FIR registered, which was noting but gross abuse of the process of law. The disputes raised by the complainant is of civil nature, as the complainant himself is seeking arbitration. Having elected his remedy by filing petition under Arbitration Act. raising substantially the same dispute, FIR filed belatedly is barred by the doctrine of election. No case of cheating, misappropriation or forgery is made out.

5-E. The petition u/s 482 of the company was opposed by the complainant on the grounds inter alia that the officials of the company committed forgery, intending that documents shall be used for the purpose of cheating and also committed breach of trust by forging the cheques and filling the blanks therein in violation of the legal contract, while no such amount was due and payable by the complainant to the company. When the company in mala fide abruptly stopped supply of motorcycles, specially when the company had agreed to continue supply on cash basis, the complainant had no option but to invoke the arbitration clause. The petition for arbitration is an independent remedy in addition to seeking criminal action for which the complainant is entitled.

5-F. On the aforementioned facts, in para 17 the Court observed that the point referred to the arbitration is the same which is the subject matter of the FIR. We are of the view that in the facts and circumstances, the alleged breach of trust and misappropriation at the most is predominantly a civil wrong. It may or may not amount to a criminal offence. Moreover, much prior to lodging of the complaint, respondent No. 2 had already resorted to civil remedy on the same allegation seeking reference for adjudication by Arbitrator. Without waiting for the decision of the Arbitrator, the very act of lodging the complaint with the sole object to get initiated proceedings for criminal action on same and similar

allegations, will definitely bring the case within the category of abuse of the process of law, namely, initiation of the proceedings maliciously with ulterior motives. The question whether or not blank cheques were given to be utilized only towards future supply of motorcycles and for no other purpose or whether the same were given, as alleged by the petitioner, is a question, which will have to be gone into and decided in arbitration proceedings on the basis of the evidence to be adduced by the parties. For this reason alone, we are of the view that the proceedings initiated on the basis of the complaint of respondent No. 2, the FIR is liable to be quashed and set aside.

6. Feeling aggrieved the complainant Sunil Kumar approached the Apex Court, when vide judgment dated 27.10.1999 rendered in the case of Sunil Kumar (supra) the Apex Court upheld the judgment of Delhi High Court and dismissed the appeal filed by the complainant with the observation that necessary ingredients for the offence of cheating or criminal breach of trust have not been made out and on the other hand the attendant circumstances indicate that the FIR was to preempt the filing of the criminal complaint against the complainant u/s 138 of the Negotiable Instruments Act. The High Court, therefore, was well within its power in quashing of the FIR as otherwise it would tantamount to the abuse of the process of the Court.

7-A. Countering the contentions, Mr. Sharma for the complainant, while placing reliance on the case of Indian Oil Corporation (supra) has submitted that by a wrong act of the opponent if civil and criminal remedies are available, both can be availed. The facts in brief of this case are that the appellant Indian Oil Corporation entered into a contract with the respondent, agreeing to supply aircraft fuel. According to the appellant, in respect of fuel supply under the contract, the respondent committed default in making payments. The respondent hypothecated its two aircraft to the appellant under a deed. It is stipulated in Clause 2 of the deed that the hypothecation was by way of charge and security for payment of the amount due. Instalments schedule was also provided. Respondent declared that it was not assigned, sale, lease, charge underlet or otherwise encumber or part with possession, custody or beneficial interest in respect of the two aircraft without the previous written consent of the appellant. As per the appellant's schedule, the payment was not made. A revised payment schedule was agreed and the appellant agreed to resume supply of aircraft fuel on cash and carry basis. But this agreement also came to an end, as the instalments were not paid. Apprehending that the respondent may remove one of the aircraft from Coimbatore airport to a place outside its reach, the appellant filed a suit in High Court seeking a mandatory injunction to retain the aircraft. Interim injunction was granted. About another aircraft kept at Chennai, the appellant filed another civil suit for mandatory injunction. The appellant then filed two complaints against the respondent and its two Directors alleging that they unauthorizedly removed the engine and certain other parts from the two aircrafts, so as to defeat appellants right to take possession thereof, in default of payments. Feeling aggrieved with the criminal proceedings the respondent

challenged the same u/s 482 of Cr. P.C. requesting for quashing the same on two grounds:

(i) That, it is purely a contractual dispute of civil nature.

