

(2011) 10 RAJ CK 0068

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 3483 of 2011

Nav Ratan Kothari

APPELLANT

Vs

State of Raj. and Another

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Constitution of India, 1950 — Article 21, 226

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(1), 156(3), 482

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14A

Penal Code, 1860 (IPC) — Section 120B, 202, 353, 405, 406

Citation : (2012) 2 RLW 1259

Hon'ble Judges : Mahesh Chandra Sharma, J

Bench : Single Bench

Advocate : S.R. Bajwa, with V.R. Bajwa, for the Appellant; Ajay Kumar Jain and Peeyush Kumar, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Mahesh Chandra Sharma, J.—This Misc. Petition has been filed by the petitioner u/s 482 Cr.P.C. against the order dated 7.10.2011 passed by Additional Sessions Judge No. 5 Jaipur Metropolitan, Jaipur in Criminal Revision No. 11 of 2011 Nav Ratan Kothari vs. State and anr. whereby he has declined to grant stay of operation of order dated 9.9.2011 passed by Additional Chief Metropolitan Magistrate No. 4 Jaipur Metropolitan, Jaipur in Criminal Case No. 1042/2011 whereby cognizance for offence under sections 420, 409 read with section 120B IPC was taken and process was issued against the petitioner for securing his presence through arrest warrant in FIR No. 160/2010 registered at Police Station Brahmpuri Jaipur. Factual matrix of the case are that a criminal complaint was filed in the court of concerned Magistrate by the complainant Bhagwat Gaur, who is respondent No. 2 herein (in short the complainant) against the petitioner Nav Ratan Kothari and three other accused persons alleging commission of offence punishable under sections 420, 467, 471, and 120B IPC. The said criminal complaint was sent for investigation u/s 156 (3) Cr.P.C. by the concerned

Magistrate to Police Station Brahmpuri, Jaipur. In pursuance thereof a regular FIR No. 160/2010 was registered at Police Station Brahmpuri, Jaipur for offence punishable under sections 420, 467, 471 and 120B IPC, which reads as under:

2. The Police Station Brahmpuri, Jaipur prima facie found that the lease agreement in question and other documents were prepared in the office of Tourism Department, Jaipur which comes under the territorial jurisdiction of Police Station Vidhayakpuri, Jaipur City (South). In the said background, the police submitted final report for lack of territorial jurisdiction in the court of Judicial Magistrate No. 22 Jaipur City, Jaipur. The concerned Magistrate by a detailed order dated 5.7.2010 sent the case back for investigation to Police Station Brahmpuri, Jaipur. After due investigation the Investigating officer of Police Station Brahmpuri, Jaipur found that no offence was committed and a supplementary final report was submitted in the court of concerned Magistrate on 27.9.2010. Thereafter the complainant submitted a protest petition before the Magistrate on 22.10.2010. Subsequently by the order of the CJM Jaipur City, the case was transferred to the Court of Addl. Chief Judicial Magistrate No. 4 Jaipur City. The said Magistrate by way of a detailed order dated 15.12.2010, after hearing arguments on protest petition of the complainant rejected the final report submitted by the police and ordered further investigation at the hands of a senior experienced highly placed police officer. Further investigation was handed over to Additional Deputy Commissioner of Police, Jaipur (North). Thereafter again a negative final report was submitted on 14.3.2011, against which again a protest petition was submitted by the complainant on 23.4.2011. The Magistrate on the basis of material available on record, rejected the final report and by order dated 9.9.2011 taken cognizance of offence under sections 420, 409 and 120B IPC as also summoning the accused persons, including the petitioner through arrest warrant. The said order dated 9.9.2011 has been challenged in revision petition before the Sessions Judge Jaipur Metropolitan, Jaipur, which is presently pending before Additional Sessions Judge No. 5 Jaipur Metropolitan, Jaipur. The revisional court after hearing submissions of either sides on the stay application, proceeded to decline the said application for stay, by refusing to grant stay on operation of order dated 9.9.2011.

Against the order of the Addl. Sessions Judge, dated 7.10.2011 this misc. petition has been filed by the petitioner Nav Ratan Kothari.

3. Mr. S.R. Bajwa, Senior Advocate assisted by Mr. V.R. Bajwa, advocate, has contended that if the impugned order dated 7.10.2011 summoning the accused persons by arrest warrant is allowed to stand, the same would result in gross abuse of process of court and complete miscarriage of justice. He has further contended that the order of taking cognizance as also issuing process against the accused petitioner suffers from numerous legal flaws, rendering the forensic worth of the said order to nullity, hence the revisional court has gravely erred in denying stay on the operation of the said order. The revisional court, summoned the record of the trial court, which has also been ordered to be sent back after

