

(2012) 11 DEL CK 0304

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 1518 of 2011 and Criminal M.A. No. 17542 of 2011

RBI Marketing (Netherlands) B.V. and Another

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 22-11-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

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

Penal Code, 1860 (IPC) — Section 120B, 415, 420

Citation : (2012) 10 AD 377

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Uday U. Lalit, Mr. Sandeep Sethi, with Mr. Prateek Jalan, Mr. Prasenjit Keswani, Mr. Nirnimesh Dube, Mr. Ankur S. Kulkarni and Ms. Jyoti Gupta, for the Appellant; Dayan Krishnan, ASC with Mr. Nikhil A. Menon, Ms. Manvi Priya and Inspector Raj Kumar Saha, CBT/EOW/Crime Branch New Delhi Mr. Aman Lekhi with Mr. Sandeep Kapur and Mr. Shivek Trehan, Respondent Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Pathak, J.—By way of present petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ("Cr. P.C.", for short), petitioners seek quashing of FIR No. 195/2011 u/s 420 read with Section 120-B of the Indian Penal Code, 1860 ("IPC", for short) registered at Police Station Economic Offence of Delhi Police on 5th October, 2011, against the petitioners on the complaint of respondent No. 3 filed through its Chairman, that is, respondent No. 2. Petitioners have alleged that the petitioner No. 1 is a Dutch company, having its office at Dr. W. Dreesweg 2, 1185 VB Amstelveen, Netherlands. Petitioner No. 2 is Authorized Representative of petitioner No. 1 and is stationed at Cape Town, South Africa. Respondent No. 3 is a private limited company incorporated under the Companies Act, 1956. Co-accused Mithra Thomas Kanagaratna Dewars (for short hereinafter referred to as accused No. 1)

is former Executive Director of respondent No. 3.

2. Petitioner No. 1 is engaged in the manufacturing of a soil stabilizer namely, "RBI Grade 81". Petitioner No. 1 is patent holder of the said product. This product is used for strengthening and increasing the load bearing capacity of the roads. In the year 2005 accused No. 1 approached the petitioners with a proposal to produce and market "RBI Grade 81" in India but talks could not fructify into a business relationship. Later, in the month of July/August, 2006 accused No. 1 informed the petitioners that respondent No. 2 was interested in entering into a business relationship with petitioner No. 1. In order to satisfy himself regarding creditworthiness of the product, respondent No. 2 constructed a trial road in the State of Orissa sometime in the third week of April, 2006. Thereafter a Memorandum of Understanding (MOU) was executed between the petitioner No. 1 and respondent No. 3 on 22nd April, 2007 whereby petitioner No. 1 agreed to grant exclusive rights to respondent No. 3 to use its patented "RBI Grade 81" against the payment of royalty @ 12% ex-factory price in addition to the licence fee of Euro 2 million.

3. Subsequently, a "Patent Licence Agreement" was executed between the respondent No. 3 and petitioner No. 1 on 26th May, 2007. Besides this certain other agreements including confidential Addendum to the agreements were also executed on the same day between the respondent No. 3, Flowds Ltd. and petitioner No. 1, on the instance of respondent No. 2. In terms of the agreement it was sole responsibility of respondent No. 3 to manufacture the licensed product, that is, "RBI grade 81" by using its own manufacturing and production equipments, infrastructure and employees and supply the licensed products to the customers. Petitioner No. 1 was to only provide reasonable knowhow and training for the transfer of intellectual property to respondent No. 3 as contemplated in the agreement. It also provided minimum royalty. Confidential Addendum envisaged that it would take about 11/2 years for the plant to be established and the sales to begin, thus, no royalty payment was stipulated till 31st December, 2008. It is only thereafter minimum royalty payments were prescribed. In terms of Clause 10, petitioner No. 1 could have terminated the agreement by giving a notice in writing in certain circumstances and the Clauses relevant for the purpose of this case, reads as under:-

10.3 RBI shall have the right at its election to terminate this agreement forthwith by notice in writing to Legend Surface Developers in the event that:

10.3.1 Legend Surface Developers shall fail to perform or observe any of the obligations on the part to be performed or observed under this agreement provided that, subject to clause 10.3.2, in a case where the breach is remediable such notice from RBI shall also require Legend Surface Developers to remedy such breach and if Legend Surface Developers so remedies within 30 (thirty) days of such notice being served such notice to terminate this agreement shall be deemed to be void and of no effect: or

