
(2002) 03 BOM CK 0002

In the Bombay High Court

Case No : Criminal W.P. No's. 1084, 1130 and 1248 of 2001

Pyarelal Ramkishore Prajapati

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 20-03-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 482
Penal Code, 1860 (IPC) — Section 34, 406, 420

Citation : (2003) BomCR(Cri) 103 : (2002) CriLJ 3611 : (2002) 4 MhLj 293

Hon'ble Judges : A.B. Palkar, J

Bench : Single Bench

Advocate : S.V. Marwadi, for the Appellant; J. Janardhanan, A.A.G., K.K. Kapoor, Assistant Public Prosecutor and P.O. Verghese, for the Respondent

Final Decision : Allowed

Judgement

A.B. Palkar, J.—All these three petitions have been filed by the accused in C. R. No. 44 of 1995 in respect of which Criminal Case No. 69/P of 2000 and Case No. 429 of 1994 of Thane, which have been merged in the aforesaid Case No. 69/P of 2000, pending before the learned Addl. Chief Metropolitan Magistrate, 19th Court, Esplanade, Bombay, for quashing of the prosecution.

2. Pyarelal Ramkishore Prajapati is the main accused and was the only accused when complaint was filed on behalf of M/s Arcade (I) Pvt. Ltd. by one M. G. Ramchandra, who is now joined as a party respondent to the above petitions and would hereinafter be referred to as "respondent" or "complainant" whereas petitioner would be referred to as "petitioner" or "accused" for the sake of convenience.

3. The case of the prosecution in brief is that petitioner entered into an agreement with the respondent on 11-5-1987. On record there is no detailed agreement as is normally found in case of building construction but the booking memo is treated as agreement and there is no dispute between the parties that this was entered into on 11-5-1987. The said document states that this is to

confirm and record that they have agreed that Om Shanti Construction Company had agreed to sell and M/s Arcade (India) Pvt. Ltd. had agreed to purchase office/flat/row house Nos. 9 to 33, 43 and 44 on the ground floor of building A, B & C Wings for aggregate price of Rs. 35 lakhs exclusive of all other deposits, registration, legal and stamp charges and costs. The schedule of payment is stated over-leaf and it is not disputed by the accused that Rs. 7 lakhs were paid as booking amount by cheque. A plan showing the situation of these shops was also provided to the respondent. As per this plan certain shops were to be of 258 sq. ft., certain shops were of 285 sq. ft., whereas shops Nos. 43 and 44 were of 1455 sq. ft. Om Shanti Co-operative Housing Society is a registered society whereas Om Shanti Construction company is a partnership firm.

4. According to the respondent, petitioner/accused Pyarelal is the kingpin and has full control over the management of the firm as also the society and the actions on behalf of the firm and the society are taken by the accused in his capacity as an individual as well as in his capacity as the person in-charge of the affairs of the firm.

5. The City and Industrial Development Corporation of Maharashtra (CIDCO for short) is the planning authority for the area i.e. New Bombay, and the plot in question having an area of 14255 sq. meter situated at Airoli was leased for residential purpose. Accused No. 1 requested the CIDCO to allot some land for commercial purpose which was considered favourably and he was allowed to use 2400 sq. meters of land out of the larger plot for commercial purpose. According to the complainant, the plans show that the entire frontage acquired for commercial development was utilized for accommodating 28 shops as shown on the plan including shop Nos. 43 and 44 and as per the plan, three different wings A, B & C were to be constructed. M/s Relations Real Estate Consultants were the sole selling agents of the accused and memorandum of understanding which is earlier referred to as agreement was entered into in their presence. The construction work was to be completed on 23-11-1988. Thus the contract was to sell 28 shops for Rs. 35 lakhs. The original contract showed shop No. 34, which was included in the agreement, was deleted surreptitiously by petitioner feigning afterwards as a typing error in petitioners' copy. It is specifically contended in the complaint filed before the Magistrate (C. C. No. 429/94) in July 1994 that the contract was struck with the petitioner for Rs. 35 lakhs and pursuant to that respondent paid a sum of Rs. 7,00,000/-. He had no money and therefore, he had to arrange for finance by borrowing from others. It is also his further allegation that he paid a substantial sum of Rs. 22,12,000/- in cash, and thus a total sum of Rs. 29,12,000/- was paid to the petitioner. He has also deposited a sum of Rs. 7,00,000/- in Civil Suit No. 224 of 1992 which was filed by him for specific performance of the contract. Thus he has paid more than the agreed consideration i.e. Rs. 36,12,000/-. The accused made fraudulent changes in the plan behind the back of the complainant and without his knowledge and converted the carpet area of 28 shops as shown in the original lay out into forty five shops by reducing the width of each shop and fraudulently obtained sanction

from the CIDCO for such a plan, and kept the said sanctioned plan with him as a closely guarded secret. The accused after extracting fabulous amount from the complainant not only got sanctioned the plan for the purpose of carrying out the work but is now pressing in service three different plans. By letter dated 16-9-1987 the accused dishonestly stated that the contract was for four shops being shop Nos. 9, 33, 43 and 44. Thus the accused have committed offence punishable u/s 420, Indian Penal Code and in the alternative u/s 406 read with Section 120-B of the Indian Penal Code.