passing of the order dated 7.10.2011. The revisional court vide order dated 21.9.2011 admitted the revision petition. On the one hand when the revisional court admits the revision petition on the other hand, still the said court denies to grant stay of order in the said revision petition. The petitioner and other accused persons are very responsible, peace loving citizens of the country. The petitioner is an eminent businessman, dealing in trade of jewellery, his business is not only within the country, but it stretches to various other countries in the world. He has lots of landed property in the city of Jaipur as also elsewhere. He is deeply associated with social service, especially in the fields of education and health. The other accused persons happen to be highly placed government officials. One is a senior IAS officer and other is an RAS officer. Against all these persons inspite of multiple negative final reports the trial Magistrate without any application of mind summoned them through arrest warrants, completely contrary to the guidelines laid down by the Apex Court in Indra Mohan vs. State of Uttaranchal 2007 (12) SCC 1 . The learned counsel has also placed reliance on Raghuvansh Dewamanchand Bhasin vs. State of Maharashtra and another Criminal Appeal No. 1758 of 2011 arising out of SLP (Crl.) No. 5412 of 2008 decided on 9.9.2011, S.K. Alagh vs. State of UP and others JT 2008 (2) SC 540, and Common Cause, A Registered Society Vs. Union of India and Others, . Mr. S.R. Bajwa, Sr. Advocate for my perusal placed before me a note sheet dated 27.10.2005 of Ex. Chief Minister of Rajasthan Smt. Vashudhara Raje. The same reads as under:

Perused the notings at 149 N supra. This issue has already been discussed in various meetings of BIDI and has also been examined in detail at the level of Addl. Chief Secretary, Chief Secretary etc. Against this back drop, the proposal at 149 N endorsed by Pr. Secretary, Tourism and Chief Secretary and approved by MoS, Tourism is approved. A committee may be set up for the maintenance and upkeep of Jal Mahal.

Sd/-

(Vashudhara Raje)

Chief Minister

Mr. Bajwa on the basis of this note sheet states that the trial court took cognizance only against the petitioner, Navratan Kothari, Vinod Jutsi, Rakesh Saini, and Hardesh Kumar Sharma only, it shows a pick and choose policy, has been adopted. All the persons who are directly or indirectly connected with the grant of lease or licence to the petitioner should also be booked.

4. On the other hand, Mr. Peeyush Kumar, Public Prosecutor and Mr. Ajay Kumar Jain, counsel for the complainant have contended that the Additional Sessions Judge, by a detailed order dated 7.10.2011 rejected the prayer of the petitioner and other accused persons for staying the operation of the Judicial Magistrate's order dated 9.9.2011 taking cognizance and summoning them by arrest warrant looking to the sensitivity of the issue involved by which lands of crores of rupees

of the Govt. have been handed over to the accused petitioner and his company only by paying an amount of Rs. 2.5 crores in connivance with the officers of the Govt. and hence the refusal to stay the order of the Judicial Magistrate has been passed after considering the material available on record and judgments and the arguments by the parties. The interim order passed by the revisional court during the pendency of the revision petition, is not open to be challenged by way of filing misc. petition before this court. The misc. petition against an interim order is not maintainable at this stage when the revision petition is pending before the revisional court against the order taking cognizance and issuing process of summoning the accused persons by way of arrest warrant. They have placed reliance on M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, , Chiman Jagwani and Others Vs. Union of India (UOI) and Others, , Munna Devi Vs. State of Rajasthan and anr, , State of Haryana and others Vs. Ch. Bhajan Lal and others, , and various other cases reported in AIR 2008 SC 1165, AIR 2007 SC 2762, AIR 1999 SC 3845, AIR 1986 SC 1436, 1978 Cri.L.J. 1687, 1997 Cri. L.J. 282, 2008 Cri.L.J. 3392, (1978) 4 SCC 58, AIR 1957 SC 340, AIR 2000 SC 2245, 2010 Cri.L.J. 769, AIR 2005 SC 359, 2002 Cri.L.J. 131, AIR 1963 SC 1430, 2001 Cri.L.J. 4948, 1999 Cri.L.J. 2403, 1999 Cri.L.J. 2403 , (2001) 2 SCC 17, AIR 2005 SC 1962, 2008 Cri.L.J. 2555 (All.), 2009 Cri.L.J. 209, AIR 2007 SC 1274, AIR 2009 SC (Supp.) 1615, AIR 2008 SC 550 , 2008 Cri.L.J. 1153, (2006) 12 SCC 421, AIR 2008 (SCW) 5881 , 2009 Cri.L.J. 2762, 2010 Cir.L.J. 611, 2009 (5) SCC 111 , (2009) 8 SCC 1, AIR 2008 SC 56, (1995) 5 SCC 762, AIR 2010 SC 528, AIR 2011 SC 1037, (2009) 6 SCC 171, AIR 1984 SC 718 (10) 2001 Cri.L.J. 244 and (1999) 3 SCC 259. The learned counsel for the complainant also placed the photo copies of the judgments and written submissions by the accused petitioner and the complainant before the revisional court.

5. I have heard the learned counsel for the parties and also considered the arguments submitted by them.

6. It is necessary to have a look at some of the important judgments, on which reliance has been placed by the counsel for the parties.

