
(2010) 05 KAR CK 0026
In the Karnataka High Court
Case No : Criminal P. No. 1891 of 2006

Mr. Behram Bomanji Dubash and Others	APPELLANT
Vs	
The State of Karnataka	RESPONDENT

Date of Decision : 25-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 482
Penal Code, 1860 (IPC) — Section 34, 418, 420

Citation : (2010) CriLJ 3963 : (2010) ILR (Kar) 5190 : (2011) 6 RCR(Criminal) 178

Hon'ble Judges : K.N. Keshavanarayana, J

Bench : Single Bench

Advocate : Amit Desai and B.N. Jayadeva, in Criminal P. No. 1891/2006, C.H. Jadhav and P. Prasanna Kumar, in Criminal P. No. 4069/2006 and 3893/2007 and C. Pattabi Raman, in Criminal P. No. 3618/2007, for the Appellant; B. Balakrishna, HCGP for R1 in CrI. P. Nos. 1891 and 4069 of 2006, 3892 and 3618 of 2007, for the Respondent

Final Decision : Allowed

Judgement

K.N. Keshavanarayana, J.—In all these petitions filed u/s 482 of Code of Criminal Procedure (for short "the Code") the respective petitioners who have been arraigned as accused persons in C.C. No. 20672/2003 on the file of the 5th Addl. C.M.M. Bangalore, have sought for quashing the said criminal proceedings launched against them. As these petitions relate to one and the same criminal proceedings in C.C. No. 20672/2003 and since common questions of fact and law arise for consideration, all these petitions were heard together and are being disposed of by this common order.

2. Petitioners 1 to 5 in Criminal Petition No. 1891/2006 have been arraigned as accused Nos. 1, 2, 4, 5 and 6 respectively, petitioner in CrI.P. No. 4069/06 has been arraigned as accused No. 8, petitioner in CrI.P. No. 3892/07 has been arraigned as accused No. 7, while the petitioner in CrI.P. 3618/07 has been arraigned as accused No. 3 in the charge sheet filed by the Assistant

Commissioner of Police, F and M Squad, CCB. N.T. Pet, Bangalore alleging offences punishable under Sections 418 and 420 r/w 34 IPC.

3. Scarlet Flowers and Agritech Ltd. (for short "Scarlet"), a public limited company having its registered office at No. 6-1-71, Lakdi-ka-pul, Hyderabad, A.P. and Corporate Office at No. 284. II Main, J.P. Nagar III Phase, Bangalore was the complainant before the Police and it has been arraigned as respondent No. 2 to these petitions. The petitioners herein are stated to be the Chairman, Directors and officials of Oriental Floratech India Ltd. (for short "Oriental"), a public limited company having its registered office at II floor, Darabshaw house, Ballard Estate, Mumbai.

4. Facts leading to the presentation of these petitions are as under:

Oriental was engaged in floriculture consultancy, plant propagation activities, and supply of planting materials to various floricultural companies and grower's. The activity of the Scarlet was floriculture namely growing and export of fresh cut roses. Some time during the year 1994, Scarlet conceived a project for growing the roses and to export the same to overseas countries. According to Scarlet in a seminar on floricultural industry held during the month of July-August 1994 in Bangalore City, accused No. 1 (R.R. Bhinge) being the Director of Oriental and other staff members met Smt. G. Avanija Reddy, the Managing Director and G. Rajashekar Reddy, Director (CWs.1 and 2) of Scarlet and represented to them that Oriental is the authorised representative / agent for major rose breeders of the world namely (1) De Ruiters New Roses International B.V. (2) Terra Nigra b.v. and (3) W. Qordes Sohne and that Oriental is having marketing expertise and practical experience in various aspects of rose production in Indian climatic conditions. It is thereafter CWs.1 and 2 stated to have formed the company "Scarlet; and after negotiations a Memorandum of Understanding (for short "MOU") dated 21.12.1994 was entered into between Oriental and Scarlet for consultancy assistance for the implementation of the project of floriculture by Scarlet. Under the said MOU among other things it was agreed that Oriental should provide all assistance and co-operation in procuring the planting material for the purpose of the project either by procuring the same from its own propagation facilities or sourcing the same from elsewhere. The duration of the said consultancy agreement was from the date of the execution of the agreement and until the first export of cut flowers by Scarlet or 31.3.1996, whichever is earlier. However, the agreement provided for extension of the period by one calendar year from the first export date on mutually agreed terms. For the consultancy services to be provided by Oriental, Scarlet was required to pay one time fee of Rs. 20 lakhs at different stages as mentioned in the agreement. Thereafter, Oriental sent report on variety port folio to Scarlet along with its letter dated 29.12.1994 for floricultural project of Scarlet in 4-hectare area. According to Oriental, for 4 hectare project Scarlet required 2,80,000 plants and the price of each plant at the nursery of the Oriental was Rs. 58/-per plant inclusive of royalty. Oriental informed Scarlet that out of 8 varieties

