

**(2009) 11 CAL CK 0013**  
**In the Calcutta High Court**  
**Case No : C.R.R. No. 273 of 2009**

|                                       |            |
|---------------------------------------|------------|
| Stemcor India Private Ltd. and Others | APPELLANT  |
| Vs                                    |            |
| The State of West Bengal and Another  | RESPONDENT |

**Date of Decision :** 17-11-2009

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5  
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482  
Factories Act, 1948 — Section 92  
Penal Code, 1860 (IPC) — Section 114, 120B, 405, 406, 420

**Citation :** (2010) 1 CALLT 161 : (2010) CriLJ 3802 : (2011) 7 RCR(Criminal) 1112

**Hon'ble Judges :** Partha Sakha Datta, J

**Bench :** Single Bench

**Advocate :** Milon Mukherjee, Sandipan Ganguly, S. Banerjee and Mangaljit Mukherjee, for the Appellant; Bhaskar Sen, S. Moitra and Ranjan Roy for No. 2 and Krishna Ghosh, for the Respondent

## Judgement

Partha Sakha Datta, J.—By this application the eight Petitioners who are the accused persons in connection with Burrabazar P. S. Case No. 15 dated 17-1-2009 under Sections 420/406/120B of the I. P. C. corresponding to G. R. Case No. 283 of 2009 now pending before the learned Additional Chief Metropolitan Magistrate, Calcutta pray for quashing of the proceeding on certain grounds which shall appear from the body of the judgment. The O. P. No. 2, de facto complainant filed a petition before the learned ACJM, Calcutta under Sections 156(3) of the Cr. P. C. against the five persons alleging the following fact:

The O. P. No. 2 is a company dealing in the business of iron ore. Accused No. 1 M/s. Steamcor India Limited who is the Petitioner No. 1 herein is also a company dealing in the same business of iron ore, while accused No. 2-5 are said to be the directors/responsible officers who at the relevant time would look after the business of the said company and are jointly and/or severally in-charge of and

responsible to the said company for its day-to-day business. Accused Nos. 2-3 who are the Petitioners Nos. 2-5 respectively herein represented themselves to the complainant company as responsible officers of the company and canvassed a colour and glossy prospect of the said company. They represented to the complainant company the magnitude of their business and of their sincerity, honesty and strictness and requested to the complainant company for purchase of iron ore at a very lucrative price. The complainant company on such representations advanced by the accused persons became deeply impressed and agreed to keep their request and after due negotiations entered into two contracts on 8th January, 2008 and 21st February, 2008 for purchase from them iron ore of huge quantity. The contract dated 8th January, 2008 was for the purchase of 10,000 metric tonnes of iron ore which was later enhanced to 20,000/- metric tonnes at Rs. 1500 per metric ton + ex-mines + royalty and taxes and Rs. 1300/- per ton towards loading charges. The grades relating to this contract were required to be delivered within 30 days from the date of delivery of the order and the entire payment towards the said grades was made of by the complainant company in advance from the complainant's office at Burrabazar. Under the second contract dated 21st February, 2008 the complainant's company gave order for sale and supply of 40,000 metric tonnes of iron ore at the same price and the goods were to be delivered latest by April 2008 and the entire amount was paid in advance from its office at Burrabazar. Time being the essence of the contract the accused persons were under the liability to deliver the entire materials of the first sale on or before 21-2-2008 at the latest and the materials under the second contract by 30th April, 2008 to the complainant's company. Confirmation and undertaking to such effect were given by the accused persons in writing besides over telephone to the complainant's company which had no reason to disbelieve such assurances and undertakings and thus the complainant was induced to rely upon and act on such representation which according to the complainant on evaluation of events clearly appeared to have been made with fraudulent and dishonest intention right from the very inception. The complainant's company accordingly made almost 100 per cent payment in advance of Rs. 9 crores by cheques drawn on Oriental Bank of Commerce, Overseas Branch which were duly honoured by the accused persons. On 21-1-2008, 3-3-2008 and 7-3-2008 a sum of Rs. 3 crores each was tendered to the accused persons through three cheques which were all encashed by the accused persons but on various pretexts and excuses the accused persons indulged in the dishonoured tricks and started taking and consuming time and delayed or evaded in delivery of the goods to the complainant company. In spite of the complainant's repeated requests and reminders the accused persons did neither issue any delivery order nor they delivered the goods to the complainant's company. Thereafter due to continuous representation and demands and on the deep pressure the accused persons, more specifically the accused Nos. 4-5 who were the O. P. Nos. 3-4 herein agreed to sit across the table, and in a meeting held on 10th May, 2008 at the complainant's Calcutta office they undertook to deliver the goods but could not indicate any possible

