

(2014) 08 CAL CK 0016
In the Calcutta High Court
Case No : CRR 3431 of 2012 and 718 of 2013

Sushil Mohata

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 20-08-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 415, 482
Penal Code, 1860 (IPC) — Section 34, 406, 418, 420, 504

Citation : (2014) 08 CAL CK 0016

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : Sekhar Basu, Learned Senior Counsel, Advocate for the Appellant;
Syed Julfikar Ali, Learned Advocate, Sandipan Ganguly and Avik Dutta, Learned
Counsels, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Subrata Talukdar, J.—By filing CRR 718 of 2013 and CRR 3431 of 2012 the petitioners challenge the proceedings in Case no. C-2144 of 2012 and C-2794 of 2012 presently pending respectively before the Learned 10th Judicial Magistrate at Alipore and the Learned 7th Judicial Magistrate, Alipore as also the orders passed in the said proceedings. With the consent of the parties both the matters are taken up for analogous hearing as they arise out of identical allegations connected to purchase of flats with facilities at South City Project in which the petitioners are the Officers/Directors.

CRR 718 of 2013:-

1) The petitioners claim that they are Directors/Officers of a Company by the name of South City Projects (Kolkata) Limited (hereinabove referred to as the said Company and/or South City Projects for short) having its registered office at 375, Prince Anwar Shah Road, Kolkata-700068. The petitioners no. 2 and 3 further claim that they have ceased to become the Directors of the said Company with effect from 14th of May, 2012, i.e. prior to the filing of the complaint.

In support of their above contention the petitioner nos. 2 and 3 rely upon documents marked Annexure P-1 of CRR 718 of 2013. The petitioners allege that the Opposite Party no. 2 (for short the OP2) in CRR 718 of 2013 filed a complaint before the Learned Chief Judicial Magistrate, Alipore alleging commission of offences by the petitioners punishable under Sections 418/420/406/504 and 506 of the Indian Penal Code (for short the IPC) which was registered as Case no. C-2144 of 2012.

In her complaint it is stated that the OP2 and her father-in-law came to learn from hand bills and/or souvenirs that flats are available in South City Projects. The flats were available to intending purchasers with facilities such as shopping mall, landscape garden, residents Club with all modern facilities, international school with football ground and a swimming pool etc. With respect to the Club, named and styled as South City Club the hand bills and/or souvenirs advertised as follows:-

"Promising a resort like experience, the South City Club has a perfect getaway for the entire family. Spread over 3 acres (180 cottahs), the multi-facility Club offers social and entertainment activities along with an air conditioned sport centre, guest room, banquet facilities for function. The Club will provide dedicated parking space for members and guests.

The South City Club will have the largest swimming pool within a residential complex in the city, along with that a children's pool, sports pool and a leisure pool. It will also have tennis and squash courts, an indoor cricket arena, billiards and pool tables besides a card room. There will be a fine dining restaurant with banquet facilities, pub, lounge, health Club, spa and a creche for toddlers."

According to the complainant, attracted by the Club facilities offered she agreed to purchase a high priced residential unit in South City Projects and submitted an application in prescribed format along with an application money of Rs. 1 lac which was duly acknowledged by the petitioners-accused through money receipt.

In May, 2004 allotment offer was issued to the complainant vide memo no. UN/1/0193. By the said allotment the complainant was allotted a residential unit in South City Projects as per Standard Terms and Conditions (for short STC) of sale. By the said allotment letter the complainant was asked to pay 50 percent of the Club membership fees of Rs. 60,000, i.e. Rs. 30,000 along with first money instalment through 3 separate cheques amounting to Rs. 6,45,812, Rs. 30,000 and Rs. 5,500 respectively.

The complainant duly paid 50 percent of the Club membership fees amounting to Rs. 30,000 which was acknowledged by the petitioners-accused. She paid the balance 50 percent of the Club membership fees also amounting to Rs. 30,000 at the time of taking over possession of the residential unit being allotted to her being no. I, Floor 13, Tower no. 1 (Oak) having a built-up area of 1415 sq. ft and a super built-up area of 1854 sq. ft.

2. It is the further case in the complaint that after making full payment of the total Club membership fees of Rs. 60,000 plus service tax on which charges (balance amount) of Rs. 7,416 in the month of June, 2008 as per STC of sale was paid at the time of possession of her residential unit of the complex. The complainant alleges that in spite of full payment and taking possession of her allotted residential unit in the year 2008, the said flat was not registered till 20th September, 2010, after much harassment faced by the complainant.