recommended in its report to Scarlet, they could supply Scarlet only 5 varieties namely Kiss, Vivaldi, Tineke, First Red and Aalsmeer Gold for June, 1995 planting and other varieties namely Aarupa, Dallas, Cardinal for November or December planting. Oriental required Scarlet to confirm the orders at the earliest. Though Scarlet initially thought of implementing the project in an area of 4 hectares, at the first instance they started in an area of 1 hectare which was later extended by another 1 hectare. As per the terms and conditions of the MOU, Oriental provided the technical support to Scarlet for implementation of the project and also supplied planting materials as per the orders placed by Scarlet and Scarlet made payments to Oriental as per the bills raised. However, according to Scarlet there was some delay in supply of plants by Oriental and the quality of planting material supplied was also very poor, which resulted in high mortality of plants. On account of this. Scarlet went on insisting Oriental to refund Rs. 10 lakhs which was paid by them as advance for the second hectare but the same was not agreed to by Oriental and therefore Scarlet was compelled to place orders for planting materials for the second hectare also. According to Scarlet, the quality of planting materials supplied even for the 2nd hectare was poor, as a result Scarlet suffered great loss. When the roses were ready for cutting and exporting, Scarlet called upon Oriental to send grower's certificate, to enable export of flowers, as, without grower's certificate from the original propagator, export of roses to overseas countries was not possible and the roses exported without the grower's certificate was liable for confiscation and the exporter was exposed for criminal action. However Oriental did not send the grower's certificate in respect of two varieties namely Tineke and First Red while in respect of other varieties grower's certificates were sent. During October 1997, in a flower exhibition called Flora 1997 held in Bangalore, CWs.1 and 2 met one Piter Stroppe of Terra Nigra Holland who are the breeders of First Red variety and learnt that Oriental is not a licensed propagator of Terra Nigra varieties and that Terra Nigra is contemplating to initiate legal action against Oriental. Subsequently, Scarlet also came to know that even in respect of Tineke variety Oriental is not a licensed propagator and in spite of the same Oriental has received from Scarlet the value of the plants inclusive of royalty and has failed to pay the royalty to the propagator. On account of this, differences arose between Scarlet and Oriental. Scarlet made claims against Oriental for refund of amount and also the loss stated to have been incurred by them on account of non supply of grower's certificate in respect of Tineke and First Red varieties. According to Scarlet their demand was not complied with and Scarlet was of the opinion that the Chairman, Directors and officials of Oriental by misrepresenting that they are authorised propagators of Tineke and First Red varieties of roses, induced CWs. 1 and 2 to part with money and thereby Oriental has cheated Scarlet. It is in this background CW.1-G. Avanija Reddy, Managing Director of Scarlet filed a complaint before J.P. Nagar Police, Bangalore on 3.11.1999 against Oriental and Mr. Behram Bomanji Dubash (accused No. 1), Chairman of Oriental, Mr. R.R. Bhinge (accused No. 2), Mr. Phendse (accused No. 3), Directors of Oriental, Mr. P.B. Karyekar (accused No. 7), Company Secretary of Oriental and Mr. J.K. Rana

(accused No. 8), authorised representative of Oriental, alleging offences punishable under Sections 409, 418 and 420 IPC. Based on the said complaint, J.P. Nagar Police registered the case in Crime No. 633/99 for the aforesaid offences and submitted FIR to the jurisdictional Magistrate. After investigation, the Police Inspector of J.P. Nagar Police Station filed charge sheet some time during May 2001 against six persons namely the Chairman, two Directors, the Company Secretary, the authorised representative and the Chief Executive Officer of Oriental for the aforesaid offences. The learned Magistrate by order dated 7.7.2001, took cognizance of the offences alleged in the charge sheet and directed issuance of summons to the persons named as accused therein. After coming to know of the learned Magistrate taking cognizance and ordering issue of summons, two of the accused persons namely R.R. Bhinge and Behram B. Dubash filed petitions u/s 482 of the Code before this Court in CrI.P. Nos. 245 and 246 of 2003 and sought quashing of the proceedings on various grounds. To the said petitions, the complainant Smt. Avanija Reddy was also arraigned as respondent No. 2. This Court after hearing both sides, by order dated 31.3.2003, allowed those petitions. This Court held that the investigation was perfunctory and there was no proper investigation as such the final report submitted cannot be called as a final report in the eye of law. This Court also pointed out several infirmities in the investigation and therefore this Court set aside the order passed by the learned Magistrate taking cognizance and directed Commissioner of Police, Bangalore City to entrust the investigation of the case to a Senior Police Officer not below the rank of a Assistant Commissioner of Police or to entrust the investigation to any special investigating agency like CCB or COD and to submit final report within a period of 6 months from the date of the said order. The accused were directed to assist the investigation and to appear before the IO. Thereafter the investigation was entrusted to Assistant Commissioner of Police, CCB who after conducting further investigation ultimately filed fresh charge sheet on 19.11.2003 for the offences punishable u/s 418 and 420 r/w 34 IPC against the petitioners herein. The learned Magistrate on receipt of the charge sheet, by order dated 20/12/2003, took cognizance of the offence alleged and directed issue of summons to the petitioners herein. After coming to know of filing of fresh Charge sheet and the learned Magistrate taking cognizance and issuing summons, the petitioners presented these petitions u/s 482 of the Code seeking to quash the criminal prosecution launched against them. Inter alia on the ground that the order dated 20.12.2003 passed by the learned Magistrate taking cognizance and issuing summons against the petitioners is bad in law, inasmuch as the learned Magistrate has mechanically passed the order without application of judicious mind to the materials produced along with the final report; that the learned Magistrate has failed to see that even if the entire evidence collected during the investigation produced along with the final report are accepted at its face value, no case is made out against the petitioners for any of the offences alleged; that the learned Magistrate has failed to see that the complainant has tried to convert a civil dispute into a criminal liability, and it is abuse of process of the court as such continuance of the criminal prosecution results in