date of delivery. However, the recording of the discussion was confirmed in writing by its electronic mail dated 10th May, 2008. This "undertaking" is a contemporaneous document which is an account of false representation of fact and by which the complainant company was induced by the accused persons to deliver the money. Still then no delivery of the goods was made. The complainant company on 9th June, 2008 asked the accused persons by electronic mail to deliver the either 60,000 metric tonnes of iron ore latest by 15th July, 2008 or in default to refund the entire money held by them in trust towards such advance. On the one hand the accused persons regretted delay and on the other hand they started selling assets of the accused company in order that the complainant might not be able to recover anything from them with due regard to the due process of law. Then in spite of repeated references and reminders the accused persons continued with their dishonest tricks of pleading sorrowness but finally did not make any delivery of the materials/goods to the complainant's company till the date of lodgment of the complaint. They did not refund the amount of Rs. 9 crores which was paid in advance towards the price of the goods. The accused persons allegedly had since the very inception of transactions hatched up a deep rooted criminal conspiracy amongst them. Confidence and faith of the complainant-company got eroded. The accused-company made false and vague representations, induced the complainant's company to part with and pay to them the huge sum amount of money which they held in trust for the complainant's company and ultimately cheated the complainant and also committed breach of trust. The complainant company has further instituted the suit being C. S. No. 262 of 2008 in the Original jurisdiction of the High Court of Calcutta claiming a decree for refund of Rs. 9 crores and consequential reliefs. The complainant company lodged a written complaint with the O. C., Burrabazar P. S. on 10th January, 2009 on the aforesaid facts and requested to register the complaint as FIR. But the police station having not been done so, the complainant company moved the learned Magistrate with the instant application u/s 156(3), Code of Criminal Procedure and the learned Magistrate directed the police station to register a case. The conspiracy hatched up by the accused persons came to be manifested through their overt act of cheating the complainant's company at its office falling under the police station of Burrabazar. Allegedly till date no steps have been taken by the accused company to make payment of Rs. 9 crores. Hence the case.

2. The police registered Burrabazar P. S. Case No. 15 dated 17-1-2009 under Sections 420/406/120-B of the I. P. C.

3. It has been contended in the revisional application that the Petitioner-accused No. 1 company is a subsidiary of one of the world's largest Steel Trader, namely, Stemcor Holdings Limited and has substantial investment in India having annual turnover of around 2.95 billions pounds and its business covers to 56 countries in the world. The two contracts dated 8th January, 2008 and 21st February, 2008 entered into by and between the complainant company and the accused company were 5th and 6th contracts in the series of contracts and the