In Inder Mohan Goswami vs. State of Uttaranchal, (2007) 12 SCC 1, the Apex Court held as under:

50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice--liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of

an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

? it is reasonable to believe that the person will not voluntarily appear in court; or
? the police authorities are unable to find the person to serve him with a summon; or

? it is considered that the person could harm someone if not placed into custody immediately.

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

57. The court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant.

In *S.K. Alagh Vs. State of U.P. and Others*, , the Apex Court held as under:

12. The short question which arises for consideration is as to whether the complaint petition, even if given face value and taken to be correct in its entirety, disclosed an offence as against the appellant u/s 406 of the Penal Code.

13. Section 405 defines "criminal breach of trust" to mean:

405. Criminal breach of trust in any manner entrusted with proper (sic) with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

14. Appellant 1 is the Managing Director of the Company. Respondent 3 was its General Manager. Indisputably, the Company is a juristic person. The demand drafts were issued in the name of the Company. The Company was not made an accused. The dealership agreement was by and between M/s Akash Traders and the Company.

15. Mr. Pramod Swarup, learned counsel appearing on behalf of Respondent 2, in support of the order passed by the learned Chief Judicial Magistrate as also the High Court, submitted that as, prima facie, the appellant was in charge of and was in control of the business of the Company, he would be deemed to be liable for the offence committed by the Company.

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

17. A criminal breach of trust is an offence committed by a person to whom the property is entrusted.

18. Ingredients of the offence u/s 406 are:

(1) a person should have been entrusted with property, or entrusted with dominion over property;

(2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so;

(3) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

19. As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence u/s 406 of the Penal Code. If and when a statute contemplates creation

of such a legal fiction, it provides specifically therefor. In 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 vs. R.B.S. Channabasavaradhya.)

20. We may, in this regard, notice that the provisions of the Essential Commodities Act, the Negotiable Instruments Act, the Employees' Provident Funds and Miscellaneous Provisions 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 Penal Code, a legal fiction has been created to the effect that the employer shall be deemed to have committed an offence of criminal breach of trust. Whereas a person in charge of the affairs of the company and in control thereof has been made vicariously liable for the offence committed by the company along with the company but even in a case falling u/s 406 of the Penal Code vicarious liability has been held to be not extendable to the Directors or officers of the company. (See Maksud Saiyed Vs. State of Gujarat and Others,).

21. The High Court, therefore, committed a manifest error in passing the impugned judgment.

22. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed, Respondent 2 is liable to bear the costs of the appellant for causing harassment to him which is quantified at Rs. 1,00,000 (Rupees one lakh only).

In Common Cause, A Registered Society Vs. Union of India and Others, , the Apex Court held as under:

156. Let us now examine the direction for investigation by CBI into the offence of "criminal breach of trust" or "any other offence".

157. This direction obviously consists of two parts: (a) Investigation by CBI into the offence of criminal breach of trust; and (b) Investigation by CBI into any other offence. We will take up the first part first.

158. The basis for the direction relating to investigation into the offence of "criminal breach of trust" are the following observations of the Court:

(a) "A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people." (SCC p. 553, para 22)

(emphasis supplied)

(b) "The allotments have been made in a cloistered manner. The petrol pumps -- public property -- have been doled out in a wholly arbitrary manner." (SCC p.

552, para 19)

159. These observations indicate that the Court was of the opinion that a person on being elected by the people and on becoming a Minister holds a sacred trust on behalf of the people. This, we may venture to say, is a philosophical concept and reflects the image of virtue in its highest conceivable perfection. This philosophy cannot be employed for determination of the offence of "criminal breach of trust" which is defined in the Indian Penal Code. Whether the offence of "criminal breach of trust" has been committed by a person has to be determined strictly on the basis of the definition of that offence set out in the Penal Code to which we would advert a little later.

160. The Court also appears to have invoked the "Doctrine of Public Trust" which is a doctrine of environmental law under which the natural resources such as air, water, forest, lakes, rivers and wildlife are public properties "entrusted" to the Government for their safe and proper use and proper protection. Public Trust Law recognises that some types of natural resources are held in trust by the Government for the benefit of the public. The "Doctrine of Public Trust" has been evolved so as to prevent unfair dealing with or dissipation of all natural resources. This doctrine is an ancient and somewhat obscure creation of Roman and British law which has been discovered recently by environmental lawyers in search of a theory broadly applicable to environmental litigation.

161. This doctrine was considered by this Court in its judgment in *M.C. Mehta vs. Kamal Nath* 97 to which one of us (S. Saghir Ahmad, J.) was a party. Justice Kuldeep Singh, who authored the erudite judgment and has also otherwise contributed immensely to the development of environmental law, relying upon ancient Roman "Doctrine of Public Trust", as also the work of Joseph L. Sax, Professor of Law, University of Michigan and other foreign decisions, wrote out that all natural resources are held in "trust" by the Government. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. But this doctrine cannot be invoked in fixing the criminal liability and the whole matter will have to be decided on the principles of criminal jurisprudence, one of which is that the criminal liability has to be strictly construed and offence can be said to have been committed only when all the ingredients of that offence as defined in the statute are found to have been satisfied.