miscarriage of justice and in order to prevent abuse of process of the court, it is just and necessary for this Court to quash the proceedings in exercise of jurisdiction u/s 482 of the Code.

5. Upon service of notice of this petition, complainant - Scarlet has appeared through its counsel while the State is represented by Additional Government Pleader.

6. I have heard Sri. Ameet Desai, learned Senior Counsel for petitioners in Crl.P. No. 1891/2006, Sri. C.H. Jadav, Advocate appearing for petitioners in Crl.P. Nos. 4069/06 and 3892/07 and Sri. Pattabiraman. Advocate appearing for petitioners in Crl.P. No. 3618/07 and also Sri. S. Mahesh, Advocate appearing for complainant / respondent No. 2 and Sri. Balakrishna Additional Government Pleader appearing for respondent No. 1 - State.

7. Sri. Ameet Desai, learned Senior Counsel would submit as under:

(i) The entire dispute is a commercial dispute and the criminal complaint filed on 3.11.1999 by Scarlet nearly one year after Scarlet accepting amount of Rs. 92,515/- in full and final settlement of all its claims in the month of November 1998 itself was an attempt to coerce Oriental to pay some more money and thus Scarlet has tried to convert a civil dispute into a criminal liability:

(ii) Even from the evidence collected during the investigation and produced along with the final report, it is clear that Oriental had a license from De RUITERS New Roses International B.V. in respect of First Red variety as per propagation contract signed at Hazerswoude on 11.3.1994 and at Bombay on 3.9.1994 and thus as on 21.12.1994, the date on which the MOU was entered into between the parties and the letter dated 29.12.1994 from Oriental to Scarlet, in respect of First Red variety Oriental was a licensed propagator, as such, it cannot be said that Oriental has made any false representation to the Scarlet with an intention to cheat. Some commercial disputes regarding payment of royalty between De Ruiters New Roses International B.V. and Oriental which was ultimately settled in the early part of year 2000 by itself cannot be a ground to come to prima facie conclusion that Oriental had no authority to propagate First Red variety of roses.

(iii) In respect of Tineke variety, Oriental had permission as per letter dated 29.6.1994 from Terra Nigra b.v. a copy of which letter is enclosed to the charge sheet and thus, as on the date of the MOU, Oriental had license even in respect of Tineke as such Oriental had a right to propagate both First Red and Tineke varieties of roses, therefore, the ingredients of Section 415 of IPC which is punishable u/s 420 of IPC are not made out.

(iv) The learned Magistrate without applying his judicious mind to the materials collected during investigation by the IO and produced along with the charge sheet, has mechanically taken cognizance and even without forming an opinion as to whether or not the materials placed on record makes out a case for the offences alleged against the accused persons, has directed issue of summons.

(v) Materials produced along with the charge sheet would indicate that Scarlet started with claim of Rs. 13 lakhs and odd but later scaled down its claim to Rs. 3 lakhs and odd and ultimately accepted Rs. 92,515/- from Oriental in full and final settlement of all its claims and later with a view to coerce Oriental to pay some more money, Scarlet has filed false complaint by converting a commercial dispute into a criminal action.

(vi) The entire dispute between Scarlet and Oriental as could be seen from long correspondences was only with regard to refund of royalty said to have been paid by Scarlet to Oriental on account of failure on the part of Oriental to provide grower's certificate in respect of Tineke and First Red varieties and though the dispute was settled in November 1998 itself by Scarlet accepting Rs. 92,515/- in full and final settlement of all its claims, about 1 year later a frivolous complaint came to be filed alleging misrepresentation and inducement on the part of Oriental with an intention to cheat Scarlet. Though materials produced along with the charge sheet did not make out any case, the learned Magistrate without application of mind has taken cognizance and ordered issue of summons as such the said order is illegal and therefore the proceedings are liable to be quashed.

(vii) Averments in the complaint against petitioners 2 to 5 in CrI.P. No. 1891/2006 are bald as such it does not make out any offence against them. The only basis for implicating petitioners 3 to 5 who have been arraigned as accused 4 to 6 is the further statement of CW.1 u/s 161 of Cr.P.C. wherein it is merely stated that the accused 4 to 6 as Directors of Oriental are also liable to be prosecuted and in the said statement no overt acts are attributed against those accused persons and in spite of the same, the learned Magistrate has directed issue of summons against them also. In respect of accused No. 1 Mr. Behram Bomanji Dubash, absolutely there is nothing on record to show that in December 1994 he was involved in alleged false representation and with regard to accused No. 2 is concerned, the basis is only the alleged statement of CW.1 said to have been made on 4.9.2003. Thus no offence is made out against any of the petitioners in CrI. P. No. 1891/06.