complainant company, namely, SESA has not completed lifting of the materials under the previous contracts; as such no delivery orders could be issued under the new contracts. Padma Logistics was not responsible for delay in delivery of the materials under the contracts in question. On 23rd December, 2008 SESA filed a civil suit being C. S. No. 262 of 2008 with an application for attachment before judgment alleging that in spite of payment of consideration of Rs. 9 crores to Stemcor the said Stemcor failed to deliver the materials on time which was allegedly the essence of contract and accordingly contract stood repudiated on 1st March, 2008 and 1st May, 2008 respectively. An ex parte ad interim order of injunction was obtained on certain share investment of Stemcor on 23rd December, 2008 but these facts were suppressed in the petition of complaint. An Hon"ble Judge in the Original Side of this Court directed the Stemcor to file affidavit and recorded that the Petitioner was ready and willing to honour the contract between the parties. The letter dated September 24, 2008 allegedly issued by SESA does not show repudiation of contract. On the other hand, the said letter contains an offer to rescind the contract and refund of the advance amount or to convert a total quantity of 60,000 MT of CLO into 60,000 MT of screened lumps at the price prevailing during confirmation of the order. By this letter dated 27th October, 2008 Stemcor accepted on behalf of Padma Logistics the second mentioned offer of SESA as contained in their letter dated 24th September, 2008 and requested the SESA to intimate the lifting schedule so that supply can commence at the earliest. SESA failed to intimate the delivery schedule despite the agreement to supply screened lumps as said above but alleged that their request through e-mail dated September 24, 2008 was not open ended in the fluctuating market and secondly fresh offer of Stemcor does not fit into the same. Thus, according to the Petitioner SESA is not interested to take delivery of the materials, while Stemcor is still ready and willing to supply screened lumps in accordance with the request made by SESA in their e-mail dated September 24, 2008. The suit was counter blast in order to settle the payment in US dollar 8 million, approximately Rs. 40 crores owed by SESA to Stemcor U. K. Limited being the value of the consignment covered by the 5 letters of credit. The Petitioner on behalf of Stemcor U. K. Limited made two demands, one by a letter dated 16-12-2008 and the other by 24-2-2008 to SESA on account of failure of SESA to take delivery of the consignments through the bills of lading. Further of the allegations made in the petition of complaint can at least make out a case of breach of contract for which appropriate remedy is the Civil Court and no element of mens rea is evident. The Petitioner company was acting only as an agent of Padma Logistics and cannot be held responsible for the purported breach of contract between the O. P. No. 2, namely, SESA and M/s. Padma Logistics. There has not been any entrustment of any part of the goods. The complainant has been engaged in business relationship with the Petitioner company since the year of 2003 are the present two contracts are not the first ones. The Petitioners did not have any mens rea to cheat the complainant and even after litigations started the Petitioner company and the O. P. No. 2 have continued their business. It has been contended that the petition of complaint

does not bring out prima facie that the Stemcor had at the inception of the contract intention to deceive the complainant by accepting of sum of Rs. 9 crores. Mr. Sabyasachi Banerjee, learned advocate for the Petitioner company submitted at the outset that it is ludicrous to suggest that there has been fraudulent representation made by the Stemcor towards the SESA. The averment in paragraph 4 of the petition of complaint that the accused company-Stemcor represented to the complainant company that they have huge span and magnitude of business, that they are very punctual to keep to commitment, that they are very sincere and honest in their business dealings cannot be said to be a fraudulent representation. Mere "puffing of of the capability of the accused company, even if it has been done, cannot be termed to be false representation because extolling virtue of company cannot be termed to be a false representation within the meaning of Section 114 of the I. P. C. The first contract dated 8-1-2008 recites that the delivery order would be issued immediately upon receipt of funds and the delivery was to be made within 30 days from the date of issue of D. O. The payment of Rs. 3 crores in respect of the contract dated 8-1-2008 was made on 21-1-2008 and according to the complainant D. O. was to be issued immediately on such date. The delivery of the articles as per the contract dated 8-1-2008 was to be made on or before 20-2-2008 which allegedly according to the complainant was not done. Thus, on 20-2-2008 it was within the knowledge of the complainant company that the accused company failed to act in terms of the contract which was allegedly the first transaction between the parties; but despite non-execution of the purported first contract the SESA went ahead and made further payment of Rs. 6 crores in two installments of Rs. 3 crores each on 3-3-2008 and 7-3-2008. In the FIR there is no averment that the Petitioners had made any representation to the O. P. No. 2 subsequent to 20-2-2008 regarding delivery of the first contract. It is inconceivable that a purchaser who once entered into purchase contract for the first time would enter into a second contract and make advance payment in respect of the value of the second contract when the seller failed to supply the goods of the first contract. Therefore, it is submitted that two contracts dated 8-1-2008 and 21 -2-2008 were not the only contracts between the parties. Secondly it is submitted that at paragraph 19 of the FIR, it has been stated that purported false and fraudulent representations were made in the office of the complainant company at Strand Road under P. S. Burrabazar but in the civil suit the complainant stated that the contracts had been entered into subsequent to telephonic conversation with the Petitioner No. 2 who is the executive of the complainant company having his office at Mumbai. It is submitted that where it is found that there has been existing series of transaction between the parties and one of such transactions has been mirrored in delay, such delay does not give rise to offence of cheating or criminal breach of trust. Mr. Banerjee referred to the plaint of the C. S. No. 262 of 2008 instituted by the complainant company in the original jurisdiction of this Court and the documents annexed thereto and submitted that the documents referred to the plaint can very well be considered and appreciated for the purpose of deciding whether a prima facie case of cheating has been disclosed or

