

(2006) 01 CAL CK 0015
In the Calcutta High Court
Case No : C.R.R. No. 852 of 2004

Raymond Ltd. (JKFT Division)

APPELLANT

Vs

H.V. Doshi and Brothers Pvt. Ltd.

RESPONDENT

Date of Decision : 20-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 156(1), 186, 200, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 139, 141
Penal Code, 1860 (IPC) — Section 120B, 420, 465, 467, 468

Citation : (2006) 1 CHN 578

Hon'ble Judges : P.N. Sinha, J

Bench : Single Bench

Advocate : Milon Mukherjee, Sandipan Ganguly and Sanjoy Jhunjhunwala, for the Appellant; Subodh Chandra Ukil and Chandan Kumar Ghosh, for the Respondent

Final Decision : Allowed

Judgement

P.N. Sinha, J.—This revisional application u/s 482 of the Criminal Procedure Code (in short the Code) is aimed at quashing the proceeding of complaint case No. C-1024 of 2003 under Sections 420/120B of the Indian Penal Code (in short IPC) now pending before the learned 12* Metropolitan Magistrate, Calcutta and for setting aside the orders dated 8.12.03 and 17.1.04 passed by the learned Magistrate thereby taking cognizance of offence and issuing process against the petitioner.

2. The aforesaid complaint Case being Case No. C-1024 of 2003 was initiated on the basis of complaint filed by the opposite party (in short O.P.) namely M/ s. H.V. Doshi and Bros. Pvt. Ltd. The gist of the complaint may be summarised as follows.

3. The accused No. 1 company incorporated under the Companies Act is engaged in manufacturing various products including manufacture of engineering files and tools and also marketing such products. Accused Nos. 2, 3 and 4 are all working

for gain in their respective posts under accused No. 1 company. The complainant is acting as an "Indenting Agent" for and on behalf of accused No. 1 for decades and from time to time whenever renewal of such indenting agency had taken place some changes in the terms, conditions and modalities were introduced. Since November, 2000 accused No. 1 formally started its private office at Calcutta for Eastern Region and accused No. 4 was posted there to conduct and looking after business of accused No. 1. On or about 27th December, 2000 the accused Nos. 2 and 3 while visiting Calcutta for their official business met Sri Sundeep Doshi, Managing Director and Anil Doshi, a Director of complainant company at their office for finalising the modalities of indenting agency for the year 2001 onwards. During the meeting, the accused Nos. 2, 3 and 4 intimated the Managing Director and Director of complainant that since they were accepting collateral securities for indenting agency from other agents and as such, the complainant was also required to pay or provide for collateral securities for such indenting agency. It was decided that the complainant would pay Rs. 25 lacs as collateral securities in equal instalments by cheque or bank draft in favour of accused No. 1 and after encashing the first cheque or bank draft, the accused Nos. 2, 3 and 4 would then initiate to fulfil the obligation by providing a formal agreement for indenting agency in favour of the complainant.

4. In terms of the aforesaid agreement the complainant issued five undated cheques in favour of "Raymond Limited Division: J.K. Files and Tools" by way of collateral securities as stated under:

ST. NO. Cheque No. Drawn on Amount 1. . 812567 Allahabad Bank, Stephen Rs.500,000/- House, Calcutta. 2. 812568 Allahabad Bank, Stephen Rs.500,000/- House, Calcutta. 3. 812569 Allahabad Bank, Stephen Rs.500,000/- House, Calcutta. 4. 812570 Allahabad Bank, Stephen Rs.500,000/- House, Calcutta. 5. 812571 Allahabad Bank, Stephen Rs.500,000/- House, Calcutta. 5. The complainant along with the forwarding letter dated 29.12.2000 addressed to accused No. 3 sent the aforesaid five cheques to accused No. 1 and the said letter is marked as Annexure - A in the complaint. In spite of there being no written confirmation from the complainant that the said cheques to be deposited for encashment, the accused Nos. 2, 3 and 4 in conspiracy with each other inserted in the date space, the date 21.4.01 in the cheques bearing Nos. 812568 and 812569 and submitted the cheques for encashment in the Standard Chartered Grindless Bank at 19, N.S. Road, Calcutta-1. The cheque bearing No. 812568 for Rs.5 lacs was encashed but the cheque bearing No. 812569 was returned by the bank on 21.4.01 with remark "insufficient fund". The complainant sent written protest to that effect by a letter dated 9.5.01 addressed to accused No. 2 and demanded return of the remaining cheques and it was received by accused No. 1 and the copy of the said letter is Annexure- B. In pursuance to the wilful and deliberate non-reciprocal approach in terms of Annexures A and B, the complainant had to instruct its banker to "stop payment" of the cheques by a letter dated 23.5.01 which was received by the bank on 24.5.01 and copy of the said letter is Annexure - C. A copy of the letter dated

29.5.01 was also sent through courier and it was received by accused No.1 and the copy of the said letter with receipt is Annexure - D. In spite of having encashed the cheque bearing No. 812568 for Rs 5 lacs, the accused did not take any step for finalising the indenting agency in favour of complainant nor returned the said amount to complainant.