3. The complainant has specifically alleged that in spite of the STC of sale embodied in the Deed of Declaration registered on 31st October, 2005 and specifically mentioned in para-2.8.1(a) thereof the Club membership is yet to be handed over to the complainant. Till date, according to the complainant, in spite of several oral assurances by the petitioners-accused to the effect that the Club membership along with its facilities will be provided within a short period of time, the complainant/OP2 is awaiting the Club membership.

4. It is the further case of the complainant that during the lifetime of her father-in-law such Club facilities were not handed over and her father-in-law died without enjoying any of the facilities of the Club.

5. The complainant therefore caused to be served notice dated 26th April, 2012 through her Learned Advocate to the petitioners-accused intimating her frustration on account of non-receipt of the Club membership. By their reply dated 2nd May, 2012 the petitioners-accused admitted the delay in providing the Club membership as well as the facilities. However, according to the complainant there was no indication in the said reply dated 2nd May, 2012 of the prospective date on which the Club membership along with facilities as promised in the original STC will be made available to the complainant-OP2.

6. It is also the case of the complainant that she approached the petitioners-accused in the month of March, 2012 renewing her request for grant of Club membership but, such approach was rebuffed by the petitioners-accused in abusive language. The complainant thereafter informed the matter to the Officer-In-Charge, Jadavpur Police Station but no action was taken by the police. The complainant also filed a written complaint before the Joint Commissioner of Police (Crime), Detective Department, Lalbazar but, no action was again taken by the police. Left with no other prospect of proceeding against the petitioners-accused the complainant filed the present complaint being Case no-C-2144 of 2012.

7. The Learned Chief Judicial Magistrate, Alipore was pleased to take cognizance of the complaint by order dated 29th August, 2012 and transferred the case to the Court of the Learned 10th Judicial Magistrate, Alipore for hearing. By order dated 20th October, 2012, the Learned 10th Judicial Magistrate, Alipore was pleased to issue process under Sections 420/418/504 and 34 of the IPC against the present petitioners-accused after examining the complainant-OP2 and one Rajendra Goel u/s 200 of the Code of Criminal Procedure (for short the CrPC).

8. The petitioners have moved this Court for quashing of the proceeding in the said complaint case no C-2144 of 2012 including the order dated 29th August, 2012 taking cognizance of the same.

9. Sri Sekhar Basu, Learned Senior Counsel appearing on behalf of the petitioners has argued as follows:-

i) That the ingredients of the offences alleged to have been made out in the complaint under the Sections of the IPC (supra) are not satisfied in the facts of the present case.

ii) Section 418 of the IPC provides for punishment for the offence of cheating with the knowledge that the petitioners-accused persons knew at the threshold that the victim or the complainant shall be caused wrongful loss arising out of the transaction entered into between the parties which, the petitioners-accused persons by law or by legal contract were bound to protect.

Sri Basu has argued that in respect of the offences of cheating made out under Sections 418 and 420 of the IPC it will be apparent that the intention of deceiving at the inception of the transaction is an essential ingredient of the said offences. In other words, the petitioners-accused persons must be held to have made false and fraudulent representations to the complainant-OP2 for inducing her to commit an action out of which she has suffered wrongful loss.

Sri Basu points out that in terms of the hand bills/souvenirs/brochures of South City Project the complainant was provided with all the facilities attached to her residential unit and that is the admitted position. However, the Club facility is yet to be provided and is in the process of being provided. Therefore, in a case of non-performance of part of a contract it cannot be argued that the complainant was induced by false and fraudulent representations amounting to offences under Sections 418/420 of the IPC.

In support of his above submissions Sri Basu relies upon the following decisions:-

Thermax Ltd. and Others Vs. K.M. Johny and Others,

Murarilal Gupta Vs. Gopi Singh reported in 2006(2) SCC (CRI.) 430;

Dr. Sharma's Nursing Home Vs. Delhi Administration & Ors. reported in 1999 SCC (CRI.) 91;

Kalpana Bhowmick Vs. Manashi Roy Burman and Others,

Nisan Developers and Properties Ltd. Vs. State of West Bengal & Anr. reported in 2010(3) Eastern Criminal Notes (Calcutta) 869;

iii) Sri Basu further submits that the present petitioners-accused persons have all been arraigned in their capacities as Officers/Directors of the accused no. 1 Company. The principle of vicarious liability is inapplicable in respect of offences under the IPC, unless specifically alleged. In other words, according to Sri Basu in the absence of specific averments in the petition of complaint narrating the

acts committed by the Officers of the accused no. 1 Company, the Officers/Directors cannot be implicated merely on the basis of the posts held by them in the accused no. 1 Company.