10.3.2 Legend Surface Developers, notwithstanding anything to the contrary contained in clause 10.3.1, fails to pay timely any amount due and owing by it to RBI under this agreement, and fails to remedy such breach within a period of 15 (fifteen) days of receipt of written notice requiring it to do so; or

10.3.3 Legend Surface Developers repeatedly breaches any of the material terms and/or conditions of this agreement in such a manner as to justify RBI in holding that the Legend Surface Developers' conduct is inconsistent with the intention or ability of Legend Surface Developers to carry out the provisions of this agreement; or

10.3.4 an interim order is applied for or made, or a voluntary arrangement approved, or a petition for a bankruptcy order is presented or a bankruptcy order is made against Legend Surface Developers or a receiver or trustee in bankruptcy is appointed of Legend Surface Developers' estate or a voluntary arrangement is proposed or approved or an administration order is made, or a receiver or administrative receiver is appointed or any of Legend Surface Developers' assets or undertaking, or a winding-up resolution or petition is passed or presented (otherwise than for the purposes of reconstruction or amalgamation) or any circumstances arise which entitle the court or a creditor to appoint a receiver, administrative receiver or administrator or to present a winding-up petition or make a winding-up order, or other similar or equivalent action is taken against or by Legend Surface Developers by reason of its insolvency or in consequence of debt; or

4. Upon execution of agreements, petitioner No. 1 provided technical details and confidential data to respondent No. 3 through the respondent No. 2 and accused No. 1. However, respondent No. 3 could not set up the manufacturing plant due to financial crunch and pay the stipulated royalty that fell due at the end of March, 2009. Instead a request was made for rescheduling the payment schedule, which was acceded to and communicated to the respondent on 8th June, 2009 in the following manner:

1. RECOMMENDATION REGARDING PROPOSED REVISED MINIMUM ROYALTY SCHEDULE

After consultation with the co-shareholders and Board of Directors, the proposed revised minimum royalty schedule has been considered favourably in the context of the sustained and committed efforts by legend in bringing the technology to market in India. As a result, Legend's proposal in this regard has been accepted. In conjunction with your proposed minimum royalty schedule the Board of Directors has considered your request for the initial payments as set out in the minimum royalty schedule, to December, 2009. In this regard, the following proposed for your consideration.

RBI proposes that royalty payments are paid monthly at a rate of 12% of sales (as agreed in the original Manufacturing and Licensing Agreement), without any monthly minimum on the basis of the invoicing and sales by legend for the

period July 2009 and December, 2009.

2. Should total paid royalties during the period July 2009 to December 2009 be less than the proposed minimum set out in the revised royalty schedule of EUR 913, 433, a "top up" payment will be made to RBI at that time.

3. Royalty payments subsequent to December 2009 shall be paid monthly in accordance with the proposed minimum royalty schedule until December, 2011.

5. Even thereafter royalty amounts were not paid in terms of the revised schedule. That apart, disputes arose between the respondent No. 2 and accused No. 1 leading to filing of a company petition before the Company Law Board by the accused No. 1. Faced with the repeated defaults in the payment of royalty amounts and inter se litigations between the respondent No. 2 and accused No. 1, petitioner No. 1, vide letter dated 23rd November, 2009 terminated the agreement in terms of Clause 10.3.3 and 10.3.4 of the Patent License, relevant clauses whereof reads as under:

Notice of Termination of the Patent License Agreement dated 26 May 2007

1. We write to you in relation to the Patent License Agreement ("the Agreement") dated the 26th of May 2007 concluded between RBI Marketing and yourselves.

2. It has come to our knowledge that not only has Mithra Dewars resigned from the office of Director of Legend, he has also initiated legal action against you (Darayus Nariman) and Legend for oppression and mismanagement and has applied for the appointment of a receiver for taking charge of the business and assets of Legend.

3. Clause 10.3 of the Agreement provides that "RBI shall have the right at its election to terminate this agreement forthwith by notice in writing to Legend Surface Development in the event that:....(10.3.4) an interim order is applied for or made, or a voluntary arrangement approved, or a petition for bankruptcy order is presented or a bankruptcy order is made against Legend Surface Developers, or a receiver or trustee in bankruptcy is appointed or Legend Surface Developers" estate or a voluntary arrangement is proposed or approved or an administration order is made, or a receiver or administrative receiver is appointed of any Legend Surface Developers" assets or undertaking, or a winding up resolution or petition is passed or presented (otherwise than for the purposes of reconstruction or amalgamation) or any circumstances arise which entitle the court or a creditor to appoint a receiver, administrative receiver or administrator or present a winding-up petition or make a winding-up order, or other similar or equivalent action is taken against or by Legend Surface Developers by reason of its insolvency or in consequence of debt."