6. While issuing the process on the complaint, the learned Magistrate in his order dated 16-7-1994 stated that the complainant had paid Rs. 22,12,000/- towards consideration and the accused has changed the plan. As per the original plan, there were 28 shops including two restaurants and now the accused constructed 44 shops on front side and thus prima-facie case is made out for issuance of process under Sections 420 and 406 read with Section 34 of the Indian Penal Code.

7. In the charge-sheet apart from Pyarelal, seven other accused have been joined who are petitioners in the other two petitions and are either members of his family or directors or partners of Om Shanti Construction Co. Pvt. Ltd. and the gist of the offence as per charge sheet is as below :

8. Accused entered into agreement with respondents for sale of 28 shops as shown in the plan for a consideration of Rs. 35 lakhs. He received a sum of Rs. 29,12,000/- and thereafter wrote to the complainant that the agreement was only for four shops and thereafter without the consent of the complainant submitted different plans to the CIDCO with the intention of causing wrongful loss to the complainant and wrongful gain to himself.

9. It is further stated that he dishonestly induced the complainant (respondent) to settle the dispute on payment of Rs. 40 lakhs and promised to pay Rs. 40 lakhs whereas he had no intention to pay the same and changed partnership firm into private limited company viz. Om Shanti Construction Pvt. Ltd., deleting his own name and names of accused Nos. 2 to 8 as partners of Om Shanti Construction Company, and did not deliver possession of 28 shops with an area of 13,500 sq. ft. and sold some of the shops to other persons though prevented by the Civil Court and thus committed offence u/s 420, Indian Penal Code read with 34, Indian Penal Code. Accused Nos. 1 to 8 having been entrusted with Rs. 29,12,000/- by the complainant towards consideration of 28 shops committed criminal breach of trust an offence punishable u/s 409 read with 34, Indian Penal Code and failed to register the agreement and without consent of respondent submitted different plans to CIDCO and thereby committed offence under Sections 3, 4 and 7 of the Maharashtra Ownership Flats Act punishable under Sections 13 and 15 of the said Act.

10. As pointed out earlier the private complaint has now merged into the state prosecution and what is challenged before me is the entire prosecution.

11. Before proceeding further it is necessary to point out at the outset that these petitions have been admitted even after it was brought to the notice of the Court that the discharge applications moved by the accused are pending before the Magistrate and on the date of admission, they were pending about six months, no orders having been passed.

12. Before I proceed to consider the facts and the arguments, it is necessary to bear in mind legal position. It would not be out of place to mention that number of judgments of the Supreme Court and this Court have been cited before me by the parties and in fact compilation of all the judgments cited before me if seen would be exceeding 300 pages. I have therefore decided to refer only to most relevant judgments which lay down the guidelines and certain principles enunciated in other judgments of the Supreme Court. In the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, , the Supreme Court dealt with the subject of exercise of powers by the High Court u/s 482, Criminal Procedure Code or the extraordinary power under Article 226 of the Constitution of India for quashing of prosecution. After exhaustive survey of number of judgments, the Supreme Court pointed out some of the instances in which power of the Court can be exercised under the above provisions to prevent abuse of process of Court or otherwise secure ends of justice with a caution that the powers should be exercised sparingly that too in rarest of the rare cases. Some categories were also pointed out in which the powers of quashing of F.I.R. could be exercised. It is pointed out by the Supreme Court that these are by way of illustrations although 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. In para 108 at page 629, categories pointed out are as below :

"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 F.I.R, 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 un contravened 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 F.I.R. 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 seeking vengeance on the accused and with a view to spite him due to private and personal grudge."

In para 109, the Supreme Court also expressed word of caution in the following terms :

"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

Earlier in the case of State of West Bengal and Others Vs. Swapan Kumar Guha and Others, , Supreme Court pointed out -

"Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. If on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed, the Court will normally not interfere with the investigation into the offence and will generally allow the investigation in the offence to be completed for collecting materials for proving the offence. If, on the other hand, the Court on a consideration of the relevant materials is satisfied that no offence is disclosed, it will be the duty of the Court to interfere with any investigation and to stop the same to prevent any kind of uncalled for and unnecessary harassment to an individual."

13. In a case of cheating arising out of a breach of contract, the Apex Court pointed out, in the case of Hridaya Ranjan Prasad Verma v. State of Bihar, reported in 2000 SCC 786 after referring to the definition of cheating as contained in Section 415, Indian Penal Code, that 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 for 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. (*Italics is mine*). It is an accepted principle that for the purpose of quashing the proceedings the Court will not be justified in sifting evidence as it amounts to exercising powers of the trial Court and interference with the order of taking cognizance. The power is to be exercised sparingly and only on consideration of material that it is put forth. The normal rule is not to interfere with the criminal proceedings except when the complaint or F.I.R. broadly read does not disclose any offence and can be termed as an abuse of process of law. It is pointed out by the Supreme Court in the case of *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, , that no doubt that the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court u/s 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial. It is pointed out by the Supreme Court that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as matter of course. It is not that the complainant has to bring few witnesses to support his allegations in the complaint to have the criminal law set into motion. 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. Bearing in mind this legal position it is necessary to examine some facts. It will be clear from the above discussed evidence that not only the charge sheet and the documents relied on by the prosecution but even the undisputed documents like correspondence between the parties, the factual situation and the inherent improbabilities of the allegations are required to be considered by the Court even at this stage. In the case of *G. Sagar Suri and Anr. v. State of U.P. and Ors.* (2002) 2 SCC 636 also the Supreme Court considered the scope of section 482, Criminal Procedure Code even when discharge application is filed before the Magistrate, the powers can and should be exercised in appropriate cases. In para Nos. 7 and 8 it is clearly stated :