Taking this Court to the petition of complaint along with statements of witnesses Sri Basu asserts that no specific allegation is on record reflecting any criminal act on the part of the present petitioners-accused which would tantamount to an offence u/s 420/418 or 504 of the IPC. Sri Basu therefore argues that the complaint itself is not maintainable in the eyes of law in the absence of averments pertaining to the specific acts of cheating by the petitioners-accused.

10. In support of the above proposition Sri Basu relies upon the following decisions:-

M.D. Sonalika International Tractor Ltd. Vs. Dinesh Sharma and Others,

Maksud Saied Vs. State of Gujarat & Ors. reported in 2008(2) SCC (CRI.) 692; and

S.K. Alagh Vs. State of U.P. and Others,

iv) Sri Basu also points out that with regard to the offence u/s 504 of the IPC, paragraph 14 of the petition of complaint shall clearly reveal that the alleged offence is confined to the accused no. 9, who is not a petitioner in the present CRR 718 of 2013. In such circumstances, in the absence of the accused no. 9 from the present petition, no charge u/s 504 can be sustained against the other petitioners-accused.

v) With regard to the allegation of the complainant that in the land space allotted for the Club by the original offer a building has been constructed, Sri Basu points out that neither from the petition of complaint nor from the statements of witnesses recorded u/s 200 of the CrPC such a complaint can be found. Sri Basu submits that the complaint with regard to occupation of the land space originally allotted to the Club by constructing a new building therein is an improvement made by the OP2 departing from the original complaint and hence cannot be taken into consideration by this Court.

Assuming but not admitting that there is a construction of a building on the land space originally allotted for the Club, it is submitted on behalf of the petitioners-accused that the Club offer has not been withdrawn. Instead, two floors of the said newly constructed building have been kept reserved for the Club while the other floors have been kept reserved for residential purposes. According to the petitioners-accused the original offer of Club facilities does not stand restricted in any manner whatsoever.

vi) Sri Basu has argued that the germane issue is whether the accused no. 1 Company, viz. South City Project failed to provide Club facilities within the period promised to the complainant-OP2. Assuming but not admitting that the Club facilities were to be provided within a specified time, at best the charge against

the petitioners-accused persons could have been one of deficiency of service and not the commission of a penal offence. The entire transaction between the parties was civil in nature and the complainant was wrong in availing remedies under the criminal law alleging non-performance of part of a civil contract. The eminently civil flavor of the contract shall appear from the four corners of the complaint itself, according to Sri Basu. In the event the competent Court is of the opinion that no criminal offence is made out from a plain reading of the complaint, the complaint shall be liable to be quashed. Sri Basu, ably assisted by Sri Sandipan Ganguly, Learned Counsel for the petitioners-accused also relies on the following decisions in support of the above propositions of law advanced by him during the course of argument.

2010(3) Eastern Criminal Notes (Calcutta) 1176 on the point that a commercial contract will not ipso facto amount to a criminal charge.

1999 SCC (CRI.) 91 on the point that non-performance part of the contract will not tantamount to a criminal offence.

2006(2) SCC (CRI.) 430 on the point that failure to honour a contract shall not amount to cheating.

2012(1) Calcutta Criminal Law Reporter 37 (paras-14, 16 & 20) on the point that vicarious liability under criminal law must be strictly construed.

vii) Sri Basu concludes his submission by urging this Court to take notice of the fact that the Learned Magistrate instead of granting police investigation upon filing of the complaint, thereby giving an opportunity to the Investigating Agency to investigate the criminality of the charges qua the petitioners-accused persons, instead issued process u/s 200 CrPC. Such suo motu issuance of process and the taking of cognizance by the Learned Magistrate speaks of injustice against the petitioners-accused persons who are denied the benefit of a proper investigation by the police.

Sri Basu candidly submits that there is no denial of the fact that the availability of the Club facilities offered to the complainant-OP2 is dependent upon the grant of a Completion Certificate (for short CC) from the Kolkata Municipal Corporation. The moment the CC is available the Club facilities shall be handed over to the complainant-OP2 as assured.