4. In view of the abovementioned fact (without referring at this time to your other defaults and reserving our rights to raise the same in an appropriate manner), we serve upon you this notice of immediate termination of the Agreement in terms of clauses 10.3.3 and 10.3.4 of the Agreement.

Consequently, all agreements related to the Agreement also stand terminated forthwith and with immediate effect.

6. Thereafter, petitioner No. 1 filed a suit for injunction CS (OS) No. 2351/2009 titled RBI Marketing (B.V.) vs. Legend Surface Developers (Pvt.) Ltd. wherein vide order dated 31st December, 2009 respondent nos. 2 and 3 were restrained from selling "RBI Grade 81" as also from disclosing the confidential information to any third person or entity. Respondent nos. 2 and 3 also filed a civil suit bearing CS (OS) No. 489/2010 seeking injunction against the petitioners and accused No. 1 from manufacturing and selling the patented products; interim injunction was prayed for but was declined. On 7th July, 2010 petitioner No. 1 entered into a Patent License Agreement with one M/s. Alchemist Technology Ltd. in respect of "RBI Grade 81" so as to see that product is launched in India and petitioner No. 1 derives financial benefits therefrom. In the meanwhile, Company Law Board dismissed the petition of accused No. 1; vide order dated 31st May, 2010, wherein certain observations adverse to the petitioners were made, even though they were not a party. By placing reliance on the order of Company Law Board, respondent nos. 2 and 3 preferred another application for stay in their suit but the same was dismissed on 31st May, 2010 with the following observations:-

25. It would be worthwhile to take note of the fact that the correspondence between the Plaintiffs and the Defendants on 3rd December, 2009 and 7th December, 2009 reveals that the Plaintiffs have run out of funds and had acknowledged that to take RBI Grade-81 forward in India, requires more funds and Plaintiff No. 1 had recommended to the Defendants, Shivani Oil Exploration Company Ltd. for taking over the manufacturing and marketing rights of RBI Grade 81, for India. In such a situation, Defendant No. 2 was prima facie justified in invoking clause 10.3.3 of Patent License Agreement of 26 May, 2007 to terminate the aforesaid agreement. Having said that, there remains no basis to invoke the negative covenant, especially when, the aforesaid agreement in question was not subsisting.

26. This Court is of the considered view that unless and until, the Plaintiffs are able to satisfy that there was a subsisting agreement, they cannot seek to enforce the negative covenant, as contained in the Agreement in question. To reiterate, negative covenant can be enforced, only when the Plaintiffs are not in breach/default of its obligations under the Agreement in question. Since the Plaintiffs themselves are in default, therefore, they cannot legitimately seek enforcement of the negative covenant to restrain third party, i.e., Defendant No. 5. More so, when Plaintiffs have approached this Court after an inordinate delay of four months or so and had thereby permitted Defendant No. 2 to create third party interest in the subject matter of the dispute.

7. Respondent No. 2, on behalf of respondent No. 3, thereafter has filed the present FIR with the Police Station Economic Offence Wing of Delhi Police on 5th October, 2011. In the FIR petitioner No. 1 has been referred as accused No. 2

and petitioner No. 2 as accused No. 3. The allegations in the FIR concerning the Petitioners reads as under:-

(i) The accused persons having the intention to defraud the complainant from the very inception induced the complainant into parting with his funds and thereafter illegally terminated the Patent License Agreement dated 26.05.2007 in a manner which was unauthorized, illegal and fraudulent, thereby making wrongful gains for themselves by causing wrongful loss to the complainant company to the tune of Rs. 50,00,00,000/- (approximately).

(ii) All the accused persons named hereinabove are collectively responsible for the commission of offences complained herein and are guilty of acting maliciously with intent to defraud and cheat the complainant into parting with substantial funds and to deceitfully terminate the Patent License Agreement dated 26.05.2007 to make wrongful gains for themselves thereby resulting in wrongful loss to the complainant company to the tune of approximately Rs. 50,00,00,000/-. The brief facts leading to the commission of the said offences are being narrated as under:

(a) That the accused No. 1 had approached the complainant on behalf of and in conspiracy with the accused No. 2 company and accused No. 3 with the dishonest intention to cheat and induce the complainant into parting with his funds allegedly to set up a company to fund research, development, testing, trials in order to introduce and establish the RBI 81 product patented by the accused No. 2 company to various State Government, Central Government, Defence Ministry, NHAI, Railways, PMGSY etc. and for distribution of the said product.