6. The accused again deposited the cheque No. 812569 and banker of complainant informed banker of accused about instruction of "stop payment". In spite of such correspondence the accused deposited the cheque bearing No. 812571 putting date 23.8.01 in the blank space for date in the cheque with their handwriting and cheque bearing No. 812570 with date 21.4.01 for encashment and, in view of the instructions by complainant to its banker the said cheques bearing Nos. 812569, 812570 and 812571 were not encashed.

7. The aforesaid illegal acts of the accused comes within the definition of Section 420 of the IPC and the complainant was induced to give the undated cheques to accused upon representation made by accused that formalisation of the agreement for indenting agency in favour of the complainant would be given effect after receipt of Rs. 5 lacs on encashment of the first cheque. In spite of encashing the cheque bearing No. 812568 the accused did not take any step in finalising indenting agency in favour of complainant. The said conduct of the accused is also punishable u/s 465 of the IPC. The accused persons are further liable for prosecution u/s 467 of the IPC as they inserted in the cheques dates with their own handwriting without consent of the complainant and the complainant handed over undated cheques to accused. The illegal acts of the accused persons further come within the ambit of Section 468 of the IPC as the accused intended that the said cheques shall be used for the purpose of cheating the complainant. The accused fraudulently and dishonestly used the cheques in question, knowing fully well that the complainant has not filled in dates in the cheques and it was the accused who inserted the dates in the cheques and thereby committed offence punishable u/s 471 of the IPC. The illegal acts committed by the accused persons in conspiracy amongst each other amounts to commission of offence under Sections 420/465/467/468/469/471 of the IPC and also u/s 120B of the IPC. The complainant presented the said complaint in the Court of the learned Additional Chief Metropolitan Magistrate on 8.12.03 when the said learned Magistrate took cognizance of offence and transferred the complaint to the learned Metropolitan Magistrate, 12th Court for disposal. Learned Metropolitan Magistrate, 12th Court by his order dated 17.1.04 issued process against the accused and challenging the said two orders and for quashing the complaint the accused petitioner has moved this Court in this revisional application.

8 . Mr. Milon Mukherjee, learned Advocate for the accused petitioner submitted that the main allegation of the complainant is that the cheques were issued for collateral security for granting indenting agency by accused company in favour of complainant and there was request by the complainant not to deposit the said

cheques for encashment. The petitioner presented the cheque No. 812569 dated 21.4.01 for encashment to their banker and the said cheque was dishonoured with remark "payment stopped by the drawer". The accused then served demand notice dated 4.6.01 upon the complainant which is Annexure-G and the complainant accused received the notice on 11.6.01. In spite of receipt of the notice the complainant did not take any step for payment of the dishonoured cheque amount. Accordingly, the accused company has filed a complaint being case No. CC/948/S of 2001 in the Court of the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai. The accused company presented other three cheques bearing Nos. 812567 and 812571 dated 23.8.01 and cheque No. 812570 dated 21.4.01 for encashment in their bank but the said cheques were dishonoured with the remark "insufficient funds". The accused No. 1 petitioner then sent demand notice dated 17.10.01 to the complainant O.P, by registered post with A/D and the O.P. received the notice on 30.10.01. In spite of receipt of the demand notice the O.P. complainant did not take steps for payment of the amount of the dishonoured cheques. Over this matter the accused petitioner as complainant lodged a complaint case being case No. CC/1479/S of 2001 in the Court of the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai. As the accused petitioner has earlier lodged complaint cases against the O.P. in 2001 in Mumbai for dishonoured amount of the cheques, the subsequent complaint in 2003 filed by the O.P. complainant in the Court of the learned Metropolitan Magistrate, Calcutta is not maintainable for the alleged offence of cheating.

9. Mr. Mukherjee also submitted that the O.P. as complainant in the present complaint has suppressed material facts and did not disclose at all that earlier in 2001 the accused petitioner as complainant has lodged two complaint cases against the present complainant under Sections 138/141 of the Negotiable Instruments Act (in short NI Act). The O.P. complainant filed a writ petition in this Court being W.P. No. 1099 of 2002 for quashing the criminal proceeding filed by the accused company as complainant in Mumbai Court u/s 138 of the NI Act and also challenged jurisdiction of the Mumbai Court to take cognizance of offence u/s 138 of the NI Act against present O.P. complainant. The said writ application filed by the O.P. was rejected by this Court by order dated 14.6.02. Challenging the said order of dismissal of the writ application the O.P. complainant did not prefer any appeal in higher Court. At the time of disposing of the writ petition this Court clearly observed that it would not be proper to interfere at this stage in respect of such proceeding which is pending before the Metropolitan Magistrate at Mumbai. It was further observed that whether the said Court has jurisdiction or not, the writ petitioner has a right to take such point before the said Court and in fact the said Court has jurisdiction to decide such point.