(viii) As the transaction was between two public limited companies, no offence could be alleged against the Managing Director, Director, or the employees of the public limited company in respect of any alleged offence by the company, as, in respect of IPC offences there is no vicarious liability as such the cognizance taken by the learned Magistrate against the Chairman, Directors and the officials of Oriental in respect of the alleged offence said to have been committed by Oriental is bad in law.

(ix) As Oriental has not been arraigned as an accused, the learned Magistrate could not have taken cognizance against the functionaries of Oriental in respect of offence punishable under Sections 418 and 420 r/w 34 of IPC. Therefore, the learned Senior Counsel sought for quashing of the proceedings. In support of his submissions, learned Senior Counsel placed reliance on several decisions of the Apex Court and this Court.

14. Sri. C.H. Jadav, Learned Counsel for the petitioners in Crl.P. Nos. 4069/06 and 3892/07 apart from adopting the arguments of learned Senior Counsel, submitted that both the petitioners are employees of Oriental and they were not parties to the MOU and no allegation has been made against them in the complaint as such there were no materials to make out any case against them for the offence punishable u/s 420 of IPC as such the order taking cognizance and issuing summons against these petitioners is a clear case of abuse of process of the court and the law.

15. Sri. C. Pattabiraman, Learned Counsel appearing for petitioners in Crl.P. No. 3618/07 contended that this petitioner is only a Director of Oriental and no specific overt act is alleged against him nor he was a signatory to MOU and absolutely there was no allegation against this petitioner to the effect that at any stage he had in any way made false representation with an intention to induce the complainant and thereby to cheat Scarlet, as such the ingredients of Section 420 IPC not even prima facie established therefore the prosecution is liable to be quashed.

16. Sri. S. Mahesh, Learned Counsel for respondent No. 2 fairly submitted that against the Directors of the Company the complainant may not have a good case but as against the Company and its Managing Director as well as CEO, prima facie case has been made out as such there is no ground for quashing the proceedings. It is his further submission that root cause for the complaint was non-production of grower's certificate by the accused in respect of Tineke and First Red varieties and the accused were under an obligation to secure the same from the propagators as without grower's certificate, complainant could not export the roses to overseas countries as it would expose the exporter to criminal action. It is his further submission that, in the letter dated 29.12.1994 from Oriental to Scarlet, there is a clear indication of representation by the accused to the complainant that they are authorised propagators and that the value of the plants supplied would include royalty. The undisputed fact that Oriental failed to secure grower's certificate to Scarlet from the propagators and since Oriental went on representing that they are the licensed propagators of Tineke and First Red varieties of roses and on the strength of such representation Oriental received payments from Scarlet including royalty, prima facie offence u/s 420 of IPC is made out and the order of the learned Magistrate taking cognizance and directing issue of summons has not resulted in any illegality or irregularity as such there are no grounds to quash the proceedings, therefore, he sought for dismissal of (sic)

17. In the light of the submissions of both sides and having regard to facts and circumstances of the case, the point that arise for consideration is,

Whether in the facts and circumstances of the case, exercise of power u/s 482 of Cr.P.C. to quash criminal prosecution launched against the petitioners is warranted?

18. It is well settled principle of law that criminal prosecution gets commenced when the Magistrate acting u/s 190(1) of the Code takes cognizance under any one of the Clauses (a)(b) and (c) thereunder. In Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, it has been ruled that summoning of an accused person in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course.

19. Though the expression "taking cognizance" is not defined under the Code, the said expression has come up for interpretation before the Apex Court and various High Courts in the country in several cases.

20. In Darshan Singh Ram Kishan Vs. The State of Maharashtra, , while considering the purport of Section 190 of the Code, it has been observed thus,

Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer.

21. In Narayandas Bhagwandas Madhavdas Vs. The State of West Bengal, , the Apex Court while considering the case in which the Magistrate had taken cognizance of offences as per Section 190(1)(a) of the code has observed that,

There is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action.

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What Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations.

22. In Kishun Singh and Others Vs. State of Bihar, , it has been held that,

When the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender, he is said to have taken cognizance of the offence.

23. In State of West Bengal and another Vs. Mohammed Khalid and others, the Apex Court after taking note of the fact that the expression "taking cognizance" has not been defined in the Code has held thus in para 43,

In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in

respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word "cognizance" indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

24. After referring to all the above decisions, the Apex Court in the case of State of Karnataka and Another Vs. Pastor P. Raju, has observed thus in para 13:

13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out.