"7. It was submitted by Mr. Lalit, learned counsel for the second respondent that the appellants have already filed an application in the Court of Additional Judicial Magistrate for their discharge and that this Court should not interfere in the criminal proceedings which are at the threshold. We do not think that on filing of any application for discharge, the High Court cannot exercise its jurisdiction u/s 482 of the Code. In this connection, reference may be made to two decisions of this Court in *Pepsi Foods Ltd. v. Special Judicial Magistrate*, and *Ashok Chaturvedi v. Shitul H. Chanchani*, wherein it has been specifically held that though the Magistrate trying a case has jurisdiction to discharge the accused at any stage of the trial if he considers the charge to be groundless but that does not mean that the accused cannot approach the High Court u/s 482 of the Code or Article 227

of the Constitution to have the proceedings quashed against them when no offence has been made out against them and still why must they undergo the agony of a criminal trial.

8. Jurisdiction u/s 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a 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 the 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." (Underlining is mine)

14. There has been much litigation between the parties which has arisen out of this agreement and specially out of criminal prosecution. Civil Suit filed in the year 1992 for specific performance of the contract and is pending. In order to have a proper appreciation, it is necessary to look into the correspondence which is not in dispute. The original plan shows that 28 shops are situated on one side covering all the three wings of the building which is said to be the entire frontage. After the agreement of 11-5-1987, accused (petitioner) received a letter from the CIDCO dated 3-7-1987 in which it is stated that the CIDCO proposed to construct a link road on the allotted plot, all along the sector 2 and 3 and part of sector No. 1. It is stated further that some portion of this road 120 meters long on the north side cannot be constructed due to the encroachment in this area and therefore, a small link road has been constructed about 150 meters south of Airoli village road to give access to this area from Thane Belapur Road as shown in the accompanying plan. It is stated that it is necessary to prepare alternative road connecting the service industries area and the residential area. It is a proposal to construct a link road of 11 meters wide as shown in the annexed plan in black. This was also verified on site by the Assistant Planner and Surveyor and they confirmed its viability. It is further stated that to lay this road, it is necessary to re-demarcate the plot of Om Shanti Co-operative Housing Society as show in the enclosed plan in red without changing the area allotted to the society. It is clear from this that the original plan as was agreed between the parties would be no more relevant if the CIDCO proposed a link road from out of the land allotted to the society and therefore, if there are changes in the plan as a result of the action of the CIDCO then on the ground of change in plan, the accused cannot be said to have cheated the complainant. The plan has been changed not by the accused unilaterally but it has been changed due to the action of the CIDCO. The directions of planning authority are binding on the accused.

15. Much emphasis has been led on the letter dated 16-9-1987 sent by petitioner to the respondent. It is true that in this letter the shops are described as 9, 33,

43 and 44. There is a difference in the area and the total amount payable is stated to be Rs. 57,12,000/- out of which Rs. 22,12,000/- was by cash and Rs. 35,00,000/- by cheque, as per the installments mentioned on the reverse of the agreement. If in fact this allegation could be accepted even prima facie, then accused would not have been heard any further by this Court. However, further correspondence on record shows that there is obviously some genuine mistake in this letter and the dispute between the parties in fact is whether 27 shops or 28 shops were allotted. Therefore, for such an obviously wrong statement in one letter an intention to cheat cannot be impugned, specially because even the complainant did not take it in that sense as is clear from the further correspondence between the parties; wherein there is categorical reference to 27 shops by accused and 28 shops by complainant. If the accused had the slightest intention to give only four shops, he would not state in the further correspondence as agreement for 27 shops.

16. On 26-9-1987, petitioner addressed a letter to the respondent bringing it to his notice that there is a dispute about sanction of the development plan and commencement certificate by CIDCO. Therefore, the project is likely to be delayed and the accused would not be in a position to hand over possession of the allotted shops within the stipulated period and therefore, offer was given to the respondent either to accept return of the amount paid and/or if respondent desires to continue the said transaction, then it would be pleasure for the petitioner to continue. On 26-6-1991 the petitioner received a copy of letter from the Government in respect of the said plot. A reference to this letter shows that the Government allowed the CIDCO to give additional FSI to the society. On 9-12-1991 a letter was addressed by the respondent to the petitioner with reference to the agreement of 11-5-1987 reminding the petitioner to complete sale of shops Nos. 9 to 33, 34, 43 & 44. In this letter it is clearly stated that Rs. 7 lakhs have been paid in advance which is 20% of the total price by cheque and the balance cost of Rs. 28 lakhs which was shown as sale price in the booking memo, was to be paid according to the schedule given on the reverse. This would show that on 9-12-1991 there was no reference to payment of Rs. 22,12,000/- in cash. Similarly in the plan of the civil suit claiming specific performance of this very contract (which is filed by the respondent No. 3), there is no reference to any cash payment and the averment of is payment of Rs. 7 lakhs in advance out of the total consideration of Rs. 35 lakhs. From this letter it is clear that the respondent came to know that the petitioner has been allotted additional FSI of 1.5 instead of 1 for this property. Thereafter there is reference to another letter of petitioner dated 6-9-1991 and it was enquired by respondent from the petitioner as to how exactly the petitioner will be laying out the shops and how he will be fulfilling the commitments. It is further stated in this letter that the petitioner has been assuring that no building plans have been sanctioned and the petitioner would take respondent in confidence when getting the building plans sanctioned. This letter makes two things clear. Respondent was aware about the change in plan by the CIDCO. He was aware that additional FSI has been allotted.