10. Mr. Mukherjee contended that if there was any element of cheating against the accused petitioner as alleged, why the O.P. would file complaint against the petitioner and other accused persons two and half years after lodging of

complaint by accused petitioner in Mumbai Court. Here provisions of Section 186 of the Code clearly applies and the Mumbai Court has jurisdiction to decide the entire matter. The O.P. is entitled to lead evidence in Mumbai Court to rebut the presumption u/s 139 of the NI Act and to establish the fact that the cheques issued by O.P. were not for discharging any liability or debt and the cheques were issued for collateral security. There was business relation between accused and O.P. for over decades and, if there is any breach of agreement between the said two companies there cannot be any element of cheating. The averments of complaint do not at all establish that right from beginning the accused company and its officers had the intention to deceive and cheat the O.P. complainant.

11. Mr. Mukherjee also contended that accused No.1 is a company and it cannot be sentenced to suffer any imprisonment in view of the decision of Kalpnath Rai Vs. State (through CBI), A company cannot have any mens rea and naturally the company cannot be prosecuted. The accused No. 1 company did not receive letter dated 9.5.01 sent by the O.P. The O.P. filed the complaint about 11/2 years after disposal of the writ petition. Before the O.P. lodged the complaint making allegations of cheating on 8.12.03, long before that in the year 2001, the accused petitioner as complainant initiated proceedings against O.P. on 25.7.01 and 29.11.01 u/s 138 of the NI Act. In order to attract elements of Section 120B of the IPC there must be meeting of mind of two or more persons to do certain illegal act by illegal means. The petition of complaint if taken as its entirety without adding anything to it or subtracting anything from it, will reveal that there is no element of Sections 420 and 120B of IPC against the accused petitioner.

12. Mr. Mukherjee further canvassed before this Court that long delay in filing the complaint is a matter which requires consideration by the Court. The O.P. remained silent for almost 11/2 years after dismissal of the writ petition on 14.6.02 and thereafter on 8.12.03 lodged the present complaint making allegation of criminal conspiracy and cheating. The complaint is without any explanation as to why the O.P. did not take any legal action earlier and lodged the complaint more than two years eight months after. The Hon'ble Supreme Court in Zandu Pharmaceutical Works Limited v. Mohd. Sharaful Haque reported in 2005 SCC (Cri) 283, deprecated the practice of coming to Court not with clean hands. The complaints filed by the accused petitioner are much earlier in time than the present complaint. The O.P. complainant in his defence in the proceedings u/s 138 of the NI Act in the Mumbai Court can lead evidence to establish his case that the cheques were not paid to accused company in the discharge of any liability or debt and were handed over only as collateral security for indenting agency. The ingredients of Section 420 of the IPC are wholly absent in the present complaint and at the same time there is no prima facie material for alleged offence under Sections 465/467/468/469 and 471 of the IPC as well as element of Section 120B of the IPC.

13. Mr. Mukherjee finally contended that it has been admitted by the O.P.

complainant that he is acting as an indenting agent of accused petitioner for decades and it establishes existing long term business transaction between the parties. When there is long existing business transaction between the parties failure to fulfil any part of agreement does not form basis of elements of dishonest inducement and element of cheating. Moreover, it is apparent that if there was any inducement that was allegedly made by accused Nos. 2 to 4 and not by accused No. 1 company who had no mens rea at all. Accordingly, continuation of the present criminal proceeding against the petitioner would be an abuse of the process of the Court. This Court under its jurisdiction u/s 482 of the Code is competent enough to quash the impugned criminal proceeding against the accused petitioner. In support of his contention Mr. Mukherjee cited the decisions in *Sundar Das Loghani v. Fardun Rustom Irani* reported in 40 Cri. LJ 1939 *Kalpna Rai v. State* (supra), *Zandu Pharmaceutical Works Limited v. Mohd. Sharaful Haque* (supra), *State of Orissa v. Devendra Nath Padhi* reported in 2005 SCC (Cri) 415, *The Assistant Commissioner, Assessment- II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Anr.* reported in JT 2003 (Suppl. 2) SC 99, *M.V. Javali Vs. Mahajan Borewell and Co. and Others*, *N.C. Nagpal and Others Vs. The State and Another*, *Dr. Sharma's Nursing Home v. Delhi Administration* reported in 1999 SCC (Cri) 91 and *Standard Chartered Bank and Ors., v. Directorate of Enforcement and Ors.* reported in 2005 SCC(Cri) 961.