(b) From the very inception, the accused persons were acting in agreement to defraud the complainant and to induce him to invest huge amount of monies so that they could introduce a product which was new to the market requiring substantial fund along with the intention to later oust the complainant in order to carry on the business to his exclusion by employing fraudulent tactics to deceitfully terminate all agreements at a later stage and cornering the complainant in a financial deliberately and knowingly causing wrongful loss to the complainant company and making wrongful gains for themselves.

(c) That sometime in early 2006, accused No. 1 with dishonest intentions approached Shri Darayus Nariman, the complainant herein, and fraudulently induced him into setting up a company for manufacturing and marketing a soil stabilization product by the name of RBI Grade 81 after obtaining a license from the accused No. 2 company. The accused No. 2 company is the global license holder of the patented product and accused No. 1 had approached the complainant on the misrepresentation that the accused No. 2 company along with accused No. 3 were his close associates and that the entire operation would require a mere 2-3 Crores of funding. However, all of the above-named accused persons were all along acting in agreement and in collusion with each other in

pursuance of a fraudulent and pre-meditated scheme, designed at defrauding the complainant and diverting the businesses of the company to themselves and seeking to deceitfully usurp the assets of the company, after inducing the complainant to part with huge sums allegedly towards developing the business.

(iv) That in order to induce the complainant to pump in more funds after procuring the patent License at the aforesaid exorbitant price, the accused No. 1 and accused No. 3 in connivance with each other, forwarded to the complainant manufacturing order requests received for the product from other countries via facsimiles dated 16.08.2007 and 17.08.2007. Copies of the facsimiles dated 16.08.2007 and 17.08.2007 are annexed hereto and marked as Exhibit-D (Colly). The complainant was induced into conducting various field trials and pilot projects. Each of these trials cost on an average Rs. 20 lakhs, being a total of approx. Rs. 2.5. crores. The complainant company successfully completed several trials across the country and all these efforts and achievements were funded by Shri Darayus Nariman, the complainant herein and his companies. At this point it is imperative to note that these trials and tests conducted by the complainant company successfully introduced the product into the Indian markets and helped generate awareness and interest in the product over the last 2-3 years, contrary to the false representations made by accused No. 1 of having lined up projects in order to induce the complainant. A chart showing all the trials done by complainant company is marked and annexed herewith as Exhibit-E

(v) By August 2009, the complainant company had been approached for a number of promising orders. However, accused No. 1 deliberately and with malicious intent deferred all of these orders and none of them were finalized. The orders were kept in abeyance by accused No. 1 with the motive to cheat and convert the said orders to his own use, thereby causing wrongful gain to himself along with accused No. 2 and accused No. 3.

(vi) That on 09.11.2009, the accused No. 1 in furtherance of has well thought of conspiracy with the rest of the accused persons forwarded his resignation to the complainant citing vague and outrageous reasons, leave alone any satisfactory or reasoned explanation. A copy of the Resignation dated 09.11.2009 is annexed hereto and marked as Exhibit-H. it is pertinent to note that at no point earlier had the accused No. 1 voiced any of the grievances contained in his resignation dated 09.11.2009. As if the sudden resignation and exit of accused No. 1 weren't surprising enough, on 13.11.2009 to the utter shock of the complainant, the accused No. 1 filed a false and frivolous petition before the Company Law Board making false, misguided and unsubstantiated allegations of oppression and mismanagement against the complainant, whereas the accused No. 1 being the Executive Director was himself responsible for the alleged oppression and mismanagement. However, the malicious and fraudulent intention of the accused persons began to unravel when on 23.11.2009 the accused No. 2 company served a notice on the complainant company to terminate the Patent License Agreement under Clause 10.3 on the ground that the said Company Law Board

petition had been filed. It is pertinent to notice that in the fortnight prior to tendering his resignation, the accused No. 1 had as many as 64 phone calls with accused No. 3.