17. The case of the respondent that initial plan was changed fraudulently and dishonestly has to be considered on this background. In the letter dated 18-12-1991 i.e. 3 1/2 years after the agreement, the respondent has written to the petitioner giving reference to the earlier correspondence and reference is made to the 28 shops and the area as stated in the agreement and also to the consideration of Rs. 35 lakhs and payment of Rs. 7 lakhs in advance amounting to 20% price. There is also no reference of payment of any cash either Rs. 22,12,000/- or any other amount in cash. After setting out various developments, it is stated that since construction did not commence in 1987 as expected because of litigation and diverse developments, a meeting was held in December 1987 at the residence of the Respondent attended by the petitioner and respondent as well as their Advocates and thereafter also there were subsequent meetings between them. There was a settlement in which it was agreed that the petitioner would pay Rs. 40 lakhs to the respondent in full and final settlement of the transaction and it is alleged that the petitioner was avoiding to make payment of the amount agreed in full and final settlement. It is further accepted in this letter that the respondent has come to know about additional F.S.I, sanctioned for commercial area to the society and also of additional 15% of total FSI which was then permissible for the balconies and it is asserted that being a member of the society, respondent was entitled to the benefit of the proportionate extra F.S.L of 50% and additional 15% for balconies and as such entitled to 20,280 sq. ft. plus 342 sq. ft. extra for balconies. Thereafter there was exchange of notices between the parties through Advocates. In the notice or letter dated 8-1-1992 sent through Advocate Shri T. K. Patil to the petitioner by respondent, reference is clearly to the shop Nos. 9 to 33, 34, 43 and 44 for lump sum consideration of Rs. 35 lakhs with a time schedule for payment without any reference to payment of any cash amount at any time. It is also stated by the respondent that it appears to him that the project had come into difficulties and execution thereof was delayed therefore .There was a settlement in which it was agreed to pay Rs. 40 lakhs to respondent by the petitioner. But the amount was not paid and it is further stated that due to delay in execution of the said contract, there was serious breach of contract and petitioner was called upon to construct 28 shops. In reply to this letter dated 8-1-1992 sent on 18-1-1992, it is clearly stated that the agreement was for 27 shops and not for 28 shops. This was in 1992. It clearly shows how after a lapse of long time in the year 1994, a false case is made out that only four shops were being offered when the agreement was for 28 shops and therefore it amounts to cheating. There is a dispute between the parties as to whether agreement is for 27 shops or 28 shops, which dispute will be ultimately settled by the Civil Court. In spite of this reply, notice sent by the petitioner to respondent No. 1 two years before the criminal case, does it lie in the mouth of the respondent to contend in the year 1994 either by filing a private complaint or by approaching the police that petitioner had cheated him by offering him only four shops when the agreement was for 28 shops and the intention since beginning was to cheat and dishonestly and fraudulently induce the respondents

to part with the money when the petitioner intended to give only 4 shops and not 28 shops. In this reply it is pointed out how the plot was divided by the CIDCO and demarcated into two parts. It has been expressed by the petitioner in this letter the unfortunate circumstances due to non-sanctioning of the plan, the property getting involved in litigation before the High Court, Bombay (this litigation was with CIDCO and not with the respondent). There is also reference to negotiations leading to agreement to pay Rs. 40 lakhs and the circumstances in which the Petitioner agreed to pay the same. It was clearly expressed by the petitioner that he was ready even to give the 27 shops as per the agreement even though the circumstances have changed and, prices have increased, when the litigation with CIDCO is over and Government clears the land and fresh agreement was entered into between him and the CIDCO. Therefore, in spite of increase in the prices from the year 1987 to 1992, which is a fact known to everybody in Bombay that in that particular period there was enormous increase in the prices of real estate in the Bombay city as well as in New Bombay, petitioner did not deny his liability of giving 27 shops and in fact he offered that as per the agreement 27 shops would be given. Further in letter dated 20-2-1992 it was affirmed that the booking of 27 shops Nos. 9 to 33, 43 & 44 was for consideration of Rs. 35 lakhs. In reply to this letter dated 20-2-1992, the respondent in his letter dated 27-2-1992 sent through his Advocate stated that he never entered into any agreement on 15-7-1987 and does not take cognizance of the letter dated 20-2-1992 and stated further that the agreement was with Pyarelal Prajapati.