(ii) That, if all the allegations are taken to be true, they do not constitute any criminal offence. The High Court allowed the petition on the second ground, which was challenged by the appellant before the Apex Court.

7-B. The Apex Court observed that:

If allegations in the complaint, taken at their face value, discloses a criminal offence, that cannot be quashed merely because it relates to a commercial transaction or breach of contract for which civil remedy is available or has been availed. A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed of, is not by itself a ground to quash the criminal proceedings. The test is whether the allegation in the complaint disclose a criminal offence or not....

In this case, it is no doubt true that IOC has initiated several civil proceedings to safeguard its interests and recover the amounts due. These acts show that civil remedies were and are available in law and IOC has taken recourse to such remedies. But it does not follow therefrom that criminal law remedy is barred or IOC is stopped from seeking such remedy....

The respondents, no doubt, have stated that they had no intention to cheat or dishonestly divert or misappropriate the hypothecated aircraft or any parts thereof. But these are defences that will have to be put forth and considered during the trial. Defences that may be available, or facts/aspects when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. At this stage, the only question relevant is whether the averments in the complaint spell out the ingredients of a criminal offence or not....

The High Court was, therefore, justified in rejecting the contention of the respondents that the criminal proceedings should be quashed in view of the pendency of several proceedings....

Thereafter, the following is also observed:

However, there is 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 breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged....

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceive criminal proceedings, in accordance with law. One positive step that can be taken by the Courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power u/s 250, Cr. P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant.

8. As Mr. Sharma has further placed reliance, the facts in brief of the case of Paster P. Raju (supra), are that one Lokesh lodged FIR alleging that on 14.1.2005 he along with some other persons was celebrating Shakranti festival when the respondent/Paster P. Raju, member of Christian community, came there and made an appeal to them to get converted to Christian religion where they would get many facilities which were not available to them in Hindu religion to which they belong. Many persons present there protested the appeal and strongly opposed the same. On the basis of this FIR offence u/s 153B of IPC was registered at police station. Respondent was arrested and remanded to judicial custody. He filed petition u/s 482 of Cr. P.C. for quashing the proceedings. The petition was allowed by the High Court and quashed the proceedings. Feeling aggrieved State of Karnataka approached the Apex Court. The principal contention of the respondent before the High Court was that before initiating any proceeding u/s 153B of IPC police ought to have obtained previous sanction of the Central Government or of the State Government or of the District Magistrate as required by the Section 196(1A), Cr. P.C. and in absence of such sanction the proceedings were illegal and without jurisdiction. The Apex Court observed that bar is against taking cognizance of offence and not against registration of the criminal case or investigation by the police or submission of police report u/s 173 of Cr. P.C. on completion of the investigation. It is further observed that investigation of a cognizable offence is a statutory right of the police. Interference by the High Court u/s 482 of Cr. P.C. with such statutory power of police is not permissible. Such power can be exercised to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This power can be exercised to quash the criminal proceedings pending in any Court but the power cannot be exercised to interfere in the statutory right of police to conduct investigation in a cognizable offence.

9-A. If the facts of the present case and the case of Escorts Yamaha Motors Ltd.