25. As held in Tula Ram and Others Vs. Kishore Singh, ; in State of Bihar and Another Vs. P.P. Sharma, IAS and Another, ; and in State of Maharashtra Vs. Sharadchandra Vinayak Dongre and Others, , it is only upon consideration of the materials submitted along with the final report u/s 173 of the Code, and satisfying himself that the prima facie case is made out, the Magistrate empowered to take cognizance as per Section 190(1)(b) of the Code takes cognizance of the offences alleged and proceeds to take further steps for issue of process to the accused persons, then only proceedings in a criminal case stand commenced. Therefore, taking cognizance of the offences alleged on application of judicial mind is a condition precedent for proceeding with the criminal prosecution against any person, and as a corollary if cognizance of the offence is not taken in accordance with law, certainly criminal prosecution cannot be proceeded with.

26. In Pepsi Foods Ltd.'s case referred to supra, the Apex Court has observed 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.

27. In Devendra and Others Vs. State of U.P. and Another, , it has been held that it is obligatory on the part of the Magistrate to apply his mind to the contents of the charge sheet, and such application of mind on his part should be reflected in the order.

28. On perusal of the certified copy of the order sheet maintained by the Magistrate in C.C. No. 20672/2003 indicates that after the IO submitted the fresh charge sheet, on 20.12.2003 the office placed the same before the learned Magistrate with an office note and the learned Magistrate passed the order thereon. The notings in the order sheet reads as under:

20.12.03. Charge sheet filed by the A.C.P. of police C.C.B.F. and M. (J.P. Nagar P.S.) Through senior A.P.P. as against the accused for an offence punishable u/s 418-420 r/w 34 IPC.

Original F.I.R. in Cr. No. 633/99 and complaint, charge sheet and connected papers are hereby checked.

A-1 is on anticipatory bail of Sessions Court-9th.

A-2 is on bail of 5thACMM.

Accused 3 and 7 are on police bail.

A5, 6 and 8, 9 are absconding.

Accused copy enclosed.

For Order

Perused the records. Cognizance of the offence is taken. Register the case and issue S.S. to A-1, 2, 3 and 7, and Issue N.B.W. to A-5, 6 and 8, 9. Call on 8.1.2004.

29. As could be seen from the above, the order passed by the learned Magistrate do not in so many words reflect the application of judicious mind to the materials produced by the IO along with the charge sheet except the learned Magistrate stating that he has perused the records. The order does not reflect as to whether the learned Magistrate was satisfied about the existence of prima facie case. Though in the charge sheet offences punishable under Sections 418 and 420 r/w 34 IPC are mentioned, the order of the learned Magistrate do not specifically indicate as to in respect of which offence he has taken the cognizance as the learned Magistrate has indicated that he has taken cognizance of the offence and not the offences.

30. u/s 418 of IPC who ever cheats with the knowledge that is likely thereby to cause wrongful loss to the person whose interest in the transaction to which the cheating relates he was bound either by law or by legal contract to protect, shall be punished with imprisonment or fine or with both. Section 420 of IPC is the punishing Section for cheating. Section 415 IPC defines "cheating" and it reads 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 fact is a deception with the meaning of this section

Section 420 of IPC reads as under:

420. Cheating and dishonestly inducing delivery of property

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

Thus Section 415 of IPC requires,

(1) deception of any person

(2)(a) fraudulently or dishonestly inducing that person

(i) to deliver any property to any person

(ii) to consent that any person shall retain any property

(b) Intentionally inducing that person to do or omit to anything which he would, not do or omit 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.

31. In the case of Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another, Apex Court, while considering the requirement of Section 415 of IPC, has held thus in paras 14 and 15;

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up

promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

The said principle has been reiterated in *Indian Oil Corporation Vs. NEPC India Ltd. and Others*, : in *Veer Prakash Sharma v. Anil Kumar Agarwal* 2007 AIR SCW 4816 and in *Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others*, .

32. Now by catena of decisions of the Supreme Court, the principles relating to exercise of jurisdiction u/s 482 of the Code to quash the complaint or criminal proceedings are well settled. According to these principles a criminal proceedings can be quashed if the materials placed before the Court along with the final report submitted u/s 173 of the Code, even accepting as true and correct at its face value, does not constitute any offence alleged or make out the case alleged against the accused. Proceedings may also be quashed where it is a clear abuse of the process of the court, or when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

33. *R.P. Kapur Vs. The State of Punjab*, the Apex Court while considering the scope of Section 561-A of the old Code which corresponds to Section 482 of the present Code has held that the inherent jurisdiction of the High Court can be exercised to quash the proceedings in a proper case either to prevent abuse of process of any court or otherwise to secure ends of justice. The Apex Court in the said decision has set out certain categories of cases where the inherent jurisdiction to quash the proceedings can and should be exercised. One of the categories of the cases enumerated thereunder is:

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

34. In the case of *State of Karnataka v. L. Muniswamy* 1977 (2) SCC 169 the Apex Court while considering the scope of Section 482 of the Code has observed thus in para 7:

7. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of

justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.

35. In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , the Apex Court while considering the scope of Section 482 of the Code and Article 226 of the Constitution of India and after referring to several decisions on the point has set out the categories of cases in which the High Court may interfere in exercise of powers under Article 226 of the Constitution of India or Section 482 of the Code in respect of proceedings relating to cognizable offences to prevent abuse of process of any Court or to secure ends of justice as under:

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute an offence or make out a case against the accused.