not because the documents annexed to the plaint instituted by the complainant are the admitted documents and they can be treated to be the annexures to the complaint also. Mr. Moitra, learned advocate appearing for the complainant company admits this position but submits that the documents which have been annexed to the revisional application of the accused company and which are not common to the documents annexed to the plaint filed by the complainant cannot be looked into. To this Mr. Banerjee agreed. However, Mr. Banerjee argued that in paragraph 12 of the petition of complaint the O. P. No. 2 has referred to an electronic mail dated 10-5-2008 sent by the O. P. No. 2 which provides that there existed contract relating to purchase and delivery of iron ore between the parties in August/September, 2007 which was prior to the two contracts alleged in the FIR. In paragraph 15 of the complaint the O. P. No. 2 has referred to a letter issued by the said O. P. No. 2-complainant dated 1-7-2008 wherefrom it would reveal that there had existed long business relationship between the parties. Therefore, the story that the alleged contracts were entered into by the complainant on fictitious and fraudulent representation made by the accused company falls flat. The e-mail dated 1-7-2008 which is a reply of the accused company would reveal that the accused company requested the O. P. No. 2 to start lifting/taking delivery of iron ore of the specification as ordered by the O. P. No. 2. Again the letter dated 24-9-2008 sent by the O. P. No. 2 would reveal that the O. P. No. 2 put forward two proposals in the alternative. Further the letter dated 27-10-2008 sent by the accused company to the complainant company would reveal that the accused company had not only agreed to supply the goods i.e. screened CLO and also the screened lumps as requested by the O. P. No. 2 through their e-mail dated 24-9-2008. Again the letter dated 11-11-2008 which has been issued by the O. P. No. 1 would reflect that despite the earlier offer made by the accused company regarding supply of the ordered goods the O. P. No. 2 decided to move away from the contract and demanded refund of the money with interest. Thus, there has not been at any point of time denial by the accused company of payment of Rs. 9 crores as consideration towards the said two contracts the payment of which was received by Padma Logistics and Khanji Private Limited. It is thus apparent that the O. P. No. 2 had previous long standing transactions with the Petitioner company and accordingly there was no cause for the complainant company to be swayed by the alleged fraudulent representation. The Petitioner company vide their letter dated 27-10-2008 preferred to accept the offer so made by the O. P. No. 2 and expressed their ability to supply some other materials along with the materials as was asked for by the letter dated 24-9-2008. The O. P. No. 2 in their affidavit in reply admitted that they received e-mails dated 27-10-2008 and 8-11-2008. The letter through e-mail dated 8-11-2008 sent by the accused company to the complainant company would reveal that it was issued with the intention of intimating the fact that the accused persons were ready to supply materials in the nature of CLO 5/18 MM apart from screened lumps as per request of the O. P. No. 2. The paragraph 1 of the complaint would reveal that the accused company has been described as a trader of iron ore and is connected with Midest Integrated Steel