166. Applying the principles laid down above, the petitioner does not, on becoming the Minister of State for Petroleum and Natural Gas, assume the role of a "trustee" in the real sense nor does a "trust" come into existence in respect of the government properties.

168. A trust contemplated by Section 405 would arise only when there is an entrustment of property or dominion over property. There has, therefore, to be a property belonging to someone which is entrusted to the person accused of the

offence u/s 405. The entrustment of property creates a trust which is only an obligation annexed to the ownership of the property and arises out of a confidence reposed and accepted by the owner. This is what has been laid in *State of Gujarat vs. Jaswantlal Nathalal* 101. In *Rashmi Kumar vs. Mahesh Kumar Bhada* 102 the essential ingredients for establishing the offence of criminal breach of trust, as defined in Section 405, have been spelt out as follows: (SCC pp. 406-07, para 13)

(i) entrusting any person with property or with any dominion over property; (ii) the person entrusted dishonestly misappropriating or converting to his own use that property; or dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract made touching the discharge of such trust.

171. Mr. K. Parasaran contended that "power to allot petrol pumps", and that too under discretionary quota, cannot be treated as "property" within the meaning of Section 405 of the Indian Penal Code. It is pointed out by him that the Minister merely makes an order of allotment. Subsequently, the Indian Oil Corporation or the Bharat Petroleum Corporation enters into a dealership agreement with that person and the business is regulated by the agreement between the allottee and the Corporation (Indian Oil Corporation or Bharat Petroleum Corporation). It is also pointed out that in pursuance of the agreement, the allottee invests money, constructs the building and sets up the petrol pump. Mere exercise of "power to allot", it is rightly contended, cannot, therefore, be treated as "property" within the meaning of Sec. 405, capable of being misutilised or misappropriated.

172. The word "property", used in Section 409 IPC means the property which can be entrusted or over which dominion may be exercised. This Court in *R.K. Dalmia vs. Delhi Admn.* 106 held that the word "property", used in Section 405 IPC, has to be interpreted in a wider sense as it is not restricted by any qualification u/s 405. It was held that whether an offence defined in that section could be said to have been committed would depend not on the interpretation of the word "property" but on the fact whether that particular kind of property could be subject to the acts covered by that section. That is to say, the word "property" would cover that kind of property with respect to which the offence contemplated in that section could be committed.

173. Having regard to the facts of the case discussed above and the ingredients of the offence constituting criminal breach of trust, as defined in Section 405, or the offence as set out in Section 409 IPC, we are of the opinion that there was no case made out against the petitioner for any case being registered against him on the basis of the judgment passed by this Court nor was there any occasion to direct an investigation by CBI in that case.

In *Raghuvansh Dewanchand Bhasin vs. State of Maharashtra and another* (Criminal Appeal No. 1758 of 2011 decided on 9.9.2011 by the Apex Court), held

as under:

9. It needs little emphasis that since the execution of a non-bailable warrant directly involves curtailment of liberty of a person, warrant of arrest cannot be issued mechanically, but only after recording satisfaction that in the facts and circumstances of the case, it is warranted. The Courts have to be extra-cautious and careful while directing issue of non-bailable warrant, else a wrongful detention would amount to denial of constitutional mandate envisaged in Article 21 of the Constitution of India. At the same time, there is no gainsaying that the welfare of an individual must yield to that of the community. Therefore, in order to maintain rule of law and to keep the society in functional harmony, it is necessary to strike a balance between an individual's rights, liberties and privileges on the one hand, and the State on the other. Indeed, it is a complex exercise. As Justice Cardozo puts it "on the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice."

Be that as it may, it is for the court, which is clothed with the discretion to determine whether the presence of an accused can be secured by a bailable or non-bailable warrant, to strike the balance between the need of law enforcement on the one hand and the protection of the citizen from highhandedness at the hands of the law enforcement agencies on the other. The power and jurisdiction of the court to issue appropriate warrant against an accused on his failure to attend the court on the date of hearing of the matter cannot be disputed. Nevertheless, such power has to be exercised judiciously and not arbitrarily, having regard, inter-alia, to the nature and seriousness of the offence involved; the past conduct of the accused; his age and the possibility of his absconding. (Also See: State of U.P. vs. Poosu & Anr. (1976) 3 SCC 11).

10. In Inder Mohan Goswami & Anr. vs. State of Uttaranchal & Ors. 2 (1976) 3 SCC 1, a Bench of three learned Judges of this Court cautioned that before issuing non-bailable warrants, the Courts should strike a balance between societal interests and personal liberty and exercise its discretion cautiously. Enumerating some of the circumstances which the Court should bear in mind while issuing non-bailable warrant, it was observed:

53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

- it is reasonable to believe that the person will not voluntarily appear in court; or
- the police authorities are unable to find the person to serve him with a summon; or
- it is considered that the person could harm someone if not placed into custody immediately.