14. Mr. Ukil, learned Senior Advocate for the O.P. complainant submitted that paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 25, 27, 28, 29 and 30 of the complaint petition are important. There is long standing business transaction between the petitioner and the O.P. and the O.P. was acting as indenting agency of petitioner and petitioner used to take collateral security for the said purpose of engaging the O.P. as indenting agency and this system prevailed for decades. In terms of the agreement between the parties five undated cheques were supplied to the accused persons as collateral security for indenting agency and in terms of the agreement first cheque was encashed in order to fulfil the terms of other parts of agreement. But the accused No. 1 company and its Directors played a trick and cheated the complainant and came to this Court not with clean hands and suppressed material facts. The agreement as disclosed in page 31 of the revisional application differs in respect of Clause 4(G) and written agreement cannot be replaced by oral agreement. There was no Board resolution also produced before the Court to show that the parties agreed to change the terms of agreement. These facts cannot be established without trial. Annexure P-5 of the revisional application is not a letter but statement of accounts and letter head is different and, if this paper is considered properly, it would reveal that the accused No. 1 would not get much amount from the O.P.

15. Mr. Ukil contended that the accused petitioner did not give any reply to the letter dated 29.12.2000 sent by the complainant. There were two agreements; one for indenting agency and the other for C & F Agency and it is evident that rates of interest are also different. The agency was renewed by conduct of the parties though sometimes letters in writing were issued indicating terms of

renewal. After encashment of the first cheque when the accused persons did not fulfil the terms of contract, the O.P. complainant sent letter to the accused No.1 company and its Directors asking them to return the remaining four cheques. The letter dated 29.12.2000 was sent by courier and it was received by the accused persons as the letters were sent to the proper and correct address of the accused persons. Paragraph 13 of the revisional application filed by the petitioner is a deliberate false statement and Annexure P-5 is not a document of complainant but it is a document of petitioner. The petitioner did not send any letter stating therein that the said company or its Directors did not receive the letter dated 29.12.2000 issued by the O.P. complainant and accused also did not deny that the said cheques were issued for collateral security. If Annexure- P-5 is considered properly it would reveal that Raymonds would not get any money from the complainant. P-5 is without seal of the complainant company. The complainant also sent another letter dated 9.5.01 through Lato Royal Express courier and those letters were duly served to the accused persons. Whether the accused company and its directors received the letters sent by the complainant or not are matters of fact which can be decided in the trial. When the accused company did not fulfil the terms of agreement in spite of encashing first cheque the complainant had to give instruction to its bank relating to "stop payment" vide letter dated 23.5.01. The learned Magistrate by his order dated 17.1.04 after applying proper judicial mind issued process and this Court at this stage should not set aside the said order which is correct and legal. Filing of the revisional application for quashing the complaint is tainted with mala fides. The judgment of this Court dismissing the writ application is not a judgment on merit of the case and dismissal of the writ petition will not debar the complainant to proceed with the complaint.

16. Mr. Ukil further submitted that the accused No.1 with mala fide intention filed second complaint in Mumbai Court during pendency of the first complaint u/s 138 of the NI Act. The cheques in question were issued before one financial year but the same were presented illegally in the next financial year. The accused petitioner remained silent from April to August, 2001 and thereafter with mala fide intention lodged the complaint in September, 2001 in the Court of learned Metropolitan Magistrate at Mumbai. The several paragraphs of the complaint petition clearly makes out a prima facie case of cheating against the accused persons. The O.P. did not receive summons in respect of cases filed by the petitioner. It is true that the O.P. has lodged the complaint after filing of the complaint cases by petitioner but O.P. did not receive summons in respect of complaint cases filed by the accused petitioner. The cheques were undated and the petitioner and his men and agents inserted dates in the cheques and presented the same for encashment in bank though complainant requested not to present the cheques for encashment as the said undated cheques were handed over to accused petitioner as collateral security for the purpose of indenting agency in favour of O.P. At this stage, there is no ground for quashing the complaint and all the points raised by the petitioner are matters of fact which

can be decided only on the basis of evidence in the Court of the learned Metropolitan Magistrate.