18. Thereafter again on 11-6-1992 a letter was sent through the Advocate to the respondent by petitioner expressing that the agreement was of 11-5-1987 and was for 27 shops for a consideration of Rs. 35 lakhs out of which Rs. 7 lakhs were paid, which was 20% of the total consideration. The 2nd and third installments have become due by then which were demanded by this letter and it was stated that the contract would be terminated. In reply to this letter dated 11-6-1992, the respondent sent through his Advocate notice dated 16-6-1992 and affirmed that the suit has already been filed for specific performance by him claiming relief of injunction and damages. It is specifically asserted in this notice that the petitioner was aware that Rs. 7 lakhs are paid by cheque and for the first time it is alleged that there was cash payment of Rs. 22,12,000/-, mention of which is admittedly not there in the plaint of the civil suit. It may not be out of place to mention here that the respondent is not a layman or simple or middle class person booking a flat with a builder. Petitioner and the respondent both are builders and in this notice it is specifically stated that the respondent is doing civil engineering jobs. The respondent has purchased the shops for sale and not for his own business. Thereafter there was revocation of contract and further correspondence.

19. From the respondent's letter dated 18-12-1991 to which reference has already been made, it is clear that the respondent came to know about grant of additional F.S.I, of 1.5 and 15% additional F.S.I. for balconies and therefore,

claimed that area agreed to be sold to him increased to 20,280 sq. ft. plus 5042 sq. ft. which would be about 26,000 sq. ft. The 44 or 45 shops are constructed because of the change in plan and increase in the area to 26,000 sq. ft. whereas the agreement with the respondent is admittedly for 13,520 sq. ft. built up and the plan and design of the respondent is obviously to take possession of this large area which he must be presumed to be fully aware as a man of ordinary prudence and a man in same business that having an agreement on a built up area of 13,520 sq. ft. it is not possible for him to get possession of built up area of about 26,000 sq. ft. and there are serious difficulties in getting relief in suit filed for specific performance on the basis of agreement of 13,500 sq. ft. built up area, to secure possession of 26,000 sq. ft. built up area consisting of 44 or 45 shops as against 28 shops claimed by him as per agreement and therefore, has misused and abused the process of law and police machinery (the present investigating officer Mr. Chavan) for that purpose. The investigating officer also tried his level best to help the respondent by going out of way which would be made clear in further part of this judgment.

20. Therefore, an application for possession of 44 shops was made to the Magistrate without taking any steps in that direction in the civil litigation. It is also clear from the statement of the Architect in his affidavit dated 8-9-1992 that the frontage has increased from 78 meters to 108 meters in view of the increase in the F.S.I.

21. I have made a detailed reference to the correspondence to point out that from the admitted correspondence between parties, the case made out in the charge sheet or in the private complaint that the petitioner was dishonestly and fraudulently offering only four shops when the agreement was for 28 shops is on the face of it false frivolous and baseless. The fact that the total consideration agreed was Rs. 35 lakhs and the first payment was of Rs. 7 lakhs (by two cheques of Rs. 3.5 lakhs each) was nowhere disputed and even in the civil suit no assertion is made of any cash payment at any time and one fine morning it is asserted that cash of Rs. 22,12,000/- has been paid without mentioning the date and time of payment. This is also required to be appreciated in the background of the admitted assertion of the respondent that with great difficulties he had collected the amount of Rs. 7 lakhs by borrowing from others and by paying huge interest on it.

22. Apart from whatever I have stated about the payment under contract by respondent, there is some reference to this aspect of the matter in a petition between the parties in this Court, which is worth pointing out at this stage. It was in an appeal being Appeal from Order No. 1258 of 1996 arising out of the civil suit filed by the respondent. This was the appeal filed by the respondent against the direction calling upon him to pay the balance consideration in two installments while restraining the present petitioner from disposing of or alienating shops Nos. 12 to 56 shown in the plan. While considering the respondent's case of payment of Rs. 22,12,000/- in cash, the Court (Coram :

Patankar J.) on 19-12-1996, observed as below :

"The learned Counsel for the appellant first submitted that the letter issued by respondent No. 1 dated 16-9-1987 showed that consideration fixed was Rs. 57.12 lakhs and amount of Rs. 22.12 lakhs was paid in cash and Rs. 35 lakhs by cheque in different installments. He further submitted that appellant has also deposited an amount of Rs. 7 lakhs as per order of the trial Court and therefore this order ought not to have been passed. The learned Counsel for respondent Nos. 1 to 3 pointed out that this letter only indicated mode of payment. In my opinion, he is right in that respect. In the plaint it is only mentioned that appellant has paid Rs. 7 lakhs by cheque on 11-5-1987 and there is no mention in the entire plaint that cash amount of Rs. 22.12 lakhs was paid. There is also no mention to be found with regard payment by any other cheque. On the contrary reference is made in respect of the said letter dated 16-9-1987 and it is alleged that reckless and baseless allegations are made therein. Further there is also reference made that Respondent Nos. 2 and 3 have offered to refund the amount of Rs. 7 lakhs. In the prayer Clause (d) it is further stated that respondents may be directed to specifically perform the agreement on accepting further installments. The contents of the letter are accepted as true then it would indicate that entire payment is made. Therefore, this contention of the learned Counsel for the appellant is not right. The learned Judge of the trial Court is right in holding that prima-facie the appellant has only paid Rs. 7 lakhs."

This order was challenged in the Supreme Court by way of Special Leave Petition, which came to be dismissed.

23. I may point out that my discussion in this respect is not intended to influence the findings of the civil suit on merits. I have referred to the judgment of the High Court in appeal from order only to point out that once the matter was considered by the High Court judicially even though at prima-facie stage and the Court could not be convinced of the truthfulness of the contention of the respondent regarding cash payment of Rs. 22,12,000/-, and from my earlier discussion it is clear that the said assertion is afterthought and totally unworthy of credence.