54. As far as possible, if the court is of the opinion that a summon will suffice in

getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

In *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , the Apex Court held as under:

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

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

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

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a

just conclusion that there is sufficient ground for proceeding against the accused.

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

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

In *Johar and Others Vs. Mangal Prasad and Another*, , the Apex Court held that the revision court has limited jurisdiction and the order of the trial court not found to be passed without considering relevant evidence or passed by considering irrelevant evidence, interference by entering into merits and re-appreciating entire evidence-improper.

In *Japani Sahoo Vs. Chandra Sekhar Mohanty*, , it was held by the Apex Court that "mere delay may not bar the right of the "Crown" in prosecuting "criminals". But it also cannot be overlooked that no person can be kept under continuous apprehension that he can be prosecuted at "any time" for "any crime" irrespective of the nature or seriousness of the offence. "People will have no peace of mind if there is no period of limitation even for petty offences".

In *State of U.P. Vs. Udai Narayan and Another*, , it was held by the Apex Court that "High Court advancing elaborate arguments on scanning and scrutinising the evidence and materials produced by prosecution, ordering discharge of accused, commits error - High Court exceeds revisional jurisdiction.

In *Pathumma vs. Muhammad*, the Apex Court held that the High Court was not justified in substituting its own view for that of Magistrate on question of fact. This case was related to whether applicant was married wife or whether child was illegitimate child were pre-eminently questions of fact.

In *Hareram Satpathy Vs. Tikaram Agarwala and Others*, , it was held that court cannot enter into a detailed discussion of the merits or demerits of the case and the scope of revisional jurisdiction is very limited the High Court cannot launch on a detailed and meticulous examination of the case on merits and set aside the order of Magistrate directing issue of process against certain persons.

In *Ramesh Kumar Vs. Smt. Sushila Srivastava*, this court in revision jurisdiction order taking cognizance of offence and issuing summons for offence u/s 504, 353 IPC - setting aside of, in revision on basis of detail discussion and meticulous examination of statements of witnesses recorded u/s 202 - illegal.

In *Hareram Satpathy Vs. Tikaram Agarwala and Others*, , it was held that the Magistrate is restricted to find out whether there was a prima facie case or not

for proceeding against the accused, and he cannot enter into a detailed discussion of the merits and demerits of the case, and hence, the scope of the revisional jurisdiction of the High Court is limited and the High Court cannot launch on a detailed and meticulous examination of the merits of the case. In the instant case the High Court exceeded its jurisdiction in setting aside the order of the Sub Divisional Magistrate by a detailed and meticulous scrutiny into the merits.

In *Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others*, , it was held that "Criminal-Cheating-Ingredient of Cheating-Inducement Resulting from Deception - held deception is necessary ingredient for offence of cheating-Complainant, therefore, necessarily needs to prove that inducement had been caused by deception exercised by accused. Such deception must necessarily produce inducement to part with or deliver property, which complainant would not have parted with or delivered, but for inducement resulting from deception-there must be no dishonest concealment of facts - Non disclosure of relevant information would also be treated as mis-representation of facts leading to deception - Necessary for High Court to examine averments in complaint in terms of aforesaid section - High Court noticed representations that were made and contrasted the same with actual realities and yet concluded that averments made in complaint even if taken at their face value would not lead to the conclusion that respondent had committed offence of cheating - High Court did not take notice of explanation to section 415 - Misleading statements which withhold vital facts for intentionally inducing person to do or to omit to do something would amount to deception."

The principles laid down in the cases quoted above are correct but the judicial Magistrate has discretionary power to issue process on the basis of the material available on record and after due appreciation of the evidence.

7. Now I may consider the factual position of the matter. On 21.12.99, proposal was moved in the name of Jal Mahal Tourism Infrastructure Project to develop Jal Mahal and Lake with Private Sector Developers. In the meeting of BIDI dated 3.8.2002, MOU was signed between the Jaipur Development Authority and PDCOR for Jal Mahal Tourism Infrastructure Project. Again JDA, prepared a project, whereby 100 acres of land at Southern Sore of Mansagar lake were to be leased out for 99 years in the name of Jal Mahal Tourism Development Project and a draft agreement was also prepared by the PDCOR, the consultant. PDCOR issued invitation inviting persons interested in Jal Mahal Tourism Project on 25th April, 2003. PDCOR is a private company having 50% share of the Government and 50 % of private sector. Shri R.S. Chauhan, Advocate gave his opinion that "to lease out property for 99 years virtually amounts to sell the property." On 30.7.2003 PDCOR invited tenders from interested companies. In the tender notice it was notified that "interested parties meeting eligibility criteria and having proven track record in hospitality/leisure/recreation/tourism/multiples/housing/resort and other related commercial projects may participate in the

process." In the BIDI meeting held on 5.8.2003 all of sudden Nodal agency was changed from JDA to Rajasthan Tourism Development Corporation. Only four companies submitted their tenders on the last date of receipt of tender. M/s. KGK Enterprises Mumbai was not qualified for submitting bid, but in order to recommend, a noting was prepared on 14.10.2003, which reads as under:

The bids submitted by M/s. Nature Consolidated Limited, New Delhi has provided inadequate information for evaluation and hence recommended for rejection.

s KGK Enterprises Mumbai has shown financial and technical capability required for the project, however, the lead bidder is a Partnership firm as against the criteria mentioned in the request for proposal document, issued to all the bidders, which specifies that the lead bidder has to be a Private/Public Limited Company, PDCOR has desired that a final view by GoR is to be taken with respect to qualification/disqualification of M/s. KGK Enterprises in the next phase of evaluation.