17. Mr. Ukil also contended that at this stage the Court after carefully taking into consideration the petition of complaint and its annexures, exhibits, initial ejahar/ deposition etc. are required to arrive at a finding as to whether a prima facie case has been made out for issuing process or not. The petitioner twisted the terms and conditions and depicted them according to its own whims in paragraph 4 of the revisional application to mislead the Court. If the agreement was terminated with effect from 1.2.01 the complainant or its Director could not have signed the alleged outstanding statement mentioned in paragraph 12 of the revisional application being Annexure P-5 at page 37. The said allegations are also false in view of the fact that in March, 2001 M/s. J.K. Files and Tools invited Managing Director of the complainant to attend all India Agents Conference scheduled to be held on 14.3.01 and 15.3.01. In the midst of meeting dated 14.3.01 Sri Ashok Khedkar of the petitioner obtained signature of Sundeep Doshi on 14.3.01 in a statement prepared by V.K. Mehta on a plain white sheet of paper. Sundeep Doshi believed the contents of the said paper to be a true and correct statement and blindly signed on that paper. The Annexure P-5 of the revisional application cannot be believed as it is neither in the form of a letter nor addressed to any of its officers. The petitioner did not deny contents of letters dated 29.12.2000 and 9.5.01 sent by the complainant.

18. Mr. Ukil also submitted that in the order dated 17.1.04 learned Magistrate clearly indicated that there are sufficient materials and prima facie case to issue process. The major cause of action, if not the entire cause of action, by and between the parties hereto had taken place in Calcutta within the jurisdiction of this Court and as such invoking the jurisdiction of the Court of the learned Magistrate at Mumbai by the concerned respondents cannot be sustained either in fact or in law. In catena of decisions it has been held by the Hon'ble Supreme Court that at the time of issuing process the Magistrate has to see whether prima facie case has been made out on the basis of complaint, documents annexed with the complaint and statement of the witnesses recorded u/s 200 of the Code. As the petition of complaint discloses prima facie materials of alleged offence against the petitioner there is 10 ground for quashing the criminal proceeding against the petitioner and the revisional application should be dismissed. In support of his contention Mr. Ukil placed reliance on the decisions namely, R.P. Kapur Vs. The State of Punjab, , State of Haryana and others Vs. Ch. Bhajan Lal and others, , Mushtaq Ahmad Vs. Mohd. Habibur Rehman Faizi and others, , State of Bihar and Another Vs. Md. Khalique and Another, , Kamaladevi Agarwal Vs. State of West Bengal and Others, , Rashmi Kumar (Smt) Vs. Mahesh Kumar Bhada, and Medchl. Chemicals and Pharma (P) Limited v. Biological E. Ltd. reported in 2000 Cri. LR 488.

19. I have duly considered the submissions made by the learned Advocates for the parties and perused the revisional application, affidavits filed by the parties,

papers and documents annexed with the revisional application and affidavits, written notes submitted by the parties and the decisions concerning principles of law placed by them before me. At the outset I like to make it clear that placing of decisions do not always favour a party unless the facts and circumstances of the reported decisions and the principles of law involved are identical with the facts and circumstances of the case pending consideration before the Court.

20. The salient features of the complaint filed by the O.P. before the learned Magistrate for initiating criminal proceeding against petitioner and other accused persons have already been mentioned earlier where I mentioned gist of the complaint.

21. Complainant's allegation is that for the purpose of renewing indenting agency with accused petitioner he sent five undated cheques of Rs.5 lacs each with letter dated 29.12.2000 which were duly received by accused persons. In the said letter it was also mentioned that without previous confirmation in writing from complainant no cheque should be deposited for encashment. The main allegation of the complainant is that those aforesaid undated cheques were sent to the accused for the purpose of renewal of indenting agency in favour of complainant and as the same did not materialise, the accused persons under the law ought to have returned the cheques lying with them and not deposited the same in bank. The accused persons forming conspiracy amongst themselves thereby cheated the complainants and also forged the cheques by putting date with their own handwriting and thereby committed offence under Sections 420, 465, 467, 468, 469, 471 read with Section 120B of the IPC.

22. The question for consideration before this Court whether the allegations as disclosed in the petition of complaint at all discloses the elements of the alleged offence particularly, the offence of cheating. It transpires from the materials on record that for decades and from the written argument of the O.P. it transpires that over four decades there is business transaction between the accused No. 1 company and the O.P. No.1. It is also transparent from the averments of their pleadings through the revisional application and affidavits that from time to time the accused No. 1 company renewed indenting agency in favour of O.P. complainant. When there is longstanding business transaction between the accused company and complainant company spreading over for the last four decades whether any part of breach of agreement amounted to cheating.

23. In support to establish the case of the complainant Mr. Ukil, learned Senior Counsel placed before me the decisions which I have already mentioned above. After going through the said decisions I find that the said decisions do not help the complainant. The principle of law pronounced by the Hon''ble Supreme Court in R.P. Kapur v. State of Punjab (supra) and the State of Haryana v. Ch. Bhajan Lal (supra), are regarded as landmark judgments and foundation of law relating to exercise of power of the High Court u/s 482 of the Code to quash a proceeding. In those decisions the Supreme Court laid down the guidelines where a High Court in exercise of its inherent power u/s 482 of the Code can

quash a criminal proceeding, and for example, seven illustrations were cited by the Hon''ble Supreme Court. It was also indicated by the Hon''ble Supreme Court that these are not exhaustive list of myriad kinds of cases wherein such power should be exercised. The seven illustrations runs as follows:

(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 permittee 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 of 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.