(supra) are compared, although there appears similarity on most of the facts, yet there appears a material difference between the two. As per the allegation in the FIR lodged by the complainant, blank cheques were handed over to the officer of the company on their assurance that the same will be used for purchasing of Hundis for raising the funds. The cheques were not used for that purpose. When the same were demanded by the complainant, he was informed that the cheques have been lost and at the same time assured that if found those cheques will not be used for any purpose. As per complainant an amount of Rs. 16,70,386.44 was due on the company and nothing was due on the complainant. He did not confirm any balance outstanding. Despite demand, this amount was not paid by the company. The officers of the company, the accused in the case filled the amount of 86 lacs in the cheque No. 533555 and presented the same for encashment in the Bank without any prior permission, information or authority, undisputably such facts constitute very serious criminal offences of fraud, forgery and cheating. Qualifying such activities, as a commercial transaction or including them in commercial transaction amounts to degrading of such a dignified profession. If the allegations are true, which are required to be established through investigation at first point which is pending and thereafter during trial, if any guilt of the accused will be proved ultimately they will be required to be punished. This criminal liability can not be established against the accused in the complaint case filed by the company u/s 138 of the Act or in the arbitration proceedings which are yet to be commenced. Although, the alleged criminal act is the outcome of the commercial transaction between the parties, yet by nature it can not be said that it is simply commercial, contractual or of a civil nature. As alleged prima facie existence of mens rea appears for committing aforementioned offences. If, as prayed for by the company and the accused considering the existence of these two proceedings the present FIR is quashed and subsequently allegations are found proved, the offender will remain unpunished or thereafter initiation of criminal case will be required.

9-B. Such dispute constituting criminal offence was not in existence in the case of Escorts Yamaha Motors Ltd. (supra). In that case it was admitted that the cheques were filled by the officers of the company and presented for encashment. The dispute was, as to whether the amount filled in those cheques, was due on the complainant, and the purpose was same or not for which those cheques were given. As per the company, the complainant was receiving the consignment/motorcycles selling them and was not paying the amount. As per the complainant, there was nothing due on this count. In that case prior to lodging of the complaint the complainant preferred to initiate the arbitration proceedings but in the present case this step has been taken by the complainant after lodging of the FIR. Thus, the disputes involved in the case of Escorts Yamaha Motors Ltd. (supra) were of commercial/civil nature which could have been disposed of by way of arbitration, as there was no mens rea of committing any offence. The cheques were presented in the Bank giving prior notice to the complainant. Prior to those two cheques, admittedly on 28 cheques the company

had obtained an amount worth Rs. 1.40 crores due against the complainant, as such it was nothing new.

9-C. In the present case the material point for distinction and disposal is as to who executed the cheque in question? As per companies case complainant confirmed only Rs. 34.97 lacs as outstanding balance on 23.3.2005, then on 27.5.2006 what compelled the complainant to execute the cheque of Rs. 86 lacs in favour of the company? And if compelled, how immediately he stopped the payment? In view of this material factual difference, the ratio of the judgment rendered by Delhi High Court and confirmed by the Apex Court, do not appear fruitful for accused/company in the present case, so far as the case based on the FIR is concerned. Admittedly, at present the investigation is pending. During investigation hand writing and signatures on the cheque will require to be examined by the hand writing expert then only certain conclusion can be drawn, as to whether the same was executed by the complainant or by the accused. In this factual scenario the ratio of the cases of Indian Oil Corporation and Paster P. Raju can be applied in this case.

10-A. As the reliance has also been placed by Mr. Tanka, the facts of the case of Raymonds Ltd. (supra) in brief are that respondent H.V. Doshi (complainant) filed one complaint on 8.12.2003 against the petitioner/company (company in short) and its officers to the effect that he is acting as an indenting agent for the company for decades. On 27.12.2000 the officers of the company visited the complainant and informed that the company accepting collateral security from every indenting agent, as such the complainant was also required to pay or provide for collateral security for such indenting agency. It was decided that the complainant would pay Rs. 25 lacs as collateral security in five equal instalments by cheque or Bank Draft in favour of the company and after encashing the first cheque or draft the company would then initiate to fulfil the obligation by providing a formal agreement for indenting agency in favour of the complainant. In terms of the aforesaid agreement complainant issued five undated cheques worth Rs. five lacs each in favour of the company by way of collateral securities. In spite of there being no written confirmation from the complainant, the employees of the company in conspiracy with each other, inserted the dates in the cheques and submitted for encashment in the Bank. First cheque was encashed. Second cheque was returned back by the Bank. Complainant sent a written protest dated 9.5.2001 and demanded back the remaining cheques which was not complied with by the officers of the company. Complainant had to instruct the Bankers to stop the payment. Copy of the same letter was sent to the company which was received by it. In spite of having encashed the first cheque, the company did not take any step for initiating indenting agency in favour of the complainant nor returned the said amount to the complainant.