(vii) Further, the accused persons having illegally terminated the Patent License Agreement dated 26.5.2007 by playing fraud and by cheating the complainant and are now attempting to pressurize the complainant into selling the plant and materials, etc. to them at a price much lower to its market value by employing deceitful tactics. The malicious intent to the accused persons is clearly brought out by the communication dated 26.11.2009 addressed by the accused n.2 company to the State Bank of Hyderabad intimating them of the alleged termination of the Patent License Agreement dated 26.05.2007. That as a consequent of all the aforesaid acts of the accused persons, the State Bank of Hyderabad issued a letter calling upon the complainant to repay the amount of Rs. 17.63 Crores advanced under the loan facilities. Furthermore, on 31.12.2009 the accused No. 1 approached the complainant company's bank and offered to repay the loan of Rs. 17.33 crores in consideration for the transfer of the company's assets of equivalent worth in his favor. The bank communicated this to the complainant vide letter dated 15.01.2010 which is annexed hereto as Exhibit-k. As such, it became clear that the accused persons acting in connivance from the very beginning had never intended to share the profits with the complainant. In fact, accused No. 1 had fraudulently induced the complainant to invest all the monies in developing the business on the false promise of crores of rupees of business as returns which it never intended to share with the complainant. In order to do so, the accused No. 1 hatched a criminal conspiracy with the accused No. 2 company and accused No. 3 to illegally and fraudulently terminate the aforesaid exclusive patent license agreement dated 26.05.2007. Thus, it becomes clear that accused No. 1 had resigned and filed the aforesaid petition before the Company Law Board in order to facilitate the termination of the Patent License Agreement dated 26.05.2007 (and other ancillary agreements) by the accused No. 2 company and accused No. 3 and 4 and in furtherance of their common design to cheat the complainant thereby causing wrongful loss to the complainant. The said purported termination is completely fraudulent and illegal and clearly brings out the nexus between the accused No. 1 and the other accused persons, who acting in conspiracy with each other sought to illegally and fraudulently oust the complainant from the business project, which has been completely funded by the complainant, thereby marking wrongful gains for themselves and causing wrongful loss to the complainant. The chain of events when inter-lined, taking into account the conduct of the accused persons, has led the complainant to believe that the accused persons were in connivance with each other from the very inception and hatched a criminal conspiracy against the complainant with the fraudulent intention that the business be done by them to the exclusion of the complainant. Further, in pursuance of a devious and diabolical scheme and to exert pressure on the complainant the accused No. 1 has been contracting all the creditors of the

complainant company claiming falsehoods regarding the financial state of the complainant company asking them to recover their dues as they would not be able to do so later. The conduct of the accused persons goes to show that they are attempting to sabotage the business operations of the complainant company in a grossly illegal manner. The accused No. 2 company has also been falsely accusing the complainant of attempting to sell the patented formula, which has actually been stolen by the accused No. 1 with aid from former employees of the complainant company as aforesaid and thereby threatening the complainant of legal action through its attorneys. It is imperative to note that the said formula was property of the complainant company and has been misappropriated by the accused No. 1, since he had dominion and control over the same as it had been entrusted to him in his capacity as Executive Director. As aforementioned the accused No. 2 company only communicated with the accused No. 1 to the exclusion of the complainant and the complainant as such was never in physical possession of the said formula. A copy of the e-mail dated 12.01.2010 written by lawyers/attorneys of accused No. 2 company threatening the complainant is annexed hereto and marked as Exhibit-L. That it has further come to light that the furtherance of their fraudulent intentions, the accused No. 1 along with accused No. 2 company has now ordered a plant for the said product to be fabricated at Pune by a Company by the name and style of M/s. Midas Autosoft Engineers Pvt. Ltd. The plant, as per the knowledge of the complainant, is being set up in Bahadurgarh, Haryana and the accused persons are trying to procure orders and projects by converting to their own use the confidential documents belonging to the complainant company. The accused persons have wrongfully gained out of the funds of the complainant and have fraudulently diverted all the projects/orders and business dealings of the complainant company towards themselves resulting in wrongful loss to the complainant company. Thus, the criminal intent behind the complex fraudulent plot designed by the accused persons in conspiracy with each other is amply clear. That the criminal intent and the malafides of the accused No. 1, accused No. 2 company and accused No. 3 and 4 (acting on behalf of the accused No. 2 company) are evidenced by an reflected in their conduct as narrated above.