24. Thus the entire base of the criminal prosecution that there was dishonest and fraudulent intention from the beginning on the part of the petitioner as only four shops were intended to be given when the agreement was for 28 shops is groundless. The edifice based on such a foundation cannot stand for a moment. There is a dispute between the parties regarding 27 shops or 28 shops and also some dispute regarding consideration already paid, and the pending civil suit will take care of these disputes. Although, prima-facie it appears that the respondent's contention of payment of cash is afterthought and unfounded.

25. Another aspect of the matter is that the petitioner had earlier filed a petition for quashing of F.I.R. This petition bearing No. 970 of 1995 came up before a Division Bench of this Court (Coram : V. P. Tipnis and M. L. Dudhat JJ.) on

15-9-1995 when after hearing the learned Counsel for the parties, the Court admitted the petition and stayed further investigation. It was pointed out to the High Court that the complaint of the respondent was addressed by him to the Director General of Maharashtra. It was investigated into on 20-5-1993 by Deputy Commissioner of Police, Thane, and the same was disposed of as according to the D.C.P. no offence had been made out. Thereafter Respondents Nos. 1 and 2 in the petition made an application to the Home Minister due to which a fresh enquiry was held by the Deputy Commissioner who also came to the conclusion that no offence was committed by the petitioner. It is in view of this that stay was granted by the High Court to the further investigation. However, thereafter in the same petition an application was moved for vacating stay and another Division Bench (Coram : Saraf and Dudhat JJ.) although exhaustive arguments were advanced, without going into the merits of the matter on basis of the statement made, keeping the main issue in the petition open and stating that the same will be decided at the time of final hearing, directed vacation of stay and completion of investigation within six months. Thereafter on 16-3-2000 when the matter came up before the court, the learned Addl. Public Prosecutor Shri I. S. Thakur, made a statement on instructions from the investigating officer present in court that the investigation is practically complete and the report u/s 173, Criminal Procedure Code will be filed within a period of four weeks and further statement was made that the petitioner or any of his family members shall not be arrested till the report is filed and therefore, although the matter was heard, without making any comments- on merits, it was adjourned as part heard and thereafter when charge sheet was filed, petition was rejected with liberty to the petitioner to challenge the charge sheet making it clear that this rejection will not come in the way of the petitioner to challenge the charge sheet which has been challenged in the present petition. Earlier to that an attempt was made to amend the petition by incorporating a prayer clause challenging charge sheet. As the said amendment was not allowed, petition was rejected keeping it open to the petitioner to challenge the charge sheet.

26. Another very important development which needs to be mentioned and which in my view has a serious effect on the conduct of the present investigating officer is that at an earlier stage the matter was investigated into by three different investigating officers and the conclusion reached by them was that it is a dispute purely of a civil nature involving no element of any crime. The case was therefore classified as neither true nor false and a "C" summary was recommended and "C" summary was also granted. This grant of "C" summary was no doubt by a high ranking Police Officer exercising magisterial powers u/s 96 of the Bombay Police Act. It is not disputed before me that the notification conferring powers on those police officers for grant of summaries and the relevant provisions of the Bombay Police Act have been quashed holding them to be ultra virus by a Division Bench of this Court. It is pertinent to point out here that even though by a later judgment the provisions of the concerned Act are held as ultra vires, it is debatable whether all the orders passed earlier under

these provisions ipso-facto become void and honest. However, in the facts and circumstances of this case, it is not necessary to go into this aspect of the matter for the reason that later on when writ petition was filed before this Court challenging the F.I.R., a statement was made by the public prosecutor that the investigation is nearly complete and a report u/s 173 would be filed in a short period which statement was accepted by the High Court. It can therefore be assumed that although in the face of existing "C" Summary, normally no further investigation could go on without permission from the Magistrate, it is of academic interest in view of the admitted position that the High Court permitted the investigation to be completed. However, one thing is worth noticing. After the grant of "C" Summary, respondent had approached the Director General of Police Shri Arvind Inamdar, who directed one of his subordinate to go through the matter. The said Police Officer stated that "C" summary has already been granted and permission of the Magistrate may be taken for further investigation. Admittedly in this case, the present investigating officer or his predecessor have not taken any such permission from the Magistrate for further investigation or for reopening of the investigation which was a direction of the Director General of Police. What prevailed on the investigating officer to ignore the directions of the highest authority is difficult to understand inasmuch as the statement before the High Court was at a later stage. No explanation whatsoever has been given for this by the investigating officer. All the facts have been stated in detail in the reply filed by the Senior Inspector of Police in Writ Petition No. 549 of 1996. It has also been stated that after classifying the case as "C" final, sealed shops have been handed over to the petitioner. It is obvious that the shops were earlier sealed by the Investigating Officer and although there appears no probable reason for seizing and sealing the shops in a dispute of immovable property which is pending in Civil Court that also without any order from the Magistrate or without any direction from the Civil Court. What is pertinent to note is that the shops were desealed and possession was given to the Petitioner. It is also stated in the affidavit dated 1-8-1996 filed by Senior Inspector Shri Ingle in Writ Petition No. 529 of 1996, that the complaint was twice investigated into by the Thane Police. The present petitioner (respondent No. 5) at different times offered to the respondent to pay back the amount paid by him as he was unable to construct the shops in time having faced genuine difficulties to which the present respondent did not respond. As an off shoot to the civil suit in Thane Court, there were proceedings before the High Court and after classification of the case as "C" final, according to the administrative decision taken order of "C" Summary was passed by an officer duly empowered in view of delegation of powers by the Government Resolution and Ordinance No. 9 of 1991 amending Bombay Police Act and as a consequence of classifying the matter as "C" final, shops were desealed as continuation of the shops in sealed condition could be met with consequence of claim of damages by the aggrieved party against the officers also as nothing was pending after "C" summary either before the Police or before any other authority.