10-B. The learned Magistrate took cognizance against the company and its employees. Feeling aggrieved company filed petition u/s 482 of Cr. P.C. for quashing of the complaint on the ground that the cheques were issued by the

complainant for collateral security. When the cheques were not encashed, demand notice was sent and when the payment was not made by the complainant, company filed a complaint u/s 138 of the Act in the Court of Metropolitan Magistrate Bombay in the year 2001. Impugning this complaint u/s 138 of the Act one writ petition was filed by the complainant quashing the same but the same was rejected on 14.6.2002. No further step was taken by the complainant in that regard. The complainant concealed this fact of dismissal of the writ petition in his subsequent complaint filed against the company. In these facts the learned Judge of Kolkata High Court has observed that the petition of complainant does not contain elements of cheating. It is evident that the complainant filed the complaint in Court suppressing material facts of pending criminal proceedings u/s 138 of the Negotiable Instruments Act and dismissal of writ petition. If the complainant disclosed all the facts and did not suppress material facts the learned Magistrate would have been definitely cautious before issuing process.

10-C. It is clear, therefore that the complainant came to the Court not with clean hands and suppressed material facts which were very vital. Filing of complaint suppressing vital and material facts in this matter amounts to abuse of process of law. The complainant in the capacity of an accused in the aforesaid two complaint cases u/s 138 of the Negotiable Instruments Act can lead evidence to rebut the presumption and can establish his case that the cheques paid by it to company were not for discharge of any liability or debt but, the cheques were issued only as collateral security for the purpose of renewal of indenting agency. The learned Judge quashed the complaint comparing the facts of this case with the case in hand, an omission of those facts, constituting criminal liability appears in this case as existed in the instant case and highlighted in para 9 hereinabove.

11. Vide following order, the learned Magistrate took cognizance against the aforementioned four accused persons for the offence punishable under Sections 406 and 409 of IPC. The relevant extract goes as under:

ifjoknh vf/koDrk ds iath;u ij rdZ lqus x;s A

ifjoknh eSIIZ ef.k ,xzks e"khujh }kjk izksijkbVj ef.k izdk"k "kekZ iq= Jh ijekuan "kekZ] LVs"ku jksM+] nfr;k }kjk izLrqr ifjokn i=] ifjoknh ef.k izdk"k "kekZ ds / kkjk 200 n-iz-la- ,oa ifjoknh lk{kh tkudh izlkn dh /kkjk 202 n-iza-la- vUrZxr djks; x;s dFku] ifjoknh }kjk izLrqr nLrkostks dk xaHkhjrkiwoZd v/;;u fd;k x;k A ifjoknh o mlds lk{kh }kjk vius dFku ls ifjokn i=] ifjoknh o mlds lk{kh ds dFku rFkk layXu nLrkostks ds voyksdu ls izFke n`f"V esa rFkkdfFkr vfHk;qDr Jherh efYydk Jhfuoklu ?,e-Mh-? eSIIZ vk;"kj fyfeVsM+] Iyku ua- 1 lsDVj Mh- baMfLV;y ,fj;k] eaM+h nhi] Hkksiky] 2- jktho "kekZ] jhtuy eSustj eSIIZ vk;"kj fyfeVsM] 3- lquhy igy] ,fj;k eSustj eSIIZ vk;"kj fyfeVsM+] 4- lehj xxZ] ,fj;k eSustj] eSIIZ vk;"kj fyfeVsM+] Iykv ua- 1 lsDVj Mh] baMfLV;y ,fj;k eaM+h nhi Hkksiky ?e,-? ds }kjk Hkk-n-fo- dh /kkjk 406 rFkk 409 ds varxrZ vij/k ?kfVr fd;k tkuk ik;k tkrk gS A blfy, mDr vij/k esa laKku fy;k tkdj vfHk;qDr cuk;k tkrk gS A ;g ifjokn i= bl