24. If I carefully consider these illustrations I am of opinion that the petition of complaint does not contain elements of cheating and petitiior. of complaint does not make out a prima facie case against this petitioner to continue the criminal proceeding. It is evident that the complainant filed the petition of complaint in Court suppressing some vital material facts. If the complainant disclosed all the facts and did not suppress material facts the learned Magistrate would have been definitely cautious before issuing process. It is evident that the petition of complaint was filed before the learned Additional Chief Metropolitan Magistrate on 8.12.03 when the learned Magistrate took cognizance of offence and transferred the complaint to the learned Metropolitan Magistrate, 12th Court for disposal and the said learned Magistrate by his order dated 17.1.04 issued process against the accused persons.

25. It transpires from the revisional application as well from the affidavits filed by the parties that long before filing of the complaint by the O.P. before the learned Additional Chief Metropolitan Magistrate, two complaint cases were filed against the O.P. complainant in the Court of the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai u/s 138 of the NI Act. The petitioner as complainant presented cheque No. 812569 dated 21.4.01 for encashment which was dishonoured with the remark "payment stopped by the drawer". The accused petitioner thereafter served demand notice dated 4.6.01 upon the O.P. and the said demand notice was received by the O.P. complainant on 11.6.01. In spite of the receipt of notice the O.P. did not make payment of the dishonoured cheque amount and the accused petitioner filed a complaint case being case No. CC/948/S of 2001 in the Court of the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai.

26. The petitioner as complainant presented three other cheques bearing Nos. 812567 and 812571 dated 23.8.01 and cheque No. 812570 dated 21.4.01 for encashment but all the said cheques were dishonoured with the remark "insufficient fund". The accused petitioner then sent demand notice dated 17.10.01 to the O.P. by registered post with A/D and O.P. received the notice on 30.10.01. In spite of receipt of demand notice the O.P. complainant did not take any step for payment of the amount of the dishonoured cheques. Concerning that matter the accused petitioner as complainant has filed another case being case No. CC/1479/S of 2001 in the Court of the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai.

27. It further appears that the O.P. complainant had the notice of the filing of the said two complaint cases against it by the accused No. 1 company and filed a writ application before this Court being W. P. No. 1099 of 2002 for quashing the criminal proceeding started by accused petitioner against it and also challenged jurisdiction of the Mumbai Metropolitan Magistrate Court to take cognizance of offence u/s 138 of the NI Act against it. It is evident that the writ application filed by the O.P. was rejected by this Court by order dated 14.6.02. The O.P. complainant did not prefer any appeal in any higher Court challenging the order of the dismissal of the writ application.

28. In the petition of complaint filed by the O.P. as complainant it was completely suppressed by O.P. that the accused No. 1 company had earlier filed two complaint cases against it for dishonour of the cheques and the said cases are pending before the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai. The complainant also suppressed the fact of filing writ application before this Court for quashing the criminal proceeding and also challenging the jurisdiction of Mumbai Court to take cognizance of offence and made no whisper in the complaint that the said writ application was dismissed by this Court. It is clear, therefore that the complainant came to the Court not with clean hands and suppressed material facts which were very vital. If all those facts were disclosed before the learned Metropolitan Magistrate, the learned Magistrate would have

been hesitant to issue process against the accused petitioners. Filing of complaint suppressing vital and material facts in this matter amounts to abuse of process of law.

29. In view of provisions of Section 139 of the NI Act the O.P. as accused in the aforesaid two complaint cases pending in the Court of the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai can lead evidence to rebut the presumption and can establish his case that the cheques paid by it to accused No.1 company were not for discharge of any liability or debt but, the cheques were issued only as collateral security for the purpose of renewal of indenting agency. The O.P. complainant filed the present complaint in the Court of the learned Metropolitan Magistrate, Calcutta two years eight months after the filing of the complaint by accused No. 1 company. The O.P. complainant can also challenge the jurisdiction of learned Metropolitan Magistrate, 33rd Court, Mumbai to take cognizance and also can challenge place of trial. O.P. can also challenge legality and limitation points in the said Court for initiation of the complaint cases against it u/s 138 of the NI Act.