8. Learned Senior Counsel for the petitioners has contended that it is a clear case of breach of contract; civil remedies are available to the parties, which have even been availed by them; Petitioner No. 1 had terminated the licence on account of breach of the terms of Patent Licence Agreement and related agreements as also the fact that inter se litigation between the directors of respondent No. 3 had started jeopardizing the interest of petitioners in the patented product. In order to protect its interest petitioner No. 1 was forced to terminate the licence not only for the reason of pendency of litigation before CLB but also for the reason that the respondent No. 3 had miserably failed to pay the royalty amounts even as per the scheduled terms. It is further contended that the disputes between the petitioners and respondent nos. 2 and 3 are purely civil in nature arising out of the commercial transactions without an iota of criminality attached thereto. In

terms of the rescheduled terms petitioners had agreed to accept royalty of Euro 3,17,96,119/- for the period upto December, 2011 instead of royalty of Euro 5,41,00,000/-, payable in terms of the agreements and in the process petitioners had sacrificed more than 2.3 crores Euros. Respondent No. 3 paid only a meager amount of Euro 1,34,429/-, inasmuch as, inter se disputes arose between the accused No. 1 and respondent No. 2, thus, petitioner No. 1 was forced to terminate the Patent License Agreement to protect its interest in the patented product and subsequently entered into a Patent License Agreement with M/s. Alchemist Technology Ltd. on 7th July, 2010. Petitioners have accommodated the respondent No. 2 to the extent it was possible by rescheduling the terms of payment and this fact indicates bonafide intentions of the petitioners, inasmuch as, it cannot be said that the petitioners were having fraudulent or dishonest intentions at the time of entering the Patent Licence Agreement with the respondent nos. 2 and 3 or that they had entered into the patent licence agreement with respondent No. 2 with an intention to terminate the same subsequently. Petitioner No. 1 had a right to exploit its patented product, throughout the world. It had entered into an agreement with the respondent No. 3 with an intention to make a viable market for the said product in India and reap benefits by way of royalty. However, respondent No. 2 could not complete the project and pay the royalty. It was not a joint venture of the petitioners and respondent No. 2 and 3. It is not the case that petitioners had to render any financial assistance to respondent nos. 2 and 3, which they did not provide and instead terminated the Patent Licence Agreement. Various communications exchanged between the petitioners and respondent nos. 2 and 3 through letters, emails or FAX clearly indicate that the petitioners had rendered whatever assistance was possible to the respondent No. 2, inasmuch as, respondent No. 2 has not whispered about any malafide intentions of the petitioners in the said communications. Had petitioners got any malafide intention right from the beginning, they would not have extended the payment schedule of royalty and could have terminated the Patent Licence Agreement at that very stage without suffering any further financial losses. It is further contended that observations made by Company Law Board regarding collusion of the petitioners with accused No. 1 is not relevant as the petitioners were neither party to the said proceeding nor were afforded any hearing. Having failed in civil litigations respondent nos. 2 and 3 as a counterblast have filed present FIR in order to wreck personal vendetta and this act is nothing but gross abuse of process of court. Reliance has been placed on State of Haryana and others Vs. Ch. Bhajan Lal and others, and Indian Oil Corporation Vs. NEPC India Ltd. and Others, Reliance has also been placed on Harshendra Kumar D. vs. Rebatilata Koley etc. 2011 II AD (SC) 445, Chandrapal Singh and Others Vs. Maharaj Singh and Another, , Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others, , Manoj Mahavir Prasad Khaitan Vs. Ram Gopal Poddar and Another, , G. Sagar Suri and Another Vs. State of U.P. and Others, and Thermax Ltd. & Ors. vs. K.M. Johny & Ors. (2011) X AD 189.

9. Per contra, learned Senior Counsel for the respondent nos. 2 and 3 has vehemently contended that the allegations in the FIR clearly make out a, prima facie, case of cheating against the petitioners. At this nascent stage, the averments made in the FIR have to be taken at their face value, inasmuch as, their controverted version has not to be seen by the High Court in exercise of its extraordinary jurisdiction u/s 482 Cr. P.C. At this stage, Court has not to go into the merits and demerits of the case levelled in the FIR nor has to consider the resultant possible harassment of the petitioners. Reliance has been placed on Sanapareddy Sanapareddy Maheedhar and Another Vs. State of Andhra Pradesh and Another, By placing reliance on State of Orissa and Anr. vs. Saroj Kumar Sahoo 2005 (10) SCALE 24, learned Senior Counsel has further contended that where the entire set of facts are incomplete and entire evidence has yet not been collected by the investigating authority and there exists issues, which are disputed and of such magnitude that they cannot be seen in the true perspective without an adequate enquiry, High Court ought not to exercise its inherent power u/s 482 Cr. P.C. to quash the FIR. It is further contended that merely because the disputes pertain to a commercial transaction or have civil flavor, it cannot be said that an offence of cheating cannot be made out. Merely because an act has a civil profile that itself would not denude it of criminal outfit. Reliance has been placed on Rajesh Bajaj Vs. State NCT of Delhi and Others,