27. On 9-1-1996, an application was moved by the respondent to the Magistrate that he should be given possession of the shops which have been desealed, and the learned Magistrate passed a speaking order on 22-6-2000 after hearing the parties and clearly stated that since civil suit is pending between the parties in a competent Court for specific performance of contract in respect of the very same property, the petitioner before the Court i.e. the present Respondent, made an attempt to disclaim that one of the prayers in Civil Court is for possession of the property. The learned Magistrate also pointed out that the Civil Court will decide the rights of the parties and will pass appropriate orders in respect of the possession of the property and he rejected the application. What is still pertinent to point out is that in spite of all this, without getting any appropriate order regarding interim possession or mandatory injunction or appointment of Receiver from the Civil Court, and rejection of application by the Magistrate, the investigating officer resealed the shops. Admitted position is that the resealing was of 44 shops whereas the original contract, taking the respondent's case at its best, is for 28 shops. Petitioner has produced certain cutting of newspapers wherein the news of sealing of 44 shops has appeared. This would show that respondent (complainant) had a clear design to take possession of 44 shops which is far beyond his agreement and that also in the absence of any order from any competent Court and even without moving the Civil Court where specific performance suit is pending and investigating officer was anxious and out to help him by handing over possession of the shops and he in fact resealed the shops. The Investigating Officer has the audacity to say that the shops were empty whereas the police record shows that shops were in possession of third parties. There are panchanamas on record which show that the shops which were sealed were full of goods and articles of third parties and those parties had to approach the Court for possession of the articles. They are not parties to any suit or litigation in High Court, but the result of resealing of the shops was that they were dispossessed in the absence of any order from competent court. This was on the background of the reply filed by G.B.C.B. C.I.D. in Contempt Petition No. 269 of 1996 that reinvestigation would amount to waste of time by giving criminal colour to a civil dispute. The Petitioner has produced a letter sent by the Court to the Police Inspector for return of property on an application made by one Rohit Anand, Proprietor of M/s Kanchan Enterprises, who was in occupation of shop No. 48 sealed by the police. The Court passed an order directing return of the property to the said applicant and permitted said Rohit Anand to continue his business. The panchanamas drawn on the occasion show how high handed act of resealing of the property without any order from the Court affected the persons who are not parties to any litigation. They had to approach the Court for return of their movables. The fact remains that they lost possession of their shop for considerable period of time by the act of resealing by the Investigating Officer. Such an action of resealing the shops was totally uncalled for. I am not commenting on the powers of Police to seize and seal the immovable property as in another petition between these parties challenge to the action of resealing has failed. The real question is of propriety and necessity of such an action by police

in the present dispute. It is already pointed out that the 44 shops sealed had a built up area of 26,600 sq. ft. whereas the agreement is for 13,520 sq. ft. Thus the respondent's attempt is to secure possession of a large area covering 44 shops for which there is not even an agreement and for that the investigating officer has gone out of the way to help him. Respondent is not an ordinary person. He is an educated Engineer and Builder and he is fully aware of his own suit and the fact that the suit does not cover that much built up area and so many shops. He is being represented by Advocate in the suit. Thus without even claiming any interim relief in the civil suit, he practically got the possession of 44 shops which is a clear abuse of process of law by the respondent and police officer was keen to help him and for that to go to any extent.

28. The case of the other petitioners who are joined in the charge sheet as co-accused show further the manner and the extent to which the investigating officer (Mr. Chavan) has gone to please the complainant and harass the accused. The accused Nos. 2 to 8 are either family members of petitioner (accused No. 1) Pyarelal or the directors of the company or partners in the firm. It is brought to my notice by the learned Counsel for the petitioner that two of them are sons of Pyarelal, who were on the date of alleged offence less than 15 years of age. They are arraigned as accused in the charge sheet and I am sure that the investigation officer would have used his power even to arrest all the family members of the petitioner, but for the statement made before the High Court that they will not be arrested. It is stated in the charge sheet that wife and minor sons of petitioner or the directors of the company or partners of the firm are beneficiaries of this contract and because they are beneficiaries they are to be imputed with intention of dishonestly and fraudulently cheating the respondent. The joining of these persons as accused in the charge-sheet is in my view highest misuse of power by the concerned investigating officer by joining hands with the complainant. The learned counsel for the respondent had no answer to the question as to how these persons can be tried as accused merely because they are beneficiaries of the contract. No act of cheating by them is even alleged. This becomes more interesting because the very same investigating officer has filed an affidavit in Petition No. 186 of 1999 on 19-7-1999, wherein he has stated that the petitioners in that petition have no locus standi in the proceedings because they are neither complainant nor accused, made him to turn topsy-turvy and change his stand by making them co-accused is a mystery. In fact in view of the "C" summary, it was incumbent on the investigating officer to make it clear why he has come to a contrary conclusion. It will be interesting to note that the so called additional investigation conducted by this investigating officer is only recording of some more statements and collecting of documents pertaining to the society, and private limited company and the additional witnesses examined by him are mostly the other co-accused and some friends of the complaint. Therefore it was rightly contended by Mr. Marwadi, learned Counsel for the petitioner, that practically no further investigation has been done by him after the closure of investigation and getting order of "C" summary.