Opposing the submissions made by Sri Basu, Sri Avik Dutta, Learned Counsel with Sri Syed Julfikar Ali, Learned Advocate for the OP2 submits as follows:-

a) That the OP2 was induced by the advertisement of the several facilities and/or amenities proposed to be provided in the South City Club as well as colorful photographs of the proposed structure of the Club contained in the souvenir. Being so induced the OP2 became interested to purchase a high priced flat which was valued at Rs. 35,04,060 in the year 2004. The OP2 deposited the entire Club membership fees along with the value of the flat and found that even after the possession of the flat was delivered as well as the same was registered, the so

called multi-facility high standard Club facilities remained elusive.

b) That on lawful enquiry made by the Learned Magistrate u/s 200 CrPC the Court took cognizance. In view of the cognizance taken by the Court there is no need of further police investigation on the complaint. The petitioners-accused even after receiving the summons of Case no. C-2144 of 2012 did not appear before the Learned Judicial Magistrate at Alipore and filed the instant criminal revisional application being CRR 718 of 2013. Affidavits were directed to be filed during the course of hearing of CRR 718 of 2013 and such affidavits have been exchanged.

c) Sri Dutta argues that the petitioners-accused have collected Rs. 60,000 towards the Club membership fees from 6,000 flat owners of South City Project. Therefore, a total amount of Rs. 9 Crore 60 Lacs have been collected by the petitioners-accused but, even after the expiry of nearly a decade such Club facilities as promised have not matured.

d) Sri Dutta points out that from the souvenir that it is evident that 3 acres of land within the said South City Project was earmarked for the construction of the South City Club. However, the said earmarked land for the Club does not exist anymore and, instead the petitioners-accused persons have fraudulently caused to be constructed a new residential tower of 15 floors over the said land by the name of "Cyprus". New residents have been inducted into the flats of "Cyprus" building with car parking. However, the original Club proposed to be constructed on the land on which "Cyprus" now stands with its multi-facilities is nowhere within the reach of the OP2 as well as the other flat owners. It is relevant to mention here that the other 4 towers within the South City Project complex go by the names of "Oak", "Pine", "Maple" and "Cedar". The 5th tower is the new tower by the name of "Cyprus".

Sri Dutta specifically points out that in terms of paras-1.2, 1.4, 2.1, 2.7, 2.8, 2.8.1 and 10.10 of the original STC of sale it is, inter alia, provided that further extension of South City Projects i.e. by way of construction of a new building is possible only when the Company will acquire any contiguous or adjacent land but, not on the land fixed for the Club. Sri Dutta argues that by no stretch of imagination can it be presumed that the Club forming part of an essential segment of the original offer can be compromised by constructing a new building by the name of "Cyprus". He submits that other segments of construction pertaining to the South City Project such as the School and the Mall etc. have been completed but the Club has not been completed as originally promised. On the contrary the petitioners-accused have deceived and/or cheated the OP2 along with other flat owners by not providing till date the Club membership and facilities as assured at the time of purchase.

e) Sri Dutta rests his factual argument on the following propositions of law:-

2013(1) Supreme 131 in the matter of Arun Bhandari Vs. State of U.P. & Ors. on the point that the complaint clearly discloses the intention of cheating the OP2 by

the petitioners-accused at the very time of making the promise of handing over the Club facilities as per the original advertisement. The OP2 was thus fraudulently induced to part with the consideration money for the Club facilities knowing fully well that the petitioners-accused would be unable to provide the same as originally assured.

Relying on the same judgment viz. 2013(1) Supreme 131 Sri Dutta argues that even in disputes presumed to have a civil flavor the jurisdiction of the High Court u/s 482 of the CrPC is not taken away.

Mrs. Rupan Deol Bajaj and another Vs. Kanwar Pal Singh Gill and another, in the matter of Rupan Deol Bajaj & Anr. Vs. K.P.S. Gill & Anr. for the proposition that a complaint can only be quashed if the allegations made therein are so absurd and inherently improbable that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused. Sri Dutta asserts that in the facts of the present case sufficient grounds have been made out by the OP2 in the complaint to justify the institution of criminal proceedings against them and, such grounds are neither absurd nor inherently improbable.