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

4) xxxx

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

36. In *Indian Oil Corporation Vs. NEPC India Ltd. and Others*, , the Apex Court after referring to its several earlier decisions on the point has set out the relevant principles to be borne in mind by the Courts while exercising jurisdiction u/s 482 of Cr.P.C. Those relevant principles as enumerated by the Apex Court in this decision read as under:

9. The principles relating to exercise of jurisdiction u/s 482 of the Cr.P.C. to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few [xxx xxx xxx xxx xxx] The principles, relevant to our purpose are:

10 A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations, Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint is warranted while examining

prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) 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 of 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, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

37. In Bajanlal's case and in few other subsequent decisions, the Apex Court had observed that the power u/s 482 of the Code should be exercised sparingly and that too in the rarest of rare cases. However, in *Som Mittal v. Government of Karnataka* the issue as to whether the expression "the rarest of rare cases" is appropriate while exercising power u/s 482 of Cr.P.C. arose for consideration and since there was difference of opinion among the learned Judges constituting the Bench, the matter was referred to a larger Bench. The larger Bench of the Apex Court answered the said issue observing in its judgment which is reported in *Som Mittal Vs. Government of Karnataka*, thus:

9. When the words "rarest of rare cases" are used after the words "sparingly and with circumspection" while describing the scope of Section 482, those words merely emphasise and reiterate what is intended to be conveyed by the words "sparingly and with circumspection". They mean that the power u/s 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences u/s 302 IPC, but to emphasise that the power u/s 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with

circumspection. Judgments are not to be construed as statues. Nor words or phrases in judgments to be interpreted like provisions of a statue. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasising a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation.

In para 8 of the said decision, Their Lordships observed that quashing of complaint or criminal proceedings u/s 482 of Cr.P.C. depends on fact and circumstances of each case. Their Lordships have also noticed the various categories of cases where power u/s 482 of Cr.P.C. can be exercised to prevent abuse of process of any Court and to secure ends of justice as stated in Bajanlal's case.

38. Keeping the aforesaid principles of law in mind, I have perused the copies of the charge sheet papers made available to find out as to whether the present case warrants interference of this Court in exercise of power u/s 482 of Cr.P.C. If the present case is considered on the touch stone of the principles laid down by the Apex Court in the aforesaid decisions, in my considered opinion, the interference of this Court u/s 482 of the Code is warranted as the ingredients of offence of cheating punishable u/s 420 of IPC and u/s 418 has not been made out.

39. It is an undisputed fact that Oriental and Scarlet entered into an MOU on 21.12.1994 whereunder Oriental agreed to render consultancy and advisory Services to Scarlet for its floriculture project, among other areas, in respect of site selection and development, preparation of project feasibility report, selection of varieties, know how relating to facilities and equipment, know how relating to cultivation practices of cut roses, support during project implementation etc. A copy of the said MOU collected by the IO during investigation has been produced along with the charge sheet. Though as per Clause (7) in Article 1 of MOU Oriental agreed to provide all assistance and cooperation in procuring planting materials for the purpose of project either by procuring the same from its own propagation facilities or sourcing the same from elsewhere, there is no indication in the MOU that Oriental made any representation that it is the authorised propagator of any varieties of roses. The MOU also do not refer to the alleged representation or assurances said to have been made by accused No. 2 and the other staff members of Oriental to CWs.1 and 2 in the Seminar stated to have been held in July -August 1994 with regard to Oriental being pioneer in the floricultural industry and it being an authorised representative / agents for major rose breeders of the world. From the perusal of the entire charge sheet papers it is noticed that the opinion formed by the IO in the charge sheet in this behalf is based on the statements said to have been made by CWs.1 and 2 u/s 161 of the Code during investigation. In the written complaint lodged on 3.11.1999, there is no reference to the alleged assurances said to have been made by accused No. 2

and other staff members of Oriental in the seminar. No doubt, as could be seen from the contents of the letter 29.12.1994 from Oriental to Scarlet, a copy of which is produced along with the charge sheet, the Oriental has indicated its preparedness to supply rose plants of different varieties at a cost of Rs. 58/- per plant inclusive of royalty. As per this letter, they offered to supply different varieties of rose plants such as Kiss, Vivaldi, First Red, Aslmeer. Even in this letter, there is no indication that Oriental had made any representation to Scarlet that it is authorised representative or agent of the propagator of the aforesaid varieties of roses. Of course these varieties of roses cannot be exported to the overseas countries unless the exporter has been issued with grower's certificate from the propagator of these varieties or its authorised representative. As Oriental had offered to supply the aforesaid varieties of rose plants at a cost of Rs. 58/- per plant inclusive of royalty, the Oriental was under an obligation to secure the grower's certificate to the Scarlet in respect of these varieties from the propagators or its authorised representative. However, mere failure on the part of Oriental to secure the grower's certificate by itself cannot give rise to criminal prosecution for cheating unless a fraudulent or dishonest intention is shown right at the beginning of the transaction i.e., the time when the offence was stated to have been committed. It is an undisputed fact that except Tineke and First Red varieties in respect of other varieties Oriental secured grower's certificate to Scarlet. Even as per the version of Scarlet the dispute only relates to non-securing grower's certificate in respect of Tineke and First Red varieties of roses. Even if the entire materials produced by the IO along with the charge sheet is perused, prima facie it would not indicate that Oriental had at any time made any false representation to Scarlet or fraudulently and dishonestly induced Scarlet to deliver any property and thereby deceived Scarlet.