30. The suppression of material facts in the petition of complaint is a vital and serious matter for which the Court can treat that the complainant came to Court not with clean hands. In this connection the decisions cited by Mr. Mukherjee for the petitioner are pertinent. In *Sundar Das Loghani v. Fardun Rustom Irani* (supra), a Division Bench of this Court affirmed the order of discharge by the learned Magistrate in a case in which the learned Magistrate after hearing both sides and examining some documents reached the conclusion that the complainant petitioner had deliberately suppressed several facts in his petition of complaint and that the complaint was a thoroughly dishonest one.

31. In *Zandu Pharmaceutical Works Limited v. Mohd. Sharaful Hague* (supra), the Hon"ble Supreme Court held that, if on consideration of the allegations in the light of the statement made on oath of the complainant it appears that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, the proceeding cannot be quashed. But where it appears to the contrary, the interference by the High Court would be justified. In the said reported case the facts indicated that the complainant had not come to Court with clean hands. There was no explanation whatsoever for the inaction between 1995 and 2001. The Supreme Court observed that the High Court seems to have been swayed by the fact that the appellants have rejected claim of the complainant on 5.12.01. It failed to notice that the communication dated 5.12.01 was in response to the letter of the complainant dated 24.11.01. The complaint was nothing but a sheer abuse of the process of law and this is a case where the power u/s 482 should have been exercised and accordingly the Hon"ble Supreme Court quashed the complaint.,

32. The other decisions cited by Mr. Ukil, learned Senior Advocate for O.P. are not applicable in the facts and circumstances of the present case. In *Mushtaq Ahmed v. Mohd. Habibur Rehman Faizi* (supra) and *State of Bihar v. Md. Khalique*

(supra), it was held by the Hon''ble Supreme Court that power of quashing criminal proceeding u/s 482 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. It was also held that if the documents annexed with the complaint prima facie makes out a case of cheating, breach of trust and forgery, order of quashing complaint is not justified. In my opinion these are the settled principles of law and needs no elaborate discussion. The same view was propounded by the Hon''ble Supreme Court in the earlier two referred decisions namely, R.P. Kapur vs. State of Punjab (supra) and the State of Haryana v. Ch. Bhajan Lal (supra). In view of the background of the facts discussed above, I do not find any elements of cheating made out in the complaint and rather it transpires that the complainant filed the complaint suppressing some vital material facts and approached the Court of the learned Metropolitan Magistrate, Calcutta not with clean hands.

33. Mr. Ukil also submitted that pendency of civil case cannot operate as a bar to initiate criminal proceeding and in support of his contention he cited the decisions namely, Kamladevi Agarwal v. State of West Bengal (supra), Rashmi Kumar (Smt.) v. Mahesh Kumar Bhada (supra) and Medchl. Chemicals and Pharma (P) Limited v. Biological E. Ltd. (supra). These decisions lay down the principles of law that pendency of civil cases or civil suits cannot be a bar to institute criminal proceedings if the FIR or complaint discloses elements of any offence. In my opinion, these are also the settled principles of law and elaborate discussion over this settled principle of law is not required at all. The only consideration would be whether the FIR or the complaint, if taken as a whole without adding anything to it or subtracting anything from it, prima facie makes out any element of offence or cognizable offence to proceed with the criminal proceeding.

34. After going through the present petition of complaint I am of opinion that if the complaint taken at its face value and accepted in its entirety without adding anything to it or subtracting anything from it do not prima facie make out any case against the petitioner. The uncontroverted allegations in the complaint and the evidence collected in support of the complaint at the time of issuing process do not disclose commission of offence of cheating, forgery, conspiracy or other allegations as made in the complaint against this petitioner.

35. The decisions cited by Mr. Mukherjee, learned Advocate for the petitioner are pertinent and apposite in this matter. I have already discussed earlier two decisions referred by Mr. Mukherjee. Relating to the decision in Kalpnath Rai vs. State (supra), I am unable to accept the submission of Mr. Mukherjee that no proceeding can be initiated against a company. It is true that a company cannot be sentenced to suffer imprisonment but, my view is that, in appropriate cases company can be directed to pay fine and the officers who are in charge of running day to day affair of the company or the Director or Managing Director of the company may be directed to pay the fine for company. In this connection I rely upon the decision in Standard Chartered Bank and Others etc. Vs.

Directorate of Enforcement and Others etc., In this decision the majority view of the Hon"ble Supreme Court is that, there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. As the company cannot be sentenced to imprisonment, the Court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the Court can impose the punishment of fine which could be enforced against the company.

36. Regarding the other decisions namely *State of Orissa v. Debendra Nath Padhi* (supra), I am of opinion that this decision does not require any discussion.