Rajesh Bajaj Vs. State NCT of Delhi and Others, for the proposition that if the factual foundation of a complaint is found in the offence to be made out, any Court should be hesitant in quashing the criminal proceedings. Drawing the attention of this Court to the present complaint Sri Dutta argues that it is not the case of the petitioners-accused that essential facts in support of the transaction are not admitted. Moreover, the Learned Magistrate has issued process on finding upon examination of witnesses that the offences complained of are serious in nature deserving taking cognizance of the same. According to Sri Dutta, it is not the case of the present petitioners-accused that the complaint is bereft of any particulars whatsoever.

On the issue of vicarious liability Sri Dutta relies on a judgment in T.N. Mercantile Bank Ltd. Vs. State through Deputy Superintendent of Police & Ors. in Criminal Appeal no. 1958 of 2013 for the proposition that the Company is a juristic entity in the eyes of law and all acts and actions carried out by the Directors of the said Company, responsible for the day to day affairs of the Company, cannot absolve the Directors of all liability.

11. Taking this Court to page 53 of CRR 718 of 2013 Sri Dutta submits that the facilities, including Club facilities of the South City Projects were advertised and the South City Club with its artistic impression along with swimming pool and indoor game facilities was represented in its original form in the brochure.

12. He further takes this Court to page 112 of CRR 718 of 2013 where the South City Projects was described by the petitioners-accused in the following manner:-

"1. ii. South City will have four independent segments: 1. Residential complex; 2. The Academic (School); 3. The Junction and Galleria and 4. Rendez vu of the Club, which are delineated in Red, Blue, Pink and Orange respectively in the

annexed plan."

"2.i. Towers, Complex Flats, Utility Rooms and Units: The residential complex will have four independent buildings (towers to be known as Oak, Pine, Maple and Cedar to be constructed at such intervals as the said Company may decide. Each towers will have a basement, a ground floor and 35 upper floors. The upper floors will be divided into two complexes with independent entrances and lifts from the ground floor. Each Bloc will have self-contained, independent residential areas (flats). Besides the flats, the complex will have some rooms, independent of the flats (Utility rooms)."

"2.8. Facilities from other segments: All the segments are independent and autonomous. However, Unit Owners will be entitled to avail for the beneficial enjoyment the facilities from the said segments subject to what is hereinabove provided."

"2.8.1. Club: The Company intends to put up a full-fledged Club for recreational activities, which is an independent segment and the Club will continue to belong to the Company or any other person nominated by the Company. The allotted Unit Owner shall become member of the Club by the following terms:

a) Deposit: At the time of allotment, the Allottee will be liable to pay an advance of 50% of the amount of admission fee and the balance amount is to be paid simultaneously on taking over possession of the Unit. The amount of deposit will not carry any interest and will be non refundable.

b) Terms: In case of transfer of the Apartment, the membership of the Club will also stand transferred in the name of the Transferee subject to the rules, regulations and bye-laws of the Club and in such event, the Transferor shall cease to be the member of the Club. However, the Transferor may apply for fresh membership of the Club subject to the rules, regulations and bye-laws of the Club and also subject to availability of membership.

c) Payments: The Unit Owners will abide by the rules and regulations (Rules) of the Club and pay the membership and other fees and charges fixed by the Club Authority from time to time for using the facilities at the Club.

d) Right of the Club: The Allottees will not have any right of property in or regarding the formation or running of the Club and shall abide by all its rules and regulations.

e) Independent Members: There will be no restriction upon the Club Authority in admitting any person and/or persons who is not an Unit Owner as its members or give to anyone the right of user of the Club and/or its facilities on such terms as the Club Authority may decide.

f) Additional Members: The persons residing with the Unit Owner shall be given the facility to become additional member to the extent and on the terms prescribed by the Club Authority.

g) Joint Allottees: In case of more than one Allottee in respect of any unit, only one membership is hereby-covered subject of course to Clause (f) immediately proceeding.

h) User: The right and manner for user of the Club by the members will be such as shall be prescribed by the Club authority from time to time and each member will be bound to comply with the rules and regulations of the Club."

"10.10. Further extension of South City: The Company shall be entitled to acquire any contiguous or adjacent land in South City in which event such acquired land shall be amalgamated with the existing land contained in South City and thereafter the Company shall be entitled to the benefits of all the facilities, utilities and common portions of South City and the Unit Owners and the Utility Room Owners shall be deemed to have consented to the same."

13. Sri Dutta argues that in the backdrop of the fraudulent inducement the Company took a total of Rs. 35,04,060 from the petitioner for buying a Unit along with its assured Club facilities.