10. By placing reliance on Trisuns Chemical Industry Vs. Rajesh Agarwal and others, it is further contended that interference with the investigation is the exception limited to extreme cases. It is further contended that the reliability or genuineness of the allegations in the FIR have not to be looked into at the nascent stage of investigation by the High Court in exercise of its powers u/s 482 of the Cr. P.C. Reliance has also been placed on Shri Mahavir Prashad Gupta and Another Vs. State of National Capital Territory of Delhi and Others, As regards, correspondences exchanged between the parties through letters, emails and FAX, it is contended that the contents thereof cannot be read. As per the learned Senior Counsel the proof of execution of the documents does not infer the admission of truth of its contents. Reliance has been placed on Judah vs. Isolyne Shrojbashini Bose and Anr. AIR (32) 1945 Privy Council 174. It is contended that immediately after tendering of the resignation by accused No. 1 and his filing of a petition before the Company Law Board, petitioners have terminated Patent Licence Agreement by invoking Clause 10.3.4 wherein reference of Clause 10.3.3. has been incidentally mentioned without giving any detail by itself shows that petitioners were in collusion with accused No. 1 right from the inception and had induced respondent No. 2 to invest the huge amount in the project, thus, have cheated the respondent nos. 2, which fact makes out a, prima facie, case against the petitioners u/s 420 read with Section 120-B of the IPC. As per the respondent nos. 2 and 3 collusion between the accused No. 1 and petitioners is further evident from the fact that petitioner No. 1 has granted licence to a company which accused No. 1 has joined after resigning from the respondent No. 3.

11. Learned Additional Standing Counsel has also opposed this petition. It is contended that from the facts alleged in the FIR a, prima facie, case u/s 420 read with Section 120-B IPC was made out against the petitioners, as right from the inception of the contract they were in collusion with accused No. 1 and in furtherance thereto had induced respondent nos. 2 to make substantial investments without any intention of performing their obligations under the licence agreement. It is further contended that the mala fide intentions are also depicted from the fact that soon after terminating the contract petitioners entered into the Patent Licence Agreement with another company for the same products on 7th January, 2010, inasmuch as, in the said agreement the Clause with regard to termination of agreement due to filing of the petition for winding up etc. was worded differently. It is further contended that the petitions under Articles 226 and 227 of the Constitution of India as also u/s 482 Cr. P.C. are not maintainable in respect of the proceedings involving disputed questions of facts. Reliance has been placed on D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, , State of Bihar and Another Vs. P.P. Sharma, IAS and Another, and Maksud Saiyed Vs. State of Gujarat and Others, It is contended that the present petition does not fall within any of the tests laid down in State of Haryana's case (supra).

12. I have considered the rival contentions of the parties and have perused the entire record carefully. In Bhajan Lal's case (supra), Supreme Court has held as under:

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

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

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

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

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

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

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

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

13. In *Indian Oil Corporation (supra)*, Supreme Court has observed thus "A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not". Supreme Court has further observed thus "it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which, do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged".

14. In *Saroj Kumar Sahoo's case (supra)* Supreme Court held as under:-

11. As noted above, the powers possessed by the High Court u/s 482 of the Cr. P.C. are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where

the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. (See: Janata Dal Vs. H.S. Chowdhary and Others, and Dr. Raghubir Sharan Vs. The State of Bihar, It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi Vs. R. Prasanna Kumar and Others, , Mrs. Rupan Deol Bajaj and another Vs. Kanwar Pal Singh Gill and another, , Mrs. Rupan Deol Bajaj and another Vs. Kanwar Pal Singh Gill and another, , State of Kerala and Others Vs. O.C. Kuttan and Others, , State of U.P. Vs. O.P. Sharma, , Rashmi Kumar (Smt) Vs. Mahesh Kumar Bhada, , State of U.P. Vs. O.P. Sharma, and Rajesh Bajaj Vs. State NCT of Delhi and Others, .