40. Assuming for the purpose of argument that the statement of CWs.1 and 2 that Accused No. 2 and other members of staff of Oriental, in the Seminar held during July - August 1994 represented that they are the authorised representatives / agents of major rose breeders of the world, is true and correct, from the materials produced along with the charge sheet itself it cannot be said that such representation was false one and was made with an intention to deceive Scarlet by inducing them to have transaction with Oriental and to part with money. There is no serious dispute that in respect of First Red variety, De Ruiters New Roses International B.V., Holland are the exclusive representatives of said variety of cut rose. As could be seen from a copy of propagation contract entered into between De Ruiters New Roses International B.V. and Oriental, a copy of which is produced along with charge sheet, Oriental has been granted with a license by De Ruiters New Roses International B.V. to reproduce several varieties of cut roses including First Red. The said agreement was signed in Hazerswoude on 11.3.1994 and at Bombay on 3.9.1994. The said license was in force until 31.12.1994 and was renewable by De Ruiters New Roses International B.V. on yearly basis.

41. In respect of Tineke variety, as per the copy of the Fax message of Terra

Nigra b.v., Holland dated 29.6.1994, a copy of which is produced along with the charge sheet, Oriental was given permission to sell Tineke variety of plants and what was left to be done by Oriental was to sign the contracts as required by Terra Nigra b.v. From the contents of this letter prima facie it is noticed that from 29.6.1994 Oriental was permitted to sell Tineke rose plants.

42. From these documents produced along with the charge sheet itself, it is clear that as on the date when accused No. 2 and other members of the staff of Oriental said to have made representation to Scarlet in the Seminar held during July - August 1994 that they are authorised representatives of various varieties of cut roses cannot be termed as a false representation. Of course, in the several correspondences copies of which are produced along with the charge sheet that some disputes arose between Oriental on the one hand and the propagators of aforesaid two varieties of roses in respect of payment of royalty and on account of that there was some delay in securing grower's certificate. However, on this basis, it cannot be said that Oriental had made false representation to Scarlet with a view to induce Scarlet to enter into a contract and thereby to cheat Scarlet. The lengthy correspondences between Oriental and Scarlet copies of which are produced along with the charge sheet, would indicate that on account of the delay in Oriental securing grower's certificate in respect of First Red and Tineke varieties of roses, Scarlet went on demanding Oriental to refund the advances paid by it and also the losses said to have been incurred by it. As per the legal notice dated 2.2.1999 issued on behalf of Scarlet to Oriental, demand was made for refund of Rs. 14,23,230/- being the amount collected towards royalty in respect of First Red and Tineke varieties as Oriental failed to secure the grower's certificate. The other correspondences indicate that Oriental had made some more claims regarding poor quality of the plants and its mortality. Subsequently Scarlet scaled down its demand to Rs. 3 lakh and odd and ultimately it appears cheque for Rs. 92,515/- was received by Scarlet in full and final settlement of its claims as could be seen from letter dated 13.11.1998 from Scarlet to Oriental. About 1 year later the complaint came to be filed. The materials produced along with the charge sheet further indicates the honest efforts made by Oriental with the propagators for securing grower's certificate in respect of Tineke and First Red varieties. Materials produced by the IO further prima facie indicates that Oriental has subsequently paid royalties due to the propagators of these two varieties of roses. Thus from the discussion made above, it is manifestly clear that the material on record do not prima facie indicate that Oriental had at any time by making false representation induced Scarlet to enter into transaction and to deliver money. There is absolutely no material on record to indicate that Oriental had dishonest intentions of cheating Scarlet and with such intention they made false representation. Therefore, there are no prima facie materials to constitute the offence of cheating as defined u/s 415 of IPC. In my considered opinion, the learned Magistrate without applying his judicious mind to these materials which are produced along with the charge sheet and without forming any opinion about the existence of a prima facie case

proceeded to take cognizance of the offence alleged and has issued summons to the petitioners herein.

43. Yet another aspect which the learned Magistrate has failed to apply his judicious mind is whether the Director and other staff of Oriental could be held vicariously liable for the aforesaid offences said to have been committed by the company. As observed by Apex Court in the case of S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, the normal rule in the cases involving criminal liability is against vicarious liability that is no one is held to be criminally liable for an act of another. Of course, this normal rule is however subject to exceptions on account of specific provisions being made in statutes extending liability to others.