14. Sri Dutta submits that thereafter suddenly by a Deed of Declaration of the year 2009 the petitioners-accused announced unilateral changes in the STC of sale of the four towers already constructed and created an STC of sale for the new "Cyprus" tower. Paras 7 and 8 of the said Declaration read as follows:-

"7. Original STC: Only for disposal of the flats in the Residential Complex, the Company had adopted certain terms and conditions for the benefit of all the purchasers of flats therein. These terms were recorded in a Deed of Declaration registered with the Dist. Sub-Registrar-I, South 24-Parganas, Alipore in Book No. I, Volume No. 186, Pages 106 to 138 being No. 02715 for the year 2005. A copy of the Original STC is annexed.

8. Revision of Original STC: The Company has revised the plans for the Club Segment as it is entitled to do under the Original STC and has decided that a 5th tower/building to be named "Cyprus" will be constructed in the Club Segment (emphasis provided). Cyprus will have a double basement for parking, a ground and another fifteen upper floors. The Club will be housed in the ground, first and second floors of Cyprus (emphasis provided). The other upper floors of Cyprus would be independent from the rest of the building and will consist of residential apartments. The car parking rights in the basement of Cyprus and part of the open areas of the Club Segment will be sold by the Company to the purchasers of apartments in Cyprus (emphasis provided) as also to other apartment owners in the Residential Segment. The Club will be segregated and separated from Cyprus and the Residential Segment and its approach, security etc will be provided in a manner that the same are in between the Residential Segment and Cyprus."

15. The argument advanced by Sri Dutta is that from a plain reading of the terms of the Declaration of 2009 (supra) there is a breach of representation by

the petitioners-accused by converting the Club segment into a new building in the name and style of "Cyprus". Taking this Court to the reply of the Learned Advocate for the petitioners-accused to the OP2 and her father-in-law dated 2nd May, 2012 Sri Dutta submits that it is admitted by the Learned Advocate that the work of completion of the Club Premises is still in progress and, on completion of the Club facilities the OP2 along with other owners will have the benefit of the use of the Club facilities.

16. Sri Dutta vehemently contends that at the very threshold of the inducement made by the petitioners-accused to the accused-OP2, the said petitioners-accused knew that the proposed land of 3 acres for the Club facilities shall be converted illegally into a new residential building thereby depriving OP2 and other flat owners fraudulently of the Club facilities originally promised to them at the time of the advertisement. Such dishonest inducement and/or fraudulent misrepresentation continued even at the stage of taking money from the OP2 and the other flat owners towards grant of Club facilities and, it is now evident that the Club facilities, as originally promised, cannot be provided inasmuch as the original land earmarked for the Club has already been utilized for constructing a new residential building.

17. Sri Dutta therefore submits that the wrongful deprivation of the Club facilities as promised to the OP2 and other flat owners amounts to the offence of cheating.

Heard the parties. Considered the materials on record.

18. This Court is of the considered opinion that the ratio of the judgment reported in Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, shall apply in the facts and circumstances of the present case. While considering the criminal liability of a Corporation the Hon"ble Apex Court was pleased to hold at paras-55, 59, 63 & 66 as follows:-

"55. We are of the considered opinion that there is much substance in the submission of Mr. Jethmalani that virtually in all jurisdictions across the world governed by the rule of law, the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The legal position in England and the United States has now crystallised to leave no manner of doubt that a corporation would be liable for crimes of intent."

"59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation."

"63. From the above it becomes evident that a corporation is virtually in the

same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of "alter ego" of the company."

"66. These observations leave no manner of doubt that a company/corporation cannot escape liability for a criminal offence merely because the punishment prescribed is that of imprisonment and fine. We are of the considered opinion that in view of the aforesaid judgment of this Court, the conclusion reached by the High Court that the respondent could not have the necessary mens rea is clearly erroneous."