Limited and it shows that the de facto complainant was aware of the credibility and market reputation of the accused company. The only issue that has cropped up and which is admitted by the accused company was that there was delay in executing the two contracts. On bare perusal of the letter dated 27-10-2008 it would be evident that the Petitioners had only accepted the fresh proposals of the de facto complainant dated 24-9-2008 but also was ready and willing to supply the materials. The Petitioners at no point of time had made any dishonest representation inducing the complainant to part with Rs. 9 crores. Further it has been submitted that on the facts of the case the provision of Section 405 of the I. P. C. is not applicable because the principle envisaged in Section 405, I. P. C. clearly postulates that there must be entrustment at the inception and there has to be a conversion of the property which would go against the terms and spirit of entrustment. There was no entrustment of any money and there has been no conversion. Mr. Banerjee referred to the decisions in *State of Haryana and others Vs. Ch. Bhajan Lal and others*, *State of West Bengal and Others Vs. Swapan Kumar Guha and Others*, *S.W. Palanitkar and others Vs. State of Bihar and another*, *Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others*, *Thelapalli Raghavaiah Vs. Station House Officer and Others*, *G. Sagar Suri and Another Vs. State of U.P. and Others*, *Murari Lal Gupta v. Gopi Singh (2005) 13 SCC 699*, *Veer Prakash Sharma Vs. Anil Kumar Agarwal and Another*, *Ajay Mitra Vs. State of M.P. and Others*, *Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others*, *Dr. Sharma's Nursing Home v. Delhi Admn. and Ors. (1998) 8 SCC 745*, *Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another*, *Alpic Finance Ltd. Vs. P. Sadasivan and Another*, *Uma Shankar Gopalika v. State of Bihar and Anr. (2005) 10 SCC 336*, *Anil Mahajan v. Bhor Industries Ltd. (2005) 10 SCC 228*, *Ram Biraji Devi and Another Vs. Umesh Kumar Singh and Another*, *Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others*, *Indra Kanta Tiwari v. Smt. Rubu Bhattacharya alias Pubi Devi (2008) CL 469*, *All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another*, and *B. Suresh Yadav Vs. Sharifa Bee and Another*,

4. Mr. Sudipto Moitra, learned advocate appearing for the O. P. No. 2 submitted at the outset that in an application u/s 482 of the Cr. P. C. this Court is only required to see whether the petition of complaint or the FIR does disclose a prima face cognizable offence or not and once mere appears a prima facie cognizable offence on a bare reading of the petition of complaint/FIR the Court is precluded from making a roving enquiry as to whether the story made out in the complaint is probable or whether it would lead to conviction upon conclusion of trial. The rosy prospect pictured by the accused company before entering into the contracts dated 8-1-2008 and 21-1-2008 was only with a view to alluring the complainant in order that the complainant would enter into two contracts with the accused company yet the accused persons intending that they would not honour the contract. Therefore, the glossy prospect presented before the complainant company by the accused company can be said to be a fraudulent representation made at the inception of the transaction with the ulterior motive

of compelling the complainant company to part with the money in order that the same can be misappropriated so as to cause wrongful loss to the complainant company and wrongful gain to the accused company. It is true, as the decisions galore, that intention at the commencement of the business transactions has to be spelt out so as to make out before the Court of the Magistrate that prima facie a cognizable offence of cheating has been made out and this indeed has been done in the instant case. In paragraph 9 of the petition of complaint it has been clearly stated that the accused company induced the complainant to rely upon their representation which on evolution of events clearly appear to have been made with fraudulent and dishonest intention right from the inception. In the transactions in question time was really the essence of the contracts as failure of the accused company to honour the contracts as has resulted in the loss being suffered by the complainant. With respect to the submission repeatedly made by the learned advocate for the Petitioners that presentation of glossy prospect of viability of the accused company allegedly made before the complainant company was not really necessary and in fact it was not at all done in view of the contracts in question in this case were not the first contract it has been submitted by Mr. Moitra that the earlier transactions that took place in August/September, 2007 were made by the accused company in order to create a confidence in the mind of the complainant company in the hope that the complainant company would enter into further contracts with the accused so that there would arise an ample scope to cheat the complainant company to the advantage of the accused company. The mere fact that in August/September, 2007 some contracts were entered into by and between the parties does not mean that in connection with the contracts in question the glossy prospect and magnitude of business of the accused presented before the complainant was not done. Therefore, the reference to earlier contracts of August/September, 2007 is of no avail. With respect to the submission of Mr. Banerjee learned advocate appearing for the complainant that how was it possible for the complainant to make further payment of Rs. 6 lacs with regard to the second contract dated 21-2-2008 when the goods in respect of the first contract was not delivered it has been answered by Mr. Moitra that in terms of the first contract goods were to be delivered within 30 days from the date of delivery order to be issued by the accused, and as no delivery order was issued the complainant could not conceive that goods of the first contract would for all time to come would be withheld from being delivered and the complainant having reposed trust and confidence in the accused made payment of the second contracts also to the tune of Rs. 6 crores and till payment of the second contract the complainant had no idea that the money would be misappropriated. As to absence of mentioning of institution of the civil suit before the Original Side of this Court by the complainant it has been submitted by Mr. Moitra that there was no need to make any mention of the filing of the civil suit and it cannot be said to be a suppression of fact. It has been submitted by Mr. Moitra that in all cases of cheating where parties enter into commercial transaction there would be element of civil dispute but existence of the element of civil dispute does not negate the entertainable of the criminal