37. It has been established that in 2001 the accused initiated two complaint cases against O.P. complainant u/s 138 of the NI Act when the cheques handed over to accused petitioner by O.P. presented for encashment were dishonoured. The said cases were filed on 25.7.01 and 29.11.01 respectively. The allegation of the O.P. complainant is that all the said five cheques were undated and the space in the cheque meant for date were blank and the accused persons 2, 3 and 4 forming a conspiracy put dates on the said cheques and in spite of agreement that the said cheques would not be presented for encashment without prior permission of complainant, presented the cheques for encashment without permission of complainant. The allegation of the O.P. complainant is that the dates appearing on the cheques in the space for date are not the handwriting of the Director or Managing Director of O.P. company. In order to prove this fact, the O.P. company at the time of rebutting the presumption u/s 139 of the NI Act in the said two complaint cases in Mumbai Court can pray before the Court for engagement or appointment of handwriting expert for examination of the handwritings and to compare the handwritings to come to the conclusion whose handwriting are there on the cheques in space for date. The O.P. complainant as accused in the complaint cases in Mumbai Court has every right to enter into defence to rebut the presumption u/s 139 of the NI Act and to establish that the said cheques were handed over not for the discharge of any existing "liability" or "debt" but for renewal of indenting agency,

38. It was submitted by Mr. Ukil for the O.P. complainant that the allegations of the complaint are matters of fact which can be established only on the basis of evidence. On a consideration of entire facts and circumstances I am unable to agree with the views of Mr. Ukil and I am of opinion that the matter of fact as to whether the said cheques were issued for collateral security or issued in the discharge of any "liability" or "debt" can be decided by the Mumbai Court.

39. Besides that, going through the complaint I do not find any element of cheating or conspiracy or forgery against the petitioner. It is evident that for four decades there is business transaction between the accused petitioner and O.P. complainant and the accused petitioner has engaged O.P. as its indenting agency and has renewed the indenting agency time to time. At the time of renewal of agency sometimes the modalities, terms and conditions were changed. When two business concerns are running business for four decades and renewing their

terms of agreement or agency time to time and in course of such transaction if there is any breach of a part of agreement as alleged that does not form the basis of elements of cheating or forgery.

40. In order to establish cheating as provided in Section 420 of IPC it must be established that the accused petitioner had the intention to induce, deceive and cheat the complainant right from very beginning. In the instant case, nothing such happened as it transpires from petition of complaint. It is evident that the complainant on 9.5.01 and on 29.5.01 sent letters to accused petitioner requesting them to return the four cheques and to retain the amount of Rs. 5 lacs already encashed and to renew the indenting agency. If the complainant itself makes averments in the petition of complaint that the amount of one of the cheques may be retained by the accused persons how can there be elements of cheating? Moreover, by that time the accused petitioner already presented another cheque for encashment which was dishonoured and a demand notice was issued. It is true that subsequently other cheques were presented for encashment after issue of letter by complainant. I am of the opinion that the entire matter concerning allegations and counter-allegations of the parties may be considered by the learned Magistrate at Mumbai.

41. From the consideration of the entire complaint it does not transpire that the accused petitioner had the intention to deceive or cheat the O.P. complainant right from beginning. In order to attract element of cheating there must be intention right from beginning of the transaction or agreement to cheat which is absent in the present case. There is nothing in the petition of complaint that the accused company with a false and fraudulent representation made to the O.P. complainant caused him to deliver some valuable property due to such false and fraudulent representation. The complainant itself stated in the complaint that amount of Rs.5 lacs encashed through first cheque may be retained and if it is taken into consideration it will reveal that accused petitioner had no dishonest intention nor it dishonestly induced the complainant to deliver the cheques. It has already been mentioned earlier that the other elements of offence as disclosed in the complaint were prima facie not established from the averments of complaint and the learned Magistrate also did not issue process to that effect. Accordingly, it is a fit case where this Court can exercise its inherent jurisdiction to quash the petition of complaint against the petitioner as it has been transpired that the O.P. complainant approached the Court of learned Metropolitan Magistrate not with clean hands and suppressed material facts. Continuation of the complaint case or criminal proceeding against the present petitioner would be an abuse of process of law and in the present matter this Court can invoke its jurisdiction u/s 482 of the Code to quash the criminal proceeding against accused petitioner company.

42. In view of the discussions made above the revisional application is allowed and the criminal proceeding being case No. C-1024 of 2003 now pending in the Court of the learned Metropolitan Magistrate, 12th Court, Calcutta against this

petitioner company is quashed.

43. The observations made by this Court in this revisional application is only prima facie for the purpose of disposal of the present revisional application and the observations cannot be used in respect of any other person or accused. The learned Magistrate will be at liberty to come to his own decision on the basis of evidence and materials on record without being influenced in any way by the observations of this Court.

44. All interim orders passed earlier accordingly stand vacated.

45. Criminal section is directed to send a copy of this order to the learned Metropolitan Magistrate, 12th Court, Calcutta for information and necessary action.

Later:

46. Urgent xerox certified copy be given to the parties, if applied for, expeditiously.