It is stated that on 23.10.2003 technical bids were opened and KGK Enterprises was allowed against the law. KGK Enterprises was given 83 points, while other legal qualified company JM Projects was given 82 points. Financial bids were opened on 3.12.2003. It is the case of the complainant that KGK Enterprises was not qualified to bid but this fact has been concealed from other bidders. On 2.12.2003 Assembly election was over and 4.12.2003 was the last date for the Working of the then Chief Minister and technically code of conduct was not in force. On 19.2.2004 lease agreement was signed by Vinod Jutsi who was chairman of the RTDC for giving 100 acres of land to Nav Ratan Kothari. RTDC requested Jaipur Nagar Nigam to transfer the land to RTDC. Nagar Nigam is an elected body without a resolution from General House, the same cannot be transferred. But on 7.8.2004, CEO of Nagar Nigam Made a false report that resolution is likely to be placed before the General Body and in anticipation the land may be transferred and malafidely and illegally 101 Bigha land of Nagar Nigam was transferred on 9.5.2005 to RTDC. On 11.5.2005 the Govt. officials specially Secretary Tourism and other officials moved a proposal for signing on the lease agreement concealing the fact that the part of the lake is to be given on lease. This file was placed before the then Chief Minister, who categorically made a note on 27.10.05 that a committee may be set up for maintenance and up keep of Jal Mahal. The note sheet is already reproduced above. The note sheet clearly revealed that the then Chief Minister did not approve lease agreement but instead proposed formation of a committee for maintenance and up keep of Jal Mahal. The Secretary Tourism as well as the Managing Director of RTDC instead of making forgery in the record, falsely noted that "the decision on file should also be approved to the Board for signing of the agreement on behalf of the Govt." The complainant's counsel states that on the basis of forgery lease agreement was signed on 22.11.2005. Again on 4.5.2006 part of lake was handed over to Shri Navratan Kothari, though it has been clearly mentioned in the possession report itself that 14.50 acre land is sub merged as per the map. It

clearly shows that the area of the lake was given on lease wrongfully. The land use has not been changed till now. Still on whole 100 acres commercial construction has been started by the petitioner Nav Ratan Kothari.

8. On 29.4.2010, the complainant filed the complaint before the Magistrate and the same was sent to the Police Station Brahmpuri u/s 156(3) Cr.P.C. In spite of this the FIR was not registered. Again the complainant filed application and thereafter the Police Station Brahmpuri registered FIR No. 160/2010. On the pressure of the accused persons on 25.6.2010 the Police Station Brahmpuri filed the final report before the Magistrate that the matter relates to Police Station Vidhayakpuri. Again on the request of the complainant the Magistrate asked the Police Station Brahmpuri to investigate the matter and it was notified that only the Brahmpuri Police Station has territorial jurisdiction. Again on pressure tactics by the accused persons, who were Govt. Officials and business man, again on 27.9.2010 final report was submitted by the Police Station Brahmpuri. On this a protest petition was filed. The Judicial Magistrate on 15.12.2010 again sent the matter for further investigation to the Police Station Brahmpuri. Again on 14.4.2011 final report was submitted by the Police Station Brahmpuri. The Judicial Magistrate did not accept the final report and took cognizance against the accused persons vide order dated 9.9.2011 for the offence under sections 420 and 409 and 120B IPC and the accused persons were summoned through non-bailable warrants. Against this order of the Judicial Magistrate dated 9.9.2011, the petitioner filed revision petition before the revisional court and the revisional court summoned the record of the trial court. The revisional court heard the arguments of both the parties. Before the revisional court, Mr. S.R. Bajwa, Sr. Advocate submitted that he is not addressing arguments on the revision petition but he is only addressing arguments for staying the operation of the impugned order dated 9.9.2011. On this the revisional court only heard the arguments of the parties whether the order of the trial court dated 9.9.2011 should be stayed or not wherein the cognizance was taken against the accused persons and process of summoning the accused persons through non-bailable warrant was issued. The revisional court returned back the record of the trial court and refused to stay the order of the trial court dated 9.9.2011 vide a detailed order dated 7.10.2011. The Judicial Magistrate in the order dated 9.9.2011 observed as under:

9. The revisional court in its order dated 7.10.2011 after giving the details of the case and submissions put forth by both the parties, observed as under:

10. I have gone through the order passed by the trial court and the revisional court and without commenting on the merits of the case, on the basis of material available on record, in my opinion, the order passed by the trial court and the revisional court limited to refusing to stay the operation of the order of the trial court, are not perverse and the same do not suffer from any illegality so as to call for interference in the inherent jurisdiction of this court u/s 482 Cr.P.C. as per the decisions mentioned above. In my view the order passed by the trial court

and the revisional court on the question of refusing to stay the issue of process of summoning the accused persons through non-bailable warrants by the trial court is just and proper. The warrants either bailable or non-bailable should never be issued, without proper scrutiny of facts and complete application of mind. The trial court after examining the matter and after due appreciation of the evidence issued the non-bailable warrants. The power of Magistrate is discretionary, which has been exercised by the Magistrate after fully applying his mind judiciously. The offence of the petitioner relates to the thousand of crores of rupees and the act of the petitioner is against the society and nature. The inherent power could be exercised on the following points:

(i) to prevent the abuse of the process by the court.

(ii) or otherwise to secure the ends of justice.

Meaning thereby that the jurisdiction should be exercised in exceptional circumstances of the case. It was mentioned in the order dated 7.10.2011 passed by the ADJ No. 5 that Shri S.R. Bajwa only argued the case on the glaring mistake in the order dated 9.9.2011 by the Judicial Magistrate and on the rest of the arguments he will urge at the final arguments of the revision petition. The ADJ after considering the material on record in regard to glaring mistakes held that the Judicial Magistrate has not committed any glaring mistake in issuing the process of summoning the accused persons by non-bailable warrants as the accused persons many times even twice or thrice managed the matters and the police submitted final reports before the Magistrate and it was on third occasion the Judicial Magistrate on a protest petition filed by the complainant after recording the evidence took cognizance and passed the order of summoning the accused persons by non-bailable warrants in a matter involving thousands of crores of rupees. Since the revision petition is pending and arguments are still to be heard on merits by the revisional court, any order converting the non-bailable warrants into bailable warrants will prejudice the matter before the revisional court.

11. Before concluding I may summaries some historical back ground facts which are necessary to be noticed for upkeep of these historical monuments, which cannot be built up in this modern era. Jal Mahal is an 18th century pleasure palace and is located in Jaipur, the capital city of Rajasthan. The palace is perched amidst Mansagar lake, which is in turn nestled amongst the Nahargarh hills. The Jal Mahal Palace, Jaipur is noted for its sophisticated design and grand architecture. The Palace was developed as a pleasure spot and was used for the royal duck shooting parties. A causeway leads to Jal Mahal Palace situated in the middle of Man Sagar lake, opposite the cenotaphs. The first four floors of this building is under water, only the top floor remains outside. One can have a wonderful view of the lake and the palace from Nahargarh Fort Built in 1799, the palace is now abandoned, but reasonably well preserved. The lake eco system is home to a variety of migratory and resident birds. The Mansagar Dam on the eastern side of the lake acts as a vantage point for viewing the lake and the

valley. The palace and the lake around it were renovated and enlarged in the 18th century by Maharaja Jai Singh II of Amber. The Jal Mahal palace has got an eye-popping makeover. Traditional boat-makers from Vrindavan have crafted the Rajput style wooden boats. Across the lake, Aravalli hills, dotted with temples and ancient forts, and on the other side, bustling Jaipur. The drains were diverted, two million tonnes of toxic silt were dredged from the bottom, increasing its depth by over a metre, a water treatment system was developed, local vegetation and fish reintroduced, the surrounding wetlands regenerated and five nesting islands created to attract migratory birds. The lake, situated to the north of Jaipur city lies between Amber, the historic city and Jaipur, which touch with eastern side of the Jaipur which was beneficial for the city of Jaipur on the basis of the Vastu Shastra. Ex. Ruler of the Jaipur State having the knowledge of Vastu Shastra and Astrology, constructed the Man Sagar lake which is situated on the eastern angle of Jaipur. It has a water spread area of 300 acres and is enclosed by the Aravalli hills on the north, west and eastern side, while the southern side consists of plains that is intensely inhabited. There is the Nahargarh Fort (Nahargarh means home of tigers) in these hills that provides a commanding view of the Man Sagar lake and the Jal Mahal palace, in addition to a beautiful view of the city of Jaipur. The lake was created by constructing a dam across the Darbhawati River, between Khilagarh hills and hilly areas of Nahargarh, in the 16th century. The drainage area of the lake is 23.5 square kilometres contributed by an urban area accounting for 50%, hilly terrain accounting for the balance area comprising the degraded Aravalli hills, which have added to siltation problem in the lake. Rain fall of an average of 657.4 millimetres per year (90% of this rainfall occurs during the months of June to September) in the catchment contributes to the storage in the reservoir. At the outlet end of the dam, there is an irrigation system that is supplied with water stored in the reservoir (obligatory water demand for this is reported to be 2,410,000 cubic metres during the five months from November to March). But two large nalas (streams) that also drain the surrounding Nahargarh hills and the Jaipur town are the Brahmpuri and Nagtalai, which bring in large amount of untreated sewage flows, in addition to solid wastes. The hills surrounding the lake area, towards the north east of Jaipur, has quartzite rock formations (with thin layer of soil cover), which is part of Aravalli hills range. Rock exposures on the ground surface in some parts of the project area have also been utilised for constructing buildings. On the north east, the Kanak Vrindavan valley, where temple complex is situated, the hills slope gently towards the lake edge. Within the lake area, ground conditions depict a thick mantle of soil, blown sand and alluvium. Forest denudation, particularly of hilly areas, has caused soil erosion, compounded by erosion due to wind and water. Due to this, silt moved to the lake resulting in raise of the bed level of the lake. In the past, at the location of the lake, there was a natural depression where water used to accumulate. During 1596 AD, when there was a severe famine in this region there was consequent acute shortage of water. The then ruler of Amber was, therefore, motivated to build a dam to store water to overcome the severe hardships caused by the