action because the purpose of civil suit is to realise compensation and damage, while the purpose of criminal action is to ensure punishment of the offender on account of cheating and criminal breach of trust. It has been submitted that despite correspondences made from time to time the accused avoided delivery of goods or in the alternative return of the money and the overall circumstances of the case would glaringly reveal the mala fide intention of the accused persons to cheat the complainant company. As to the series of decisions cited by Mr. Banerjee it has been argued by Mr. Moitra that the decisions so cited were all fact oriented and each case requires to be decided on its own merit but the legal position that element of mens rea i.e. intention to cheat must remain present in the mind of the accused at the inception of the transaction is well established. Legal principle has been enunciated in catena of decisions but in the petition of complaint it has been expressly averred that at the inception of the transaction the accused had intention to cheat the complainant.

5. Having thus placed the facts of the case and the submissions of the learned Counsel for the parties it is necessary to consider whether the petition of complaint disclosed a cognizable offence of cheating. As held in *State of Madhya Pradesh Vs. Awadh Kishore Gupta and Others*, annexures to the revisional application cannot be looked into for the purpose of examination of the FIR or the petition of complaint. The Court no doubt shall not look into those papers but in the instant case certain documents annex to the revisional application have to be taken into consideration in view of the fact that those documents were the documents of the complaint filed before the High Court in its original jurisdiction in connection with C. S. No. 262 of 2008 and G. A. No. 4125 of 2008. Mr. Moitra also does not have any objection in the matter of looking at the documents annexed to the plaint of the civil suit by the complainant-Plaintiff. Paragraph 9 of the petition of complaint contains the averment that the accused company canvassed coloured and glossy prospect about the accused company of its huge span and magnitude of business and about the sincerity, honesty and strictness to their every commitment. Presentation of the glossy prospect and what is called puffing up of the capability or potentiality of the company of the accused by itself cannot be said to be fraudulent or false representation provided it does appear that there was no semblance of truthfulness in such representations. At the moment the Court is unable to say that the accused company did not have any necessity to canvass a coloured and glossy prospect about the accused company or that the company did not make any such canvas because it is a point of fact. But mere presentation of a very bright prospect of the accused company before the complainant by itself does not become false or fraudulent. Ordinarily in every commercial transaction a seller/distributor would always present a very good prospect and potentiality of the company to further the business interest of the seller and presentation of the glossy prospect before a party comes into contact with the seller may not necessarily imply an element of mens rea. Now it is not in dispute that the two contracts took place on 8th January, 2008 and 21st February, 2008. The first contract relates to delivery of certain quantum of goods