15. In Sanapareddy Maheedhar Seshagiri's case (supra) Supreme Court has held, thus, "while deciding a petition filed for quashing FIR or complaint or restraining the competent authority from investigating the allegations contained in FIR or complaint or for stalling the trial of the case, the High Court should be extremely careful and circumspect. If the allegations contained in FIR or complaint disclose commission of some crime, then the High Court must keep its hands off and allow the investigating agency to complete the investigation without any fetter and also refrain from passing order which may impede the trial. The High Court should not go into the merits and demerits of the allegations simply because the petitioner alleges malus animus against the author of FIR or the complainant. The High Court must also refrain from making imaginary journey in the realm of possible harassment which may be caused to the petitioner on account of investigation of FIR or complaint. Such a course will result in miscarriage of justice and would encourage those accused of committing crimes to repeat the same."

16. There is no gainsaying that powers of High Court u/s 482 of the Cr. P.C. are very wide, but at the same time it has to be noted that great care and caution is to be exercised in invoking the same. Inherent power should be exercised sparingly and only in exceptional circumstances. Inherent power cannot be exercised to stifle a legitimate prosecution. The court will not normally interfere with an investigation into the case and will permit investigation into the offence

alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted. Once an offence is disclosed, an investigation into the offence must necessarily follow in the interest of justice. If no offence is disclosed, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property would be put to jeopardy. Liberty and property of an individual are sacrosanct and the court zealously guards and protects them. Whether an offence has been disclosed or not would depend on the facts and circumstances of each particular case. At the same time, the allegations made in the FIR have to be taken on its face value to find out as to whether any offence is disclosed or not. In case facts of the case disclose purely civil disputes, FIR can be quashed but if the case has civil profile with criminal element High Court shall be reluctant to quash the FIR. The inherent jurisdiction of High Court can be exercised to quash the FIR in a proper case either to prevent the abuse of the process of Court or otherwise to secure the ends of justice.

17. Cheating has been defined in Section 415 IPC and it says that "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, to the consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"." A bare perusal of this provision makes it clear that for the purpose of constituting an offence of cheating, complainant is required to show that accused had fraudulent or dishonest intention at the time of making promise or representation. In absence of intention at the time of making initial promise, no offence u/s 420 of the Indian Penal Code can be said to have been made out. In this case, it has been alleged in the FIR that respondent No. 2 was induced to enter into agreement and invest money in the venture with dishonest intention by the accused persons, in collusion with each other, including the petitioners. A holistic reading of FIR will not show that prima facie case is not disclosed for registration of FIR and the consequential investigation.

18. Investigation is yet to commence, pursuant to registration of the FIR, inasmuch as investigating agency has to collect relevant material. In view of the nature of allegations it cannot be said that the case has purely a civil profile. Veracity of the allegations has yet to be verified by the investigating agency by collecting materials during the investigation. There are allegations and counter allegations levelled by the parties, which cannot be gone into threadbare at this initial stage of investigation. Whether the petitioners were having any fraudulent or dishonest intention at the time of inception of the contract or not is a question of fact and the material in this regard has to be collected during the investigation. At this nascent stage, it would not be proper for this Court to exercise its power u/s 482 Cr. P.C. to quash the FIR, more particularly when

complainant (respondent No. 2) has alleged in the FIR that all the accused including the petitioners connived with each other and allured him to enter into the agreement and invest huge amount in the project and when same reached at the advanced stage petitioners terminated the contract and tried to take over the respondent No. 3. Accused No. 1 and petitioner No. 2 were in regular touch right from the beginning. Immediately after accused No. 1 resigned from the company he filed a petition before the Company Law Board and during this period petitioner No. 2 and accused No. 1 were in regular touch. Immediately, thereafter Agreements were terminated, inasmuch as fresh agreement was entered into with a third company, which was joined by the accused No. 1.

19. For the foregoing discussions and the material brought on record I am of the opinion that the present case is not covered in any of the grounds mentioned by the Supreme Court in Bhajan Lal's case (supra) nor there exist any exceptional circumstance for which this court shall exercise its inherent jurisdiction as was done in Madhavrao Jiwajirao Scindia (supra). All other judgments, reliance whereupon have been placed and not discussed in detail are in the context of different facts and of no help to the parties. Petition is, accordingly, dismissed. Miscellaneous application is disposed of as infructuous.