famine to the people inhabiting the region. A dam was constructed, initially using earth and quartzite, across the eastern valley between Amer hills and Amargarh hills. The dam was later converted into a stone masonry structure in the 17th century. The dam, as existing now is about 300 metres long and 28.5-34.5 metres in width. It is provided with three sluice gates for release of water for irrigation of agricultural land in the down stream area. Since then, the dam, the lake and the palace in its midst have undergone several rounds of restoration under various rulers of Rajasthan but the final restoration in the 18th century is credited to Jai Singh II of Amer. During this period, a number of other historical and religious places, such as the Amer Fort, Jaigarh Fort, Nahargarh Fort, Khilangarh Fort, Kanak Vrindavan Valley were also built in the vicinity of the lake. All these places are now linked under a tourist corridor of road net work. In recent years, with urbanization of Jaipur city and areas surrounding the lake, ecological system of the lake and its vicinity area deteriorated drastically. It got silted up heavily thereby reducing the surface area of the lake. The silt deposited (estimated to be about 2,500,000 cubic metres) was contaminated with effluents (untreated sewage) from the city drainage causing intense eutrophication. The ground water around the lake was also found to be highly contaminated and created serious health hazards. The rainwater combined with sewage water flow from the city resulted in the lake water emanating foul smell. Water samples collected from the lake were tested, which clearly showed that water quality was not uniform. It was extremely poor in southeast, south and southwest caused due influent nalas. The water quality parameters of BOD and total nitrogen recorded were 20 mg/L each. BOD values indicated high level of organic matter. COD denoted a very high level of oxidisable chemicals. Nitrate and phosphate content were excessive. Coliform number was more than 500 times the normal. The Chloride content was found to be fatal to plants and fishes. The fresh water into the lake is seasonal during rains between July and September. This flow originates from 325 small and big streams that drain the hilly catchment of the lake. But the two municipal nalas from the Jaipur city contribute the perennial flow to the lake. The volume of water in the lake has been assessed as 3,130,000 cubic metres at the maximum water level. During lean season, it is said to be about 360,000 cubic metres from October to June. The depth of water at the deepest location in the lake is recorded to be a maximum of 4.5 metres and a minimum of 1.5 metres. In addition, the stored water was also used for irrigation on the downstream end of the lake during summer months resulting in drying up of the lake in these months. The flora is dictated by the subsidiary Edaphic type of dry tropical forests in the catchment; the total forest area of 9.01 square kilometres comprises dense forest cover of 6.45 square kilometres area, degraded forest of 0.95 square kilometres and encroachment of 1.61 square kilometres. The dominant floral specie found in the area is Dhauk (*Anogeissus pendula*), which has lean foliage. The low vegetation cover and steep gradient of the hills causes substantial erosion and the eroded material flows into the lake. On the western side, beyond the urbanized area, the Nahargarh hills on the western side are also denuded, which has reduced its

moisture retaining capacity.

12. The World Heritage Sites in India recognized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) are 28, as of 2010. India's first two sites inscribed on the list at the Seventh Session of the World Heritage held in 1983 were the Agra Fort and the Ajanta Caves. Over the years, 26 more sites have been inscribed, the latest site inscribed in 2010 being the Jantar Mantar, Jaipur.

13. I may state that to save the World Heritage Sites in India, particularly Jantar Mantar, (which has been declared as World Heritage Site), Jal Mahal and Mansagar Lake are necessary to be looked into. For the reasons mentioned above, I do not find any glaring illegality or perversity in the order dated 7.10.2011 passed by the revisional court refusing to stay the process of the trial court summoning the accused persons by non-bailable warrants. The arguments raised by the learned counsel for the petitioner for staying the process of summoning the accused persons by non-bailable warrants, being devoid of merit stand rejected. The misc. petition filed by the petitioner against the order dated 7.10.2011 refusing to stay the process of summoning the accused persons through non-bailable warrants stands dismissed. This order will not come in the way of the petitioner in arguing the matter before the revisional court and the revisional court will not take into consideration any findings given by this court while passing orders on the pending revision petition. The revisional court is directed to expedite the hearing of the revision petition as early as possible.