19. With reference to the offence of cheating, the Hon''ble Apex Court in Iridium's judgment (supra) held as follows on the issue of misrepresentation leading to deception. At paras-68, 72 & 75 the Hon''ble Supreme Court held as follows:-

"68. A bare perusal of the aforesaid section would show that it can be conveniently divided into two parts. The first part makes it necessary that the deception by the accused of the person deceived, must be fraudulent or dishonest. Such deception must induce the person deceived to either (a) deliver property to any person; or (b) consent that any person shall retain any property. The second part also requires that the accused must by deception intentionally induce the person deceived either to do or omit to do anything which he would not do or omit, if he was not so deceived. Furthermore, such act or omission must cause or must be likely to cause damage or harm to that person in body, mind, reputation or property. Thus, it is evident that deception is a necessary ingredient for the offences of cheating under both parts of this section. The complainant, therefore, necessarily needs to prove that the inducement had been caused by the deception exercised by the accused. Such deception must necessarily produce the inducement to part with or deliver property, which the complainant would not have parted with or delivered, but for the inducement resulting from deception. The Explanation to the section would clearly indicate that there must be no dishonest concealment of facts. In other words, non-disclosure of relevant information would also be treated as a misrepresentation of facts leading to deception."

"72. According to the High Court, Respondent 1 did not keep the investors in dark about the Iridium system and gave them all necessary information in respect of various aspects of the system. In coming to the aforesaid conclusion, the High Court observed that "a bare perusal of the complaint shows that there is no reference to the stock purchase agreements of 1993 and 1994. In fact, these

two important documents contain acknowledgments of the investors about their capability of evaluating the merits and risks of the purchase of the shares and their relying upon their own advisors". The High Court, therefore, negated the submission that there has not been a complete and candid disclosure of the entire material which has resulted in the deception/inducement of the appellant to make huge investment in Iridium. This conclusion reached by the High Court did not take notice of the Explanation to Section 415. The aforesaid Explanation gives a statutory recognition to the legal principles established through various judicial pronouncements that misleading statements which withhold the vital facts for intentionally inducing a person to do or to omit to do something would amount to deception. Further, in case it is found that misleading statement has wrongfully caused damage to the person deceived it would amount to cheating."

"75. The aforesaid observations leave no manner of doubt that the appellants were entitled to an opportunity to prove the averments made in the complaint. They were entitled to establish that they have been deliberately induced into making huge investments on the basis of representations made by Respondent 1 and its representatives, which representations subsequently turned out to be completely false and fraudulent. The appellants were entitled to an opportunity to establish that Respondent 1 and its representatives were aware of the falsity of the representations at the time when they were made. The appellants have given elaborate details of the positive assertions made by Respondent 1 which were allegedly false to its knowledge. It is also claimed by the appellants that Respondent 1 and its representatives willfully concealed facts which were material and ought to have been disclosed, but were intentionally withheld so as to deceive the appellant into advancing and expending a sum of Rs. 500 crores."

20. Finally, the Hon"ble Apex Court while considering the inherent powers of the High Court to quash criminal proceedings in connection with offences involving economic/commercial transactions, breach of trust, cheating etc. was of the view that the power is to be exercised sparingly and when prosecution is launched either maliciously or with ulterior motive. At paras-76 & 78 of Iridium"s judgment (supra) the Hon"ble Apex Court while holding the view that the inherent power u/s 482 CrPC ought not to be exercised to stifle legitimate prosecution, held as follows:-

"76. As noticed earlier, both the appellants and the respondents have much to say in support of their respective viewpoints. Which of the view is ultimately to be accepted, could only be decided when the parties have had the opportunities to place the entire materials before the Court. This court has repeatedly held that power to quash proceedings at the initial stage has to be exercised sparingly with circumspection and in the rarest of rare cases. The power is to be exercised ex debito justitiae. Such power can be exercised where a criminal proceeding is manifestly attended with mala fides and have been instituted maliciously with ulterior motive. This inherent power ought not to be exercised to stifle a legitimate prosecution."

"78. In our opinion, the High Court clearly exceeded its jurisdiction in quashing the criminal proceeding in the peculiar facts and circumstances of this case. The High Court noticed that while exercising jurisdiction u/s 482 CrPC "the complaint in its entirety will have to be examined on the basis of the allegations made therein. But the High Court has no authority or jurisdiction to go into the matter or examine its correctness. The allegations in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by the Court at this stage". Having said so, the High Court proceeded to do exactly the opposite."

21. In the facts and circumstances of the present case as discussed above in this judgment and order this Court notices that the OP2 was induced to invest in the project of the petitioners being attracted by the advertisement. It is the specific case of the complainant that the Club facilities were advertised with artistic impression along with swimming pool and indoor game facilities. Being eager to stay in an up-scale complex with the advertised Club facilities, the OP2 in his complaint has submitted that he was induced to part with the consideration money for both the flat and the facilities such as the Club attached to the residential complex.