44. In S.K. Alagh Vs. State of U.P. and Others, , the Apex Court while considering the question as to whether the criminal prosecution launched against the Managing Director of a company and others, for offences punishable under Sections 405 and 406 of IPC said to have been committed by a Company can be allowed to continue, has observed thus in para 16:

16. Indian Penal Code, save and except some provisions specifically providing therefore, does not contemplate any vicarious liability on the part of a party who is not charged directly for a commission of an offence.

Again in paras 19 and 20 the Court has observed thus.

19. As, admittedly, drafts were drawn in the name of the company, even if appellant was its managing director, he cannot be said to have committed an offence u/s 406 of the Indian Penal Code, 1860. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefore. In the absence of any provision laid down under the statute, a director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself (see Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, ").

(underlining is mine)

20. We may, in this regard, notice that the provisions of the Essential Commodities Act 1955, Negotiable Instruments Act, 1952 etc., have created such vicarious liability. It is interesting to note that Section 14A of the 1952 Act specifically creates an offence of criminal breach of trust in respect of the amount deducted from the employees by the company. In terms of the Explanations appended to Section 405 of the Indian Penal Code, 1860, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case failing u/s 406 of the Indian Penal Code, 1860, vicarious liability has been held to be not extendable to the directors or officers of the company (see Maksud Saiyed

v. State of Gujarat 2007 11 Scale 318).

Thus from the above it is clear that in respect of Indian Penal Code offences except to the extent provided therein, there is no application of principles of vicarious liability. In respect of offences committed by a company, there is no special provision in Indian Penal Code making the functionaries of such company vicariously liable for any of the offences committed by the company. As noticed earlier, in the complaint initially lodged by Scarlet, there was no allegation of any of the functionaries of Oriental making any false representation. Reading of the entire complaint and other materials collected during investigation do not prima facie indicate the role played by each of these petitioners as functionaries of Oriental. The transaction was between Oriental and Scarlet which are two public limited companies. In the complaint apart from the company, 5 persons were shown as accused. However, in the charge sheet subsequently filed, the Company namely Oriental Floratech India Ltd., is not arraigned as accused but only the individuals who are stated to be the Chairman, Directors and officials of Oriental have been arraigned as accused persons. In the absence of any prima facie material to indicate the individual overt acts said to have been committed by these petitioners, the learned Magistrate could not have taken cognizance of the alleged offences against these petitioners as they cannot be saddled with the criminal liability by application of principles of vicarious liability. Therefore, the order taking cognizance of the offence alleged and the order directing issue of summons to the petitioners herein is perverse and illegal and is without any basis. The learned Magistrate before summoning the petitioners to face the criminal charge has totally failed to apply his judicious mind and to form an opinion about the existence of prima facie case. The Magistrate was under an obligation to have done so before calling upon the petitioners to appear before the Court to answer the charge.

45. Perusal of the materials produced along with the charge sheet would indicate that the entire dispute between Scarlet and Oriental is a commercial dispute and Scarlet had tried to convert this commercial dispute into a criminal case. This is evident from the fact that Scarlet did file a petition before the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 49 making a huge claim against Oriental and the said petition came to be dismissed. The appeal filed before the Supreme Court against the said order came to be dismissed as withdrawn on the ground that Scarlet will take steps for appointment of an arbitrator in pursuance of the agreement. Admittedly, Scarlet did not seek appointment of arbitrator and to refer the dispute for adjudication nor any civil suit was filed to enforce the claim. In the meanwhile Scarlet had received certain payments from Oriental in full and final settlement of its claim. However not satisfied with the same, Scarlet filed a complaint about a year later alleging the offence of cheating. From this, it is manifestly clear that Scarlet had tried to convert a commercial dispute into a criminal case. Therefore, there is great force in the contention of the learned Senior Counsel appearing for the petitioners that the complaint was filed with an intention to coerce Oriental to pay some more

money. In *Indian Oil Corporation v. NEPC India Ltd.*, the Apex Court has deprecated the growing tendency of converting civil dispute to a Criminal case, as under in para 10:

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

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

46. Thus from the above it is clear that even if entire material produced along with the charge sheet are accepted at their face value and in its entirety, they do not prima facie constitute the offence punishable under Sections 418 and 420 against these petitioners and there has been an attempt by Scarlet to convert commercial dispute into a criminal case only with a view to coerce Oriental to succumb to their pressure tactics by the Scarlet.

47. In *Indira Mohan Goswamy's* case referred to supra, in para 45 the Apex Court has observed that the Courts must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ultimate motive to pressure the accused.

48. Therefore, in the light of the above discussions, I am of the opinion that no case for prosecuting the petitioners for offence under Sections 418 and 420 IPC is made out. Therefore to prevent abuse of process of the Court and to secure ends of justice it is necessary for this Court to quash the entire proceedings in exercise of its power u/s 482 of the Code. If the criminal prosecution launched is allowed to continue against the petitioners it would amount to miscarriage of justice and it amounts to perpetrating the abuse of process of the court. Therefore, I am of the considered opinion that the entire criminal proceedings launched against these petitioners are liable to quashed.

49. Accordingly, the petitions are allowed. The criminal proceedings launched against these petitioners in C.C. No. 20672/2003 on the file of the 5th Addl.

C.M.M. Bangalore, are hereby quashed.