29. The learned Addl. Advocate General appearing for the State contended that when the petitioner moved an application to the Home Secretary for withdrawal of prosecution, a meeting was called of high level officers of the Government and it shows that the petitioner is an influential person. I do not know whether the learned Addl. Advocate General wants to say that his Government takes action only if the persons are influential. Any person who has genuine grievance can approach the authorities concerned and in the facts and circumstances of the case, if the petitioner felt that he is being harassed by the action of the respondents, he was at liberty to approach the Government for taking appropriate action and he had approached in due course by a written application and the matter was considered, but the Government did not take any action probably as certain matters were pending in the High Court as appears from the correspondence on record. Even the respondent had approached the higher authorities in the Police department. I do not think that only because the parties had approached higher authorities, any inference can be drawn against them. In any case, the Court is not passing the order either because any party had the capacity to approach the authorities, but on merits of the matter and in accordance with law. The argument is mentioned only to point out that it is absolutely having no substance.

30. On behalf of the respondent it was strenuously contended that converting of private limited company into a society and further division of the society were all intended to cheat the complainant and to dupe him. This argument is without any substance. Even the authorities under the co-operative Societies Act have pointed out that any division or amalgamation of the society does not affect the rights of the person who has entered into contract. The argument is mentioned only for being rejected as it shows how worthless argument is advanced. Another argument seriously advanced is that the petitioner has not placed a copy of entire chargesheet and has not prayed for quashing of the chargesheet. This argument is also mentioned for being rejected as all the copies of documents which are required to be perused while dealing with this petition has been placed before and challenge is to the maintainability of the prosecution which the accused has prayed to be quashed.

31. The above discussion clearly shows that the complaint on the basis of which the offence is registered, the chargesheet filed and the entire investigation do not disclose any criminal offence. The case of the respondent/complainant that the petitioner offered only four shops when the agreement was for 28 shops is proved to be false by the correspondence exchanged between the parties. There is genuine dispute regarding the number of shops 27 or 28 agreed to be sold to the respondent and in that respect the contention of the petitioner is that on the copy of agreement given to the respondent, there is an overwriting and shop No. 34 which was not there has been added which is obvious from mere perusal of complainant's copy of agreement. However, this is only the petitioner's assertion. The dispute is pending before the Civil Court and taking into consideration the written agreement, no comments need be made at this stage,

and the observations made are not intended to influence the Civil Court. The complainant's case of having paid Rs. 22 lakhs and odd in addition to cheque payment of Rs. 7 lakhs, is on the face of it not acceptable and has not been accepted by the High Court when the matter came before this Court against interim order of the Civil Court as there is no pleading regarding the payment of any amount in cash in the suit. The fact that there was a settlement and the petitioner did not abide by the settlement does not amount to cheating and does not constitute a criminal offence whatsoever. It is brought to my notice that in pursuance of the agreement, the petitioner had handed over two cheques totalling to Rs. 4 lakhs. However, those cheques were not even presented for encashment to the bank. According to the respondent, he was advised by his advisers not to encash the cheques and therefore, those cheques were not presented for encashment within the validity period. In any case the settlement not being finally worked out between the parties cannot be a ground to hold that the petitioner has committed cheating or breach of trust. The investigating officer however found it to constitute offence even when the respondent himself did not act on it by encashing the cheques issued in pursuance of the settlement. The changing of plan is as per the directions of the CIDCO and no offence whatsoever under M.R.T.P. Act or under the Maharashtra Ownership Flats Act can be alleged on the ground. Therefore, taking into consideration even the documents which can be said to be more or less undisputed, the complaint taken at its face value fails miserably to make out a criminal charge.

32. In fact the conduct of the complainant (respondent) and the investigating officer (Mr. M.R. Chavan) on making almost all family members, directors and partners of the concerns as co-accused, arresting the petitioner and putting him in police custody, in the aforesaid facts and circumstances and that also on the background that once the matter was found by responsible senior police officers to be not involving any criminal offence, that also without taking permission which itself was violation of the direction of the Director General of Police and further act of resealing the 44 shops even during the pendency of discharge application before the Magistrate, without taking orders from any Court are instances which in my view, are sufficient to indicate that this is case of gross abuse of process of law by the respondent and the concerned police officers and it is a fit case in which this Court must exercise its powers u/s 482, Criminal Procedure Code to secure the ends of justice and to prevent further miscarriage of justice. Therefore, all the petitions deserve to be allowed. The entire prosecution of all the petitioners should be quashed. Petitions are allowed. The order of issuing process as well as the entire prosecution in Criminal Case No. 69/P of 2000 of the petitioners pending in the court of the Addl. Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai, is quashed and set aside. Complaint against the accused are dismissed. Their bail bonds are cancelled.