U;k;ky; dh ewy vkijkf/kd iath es ntZ fd;k tkos A

vfHk;qDr dks tfj;s fxjrkjh okjaV ryc fd;k tkos A

12. It is rightly argued by Mr. Tanka that it is not a speaking order, as per the mandate of the Apex Court in para 28 of the judgment in the case of Pepsi Foods Ltd. (supra). As observed by the Apex Court that, the order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of the allegations made in the complaint and the offence both oral and documentary in support thereof and would that be sufficient for complainant to succeed in bringing charge framed to the accused. Although, it is mentioned by the learned Magistrate in the impugned order that he has deeply considered the facts and the evidence of the case yet nothing than short appears in the order. Mentioning few lines indicating the facts, supported by evidence orally/documentary with regard to the alleged offence is also required. It ought to have been mentioned that in what way the offence u/s 406 or 409 of IPC is made out. The mandate of the Apex Court is always to be kept in mind and is to be complied with by all the subordinate Courts in the country. In future the compliance is expected from the learned Magistrate.

13. Issuance of warrant of arrest at the first instance against the accused vide order dated 20.4.2007 in complaint case, has also been objected by Mr. Tanka. With regard to this contention, the alleged offences are being punishable for a period of three years and upwards. As defined in Section 3(x) of Cr. P.C. these are the warrant cases. As provided by Section 204(1)(b) of Cr. P.C., while taking cognizance under these offences, a Magistrate can issue a warrant against accused persons. In view of this, issuance of warrant against the accused legally does not appear erroneous.

14. On perusal of the averment in the complaint, as per the complainant nonpayment of his dues amounting to Rs. 18,70,386.44, the accused have committed criminal breach of trust. On perusal of the averment as averred in the complaint it appears that this amount is due out of the commercial transaction. There is a dispute between the parties, as to what amount is due and on which of the parties by way of this commercial transaction. Although in written arguments in para 21 the complainant has mentioned that an amount of Rs. 15 lacs was entrusted to the company yet averments on this point are missing in the complaint. As per arbitration Clause 24 of the agreement, all disputes arising out of the agreement will be referred to the arbitration and accordingly application u/s 11 of the Arbitration Act has been filed by the complainant. More or less the same allegation is there in the complaint. Except the act of the accused persons as mentioned in para 9 hereinabove, no other act constitutes any criminal liability for which the investigation is pending. Rest of the dispute can very well be settled in arbitration proceedings. In view of this, the criminal case No. 682/07 based on a private complaint deserves to be quashed.

15. It is true that with regard to the time of handing over the blank cheques, as well as the cheques were signed or not there appears no uniformity in the stands of the complainant. As argued by Mr. Sharma on notice Annexure P/8 that has been wrongly typed as 20.5.2006 instead of 20.7.2007. All these points are not very material on which the investigation pending for a cognizable offence can be quashed. These variance can be considered by the appropriate Forum at the appropriate time.

16. To sum up:

A. M. Cr. C. No. 148/07 which is arising out of criminal proceedings based on FIR, involves the following questions to be investigated-

(i) As to at what point of time the cheque in question bearing No. 533555 was handed over by the complainant to the accused/company?

(ii) As to who, the complainant or the accused, filled it?

(iii) As to whether the signatures of the complainant are forged or true?

These points need investigation. Time of cheque can be ascertained from Bank record, as to at what time the cheque book of the series of cheque in question was supplied to the complainant. About hand writing and signatures, opinion of hand writing expert can be obtained. That apart, other evidence also can be collected. If the challan is filed after investigation, based on not legal or insufficient evidence as per the accused, then in that case accused will be at liberty to impugn the same, before the competent legal Forum, including this Court u/s 482 of Cr. P.C, if advised and required. Quashing this criminal proceeding the FIR and investigation at this stage, considering the points involved, does not appear justified. Hence, the M. Cr. C. No. 148/07 is dismissed.

B. As argued on behalf of the complainant, the case based on complaint is not based on the dispute of cheque in question, but on the dispute of amount due which includes the amount of incentive also-it covers by the arbitration proceedings being a commercial transaction and on the basis of observation in the case of Escorts Yamaiia Motors Ltd. (supra)-it deserves to be quashed. Consequently, M. Cr. C. No. 2991/07 is allowed and criminal proceeding based on criminal case No. 682/07 pending in the Court of CJM, Datia is quashed.