within 30 days from the date of delivery order, while the second contract dated 21st February, 2008 relates to delivery of 40,000 MT of iron ore of a certain size latest by April, 2008. It goes undisputed that both the complainant and the accused deal in the same business of iron ore. It is not in dispute that payment of Rs. 9 crores in three installments relating to the two contracts dated 8th January, 2008 and 21st February, 2008 was made on 21st January, 2008 in relation to the first contract on 3rd March, 2008 and 7th March, 2008 with reference to the second contract. It is also not in dispute that even without receipt of the goods of first contract payment was made in respect of the second contract on 3-3-2008 and 7-3-2008. The second and third payments in relation to the second contract was made before delivery of the goods in respect of the first contract. Whether or not the rosy picture of the accused company was presented before the complainant the fact remains that the parties were acquainted with each other since before the two contracts in question took place and there had existed transaction between the parties in the month of August/September, 2007 which is prior to the contracts dated 8-1-2008 and 21-2-2008. Institution of the civil suit of course by itself may not indicate that the wrong committed by the accused amounts to breach of promise or element for which no criminal liability arises. But documents annexed to the plaint relating to the transactions in question which are admitted documents would at least speak a volume about the mind of the parties because use of expressions "cheating" "fraudulent representation" "deception" a number of times at a number of places in the FIR/petition of complaint would not by itself make out a case of cheating unless the circumstances would show that at the inception of the transaction the accused had a dishonest intention to cheat the complainant. The civil suit was instituted some time in December, 2008 while the FIR was filed via 156(3) Cr. P. C. in January, 2009. Paragraph 12 of the FIR refers to a meeting held between the parties on 10th May, 2008. Annexure "D" is a letter dated 10th May, 2008 issued by SESA in favour of Stemcor immediate after the meeting was held and the resolution was that delivery of pending material of screened lumps and CLO 10 : 30 against the purchase made in August/September, 2007 would be completed by 10th June, 2008, while delivery of materials purchased against the contracts made in January/February i.e. the contracts in question would be made from M. V. Crusher at Barbil and thirdly the material would be delivered would be as per specification in the contract. Thus, it would appear that time was not regarded really the essence of contract because the letter was issued on 10th May, 2008 which is much after the scheduled date of delivery of goods of the second contract. Secondly, this document relating to the meeting held on 10th May, 2008 which has been averred in the petition of complaint itself would reveal that the meeting took place not in relation to the two contracts in question alone but also in connection with the delivery of goods with respect to the other previous contracts of August/September 2007. That there had existed a long standing business relationship between the two companies would appear from the letter of 1st July, 2008 issued by the complainant to the accused. Last paragraph of this letter which has been referred to in paragraph 17 of the plaint

recites "we have long standing relationship with your company for last so many years and we have always stood by our commitment despite market volatilities. We are pained to realise that we are made to run from pillar to post on account of bookings made by us with your esteemed company." Therefore the glossy prospect or otherwise of the accused company was known to the complainant since long before the transactions in question. On 9th June, 2008 the complainant wrote to the accused requesting to complete the delivery within June 2008 in relation the contracts of September/October, 2007 and in relation to the balance contract of 60,000 MT of screened CLO and 25,000 MT of iron ore (indicating the two contracts in question) delivery might be completed by July 15, 2008 and in case it has become difficult for the accused to do so return of the money at mutually acceptable prevailing rate may be made. This letter of the complainant was replied to by the accused on 13-6-2008 regretting the delay in delivery of the contracted goods and referred to certain problems being faced at Royda Mine.

6. Though the letter dated 13th June, 2008 of the accused has not been annexed to the plaint reference to this letter in reply to the complainant's letter dated 9-6-2008 has been mentioned in the petition of complaint itself. As annexure-"J" to the plaint the Plaintiff -complainant offered list of assets of the accused company which shows that it has 1,37,87,500 shares in one company at New Delhi, 66,666 shares in another company in Calcutta and 1,68,85,011 shares in a company at Bhubaneswar. In the circumstances presentation of glossy picture can hardly be said to be fraudulent or deceptive. Learned Advocate for the O. P. No. 2 submitted that in one hand the accused regretted the delay in supplying the goods, while in the other hand they started disposing of their assets for which the complainant as Plaintiff had to make an application under Order 38, Rule 5, Code of Civil Procedure. In the petition of complaint it has not been indicated as to whether after the contracts in question were entered into by and between the parties any disposal of assets of the accused company had really taken place, for the particulars any such disposal is not there in the petition of complaint. The communication dated 1st July, 2008 depicts the long standing relationship between the two companies and contains a request to refund the money as the complainant's suffered loss due to blockage of huge amount of money. The communication dated 7th July, 2008 is a reminder for return of the money indicating expiry of the contract and impossibility of the complainant to extend the delivery schedule further because of liquidity problem; but the letter dated 24th September, 2008 contains an alternative proposal for conversion of the contracted goods in question into 60,000 MT of screened lumps at price prevailing during the confirmation of the order. After this letter dated 24th September, 2008 the accused wrote a letter on 27-10-2008 in these terms:

"This has reference to our discussion wherein supplies of iron ore has been discussed in details. As discussed we can readily supply you CLO 5 : 18 MM from Royda Mine, apart from screened lumps as per your request. Further we have ready availability of screened 10 : 30 MM iron from Royda Mine. Requesting you

to intimate us your lifting schedule so that supply could commence at the earliest." It is not known whether the complainant company responded to this letter or not. It is true as held in *S.M. Datta Vs. State of Gujarat and Another*, that investigation of an offence is within the exclusive domain of the police department and not the law Court and in the event of disclosure of an offence it is a duty incumbent to investigate into offence. In the normal course of events criminal proceedings ought not to be scuttled at the initial stage unless the same amount to an abuse of the process of law. This decision as has been referred to by Mr. Mitra is a fact oriented one. Here a disclosure of offence u/s 92 of the Factories Act was prima facie found in the petition of complaint. Now catena of decisions, namely *Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another*, *Ajay Mitra Vs. State of M.P. and Others*, *Hari Prasad Chamaria Vs. Bishun Kumar Surekha and Others*, *G. Sagar Suri AIR 2000 SC 754 : 2000 Cri LJ 824*, *S.W. Palanitkar and others Vs. State of Bihar and another*, *Alpic Finance Ltd. Vs. P. Sadasivan and Another*, and others have one thing in common. All the decisions say in one tune that an accused can be prosecuted u/s 420, I. P. C. only when the FIR or the petition of complaint disclose that the accused has dishonest intention since the inception of the transactions. In these decisions distinction has been drawn between the breach of contract and cheating and it has been held that mere breach of contract does not give rise to offence of cheating. It is true that the period between April, 2008 and September, 2008 is a period of five months. In terms of the contract the goods of the second contract were to be delivered by April, 2008. The petition of complaint was filed before the learned Magistrate in January, 2009 but in December, 2008 civil suit was filed in the Original Jurisdiction of this Court. The communication dated 24th September, 2008 which has been made an annexure to the plaint that goods were ready to be delivered. This letter dated 27-10-2008 reveals that even as on 24th September, 2008 the complainant was willing to have goods delivered by way of conversion as alternative to refund of money. This letter dated 27th October, 2008 which is a letter of accused to the complainant company can very well be looked into as being an admitted document and this letter reveals that some time prior to 27th October, 2008 there was held again a discussion between the parties and secondly by this letter the accused intimated that they are in a position to supply CLO from Royda Mine apart from screened lumps and further there was ready availability of screened 10 : 30 MM iron from the said mine and by this letter the request was made to the complainant to intimate the lifting schedule so that supplies could commence at the earliest. It is not known whether the complainant responded to this letter but this letter has propensity to reveal existence of guilty mind before the contracts in questions were entered into by and between the parties in January, 2008. Mere use of the expression "cheating", "dishonest intention" etc. does not by itself constitute cheating (see *Anil Mahajan v. Bhor Industries*). All Cargo Movers All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, appears to have permitted looking into the documents attached to the plaint in a civil case which are admitted documents. In *B. Suresh Yadav Vs. Sharifa Bee and Another*, Their

Lordships had occasion to observe that for the purpose of establishing the offence of cheating the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation and in a case of this nature it is permissible in law to consider the stand taken by a party in a pending civil litigation. In these circumstances, presentation of glossy prospect of the accused company to the complainant company does not assume any significance, particularly when the parties had long standing business relationship and prior to the contracts in question they had the other contracts which also have been referred to in the communication dated 10-5-2008 by the complainant company. Having read the petition of complaint as a whole vis-a-vis the communications made by the complainant to the accused it does not appear that time was regarded as essence of contract. In fact, except paragraph 15 wherein allegation has been made of dishonest motive or criminal intimidation or deep routed criminal conspiracy it cannot be said that it discloses offence of cheating. Mr. Banerjee in supplementary affidavit has referred to many other correspondences between the parties which I have desisted to be taken into consideration because these were not annexures to the plaint of the complainant as Plaintiff.

7. Thus regard being had to the facts and circumstances of the case as well as materials on record, I am to hold that the criminal prosecution would be an abuse of the process of law.

8. Accordingly, the application is allowed. The criminal proceeding being No. Burrabazar P. S. Case No. 15 dated 17-1-2009 under Sections 420/406/120B of the I. P. C. corresponding to GR Case No. 23 of 2009 is quashed.

9. Urgent xerox certified copy, if applied for, be given to the parties as expeditiously as possible.