22. The OP2 has pointed out that the Club was advertised as a self-contained segment and he was eligible to become a member of the Club pursuant to purchase of the flat and completion of necessary formalities. Towards such promise the OP2 paid and the respondents accepted the consideration money for the Club. It is also the case of the OP2 that the original advertisement for membership in the project and the Club envisaged that further extension of South City shall happen only when the Company shall acquire any contiguous or adjacent land. Such acquired land shall be amalgamated with the existing land contained in the South City Project.

23. This Court therefore finds substance in the submission of the OP2 that the existing area of land of 3.1 acres demarcated within the project area for construction of the independent Club segment was not intended to be touched for any other use. In the event any construction was contemplated within South City Project in addition to the four independent segments namely, residential complex, the school, the junction and the gallery and the Club then in terms of Clause 10.10 (supra) such additional construction would take place in areas of land which are either contiguous or adjacent to the existing land, provided such contiguous and additional lands are acquired and amalgamated with the existing land of the project.

24. This Court also finds substance in the argument of the OP2 that the new residential tower of 15 floors which has been constructed on the land earmarked for the Club by the name and style of "Cyprus" was not part of the initial offer made to the prospective allottees. Admittedly, the petitioners committed a major departure from the original representation made to the OP2 and the other allottees by failing to construct and deliver the Club facilities within the

earmarked portion of land for the Club and have instead diverted the same for the purpose of constructing a residential tower. Sri Dutta has therefore submitted that in order to legitimise the subsequent action by departing from the original promise, the petitioners in the year 2009 unilaterally created a new Deed of Declaration revising the plans for the Club segment. Although the petitioners have argued that the Company was within its rights to alter the original STC, the fact remains that having acted on the original representation, the planned departure from such original representation by the petitioners whether constitutes misrepresentation amounting to cheating or not is an issue which, following the dicta in Iridium's case (supra), the OP2 is entitled to opportunity of proving his case in trial.

25. In fact the new Deed of Declaration of the year 2009 provides that the new residential tower "Cyprus" shall be constructed in the Club segment. It further provides that part of the open areas of the Club segment will now be sold by the Company to the purchaser of apartments in "Cyprus". The Club, in a different form but definitely, not in the form as originally represented to the OP2 will be segregated from the residential segment. Such segregated and truncated Club was definitely not the version originally advertised and for which specified sums of money were taken from the OP2 and other intending flat holders.

26. Again, respectfully noticing the observations of the Hon'ble Apex Court that the inherent power u/s 482 CrPC shall not be exercised to stifle legitimate prosecution, this Court is of the considered opinion that none of the parties should be shut out from testing their respective contentions at trial. This Court is also of the view that a case has been made out by the OP2 on the face of the records and the Learned Trial Court is entitled to examine whether such misrepresentation can be fastened with criminal liability at the trial.

27. This Court is also conscious of the judgment of the Hon'ble Apex Court reported in Thermax Ltd. and Others Vs. K.M. Johny and Others, wherein the Hon'ble Apex Court was pleased to hold that if there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. The Hon'ble Apex Court was pleased to hold that if there is a huge delay and there is an attempt on the part of the complainant to avoid the period of limitation, the complainant cannot be allowed to resort to a criminal proceeding.

28. To the mind of this Court the elements of criminal liability pertaining to the offence of cheating bear their prima facie imprint on the transaction entered into between the parties.

29. Once the imprints of a criminal liability are evident in the transaction between the parties, this Court holds with respect that the interpretation of the Hon'ble Apex Court in Thermax's judgment (supra) cannot apply to the facts of the present case. As noticed hereinabove in this judgment the complaint cannot held to have been filed maliciously nor with ulterior motive.

30. Finally, on the argument raised on behalf of the petitioners that the principle

of vicarious liability cannot lie in respect of each of them and there are no specific averments in the petition of complaint against each of the Officers/Directors and, in the absence of such specific averments the petitioners cannot be held liable merely on the basis of the posts held by them in the accused no. 1 Company.

31. This Court notices the judgments of the Hon'ble Apex Court reported in A.K. Singhania Vs. Gujarat State Fertilizer Company Ltd. and Another, in the matter of Mannalal Chamaria and Another Vs. State of West Bengal and Another, in the matter of Mannalal Chamaria & Anr. v. State of West Bengal & Anr.; Eastern Criminal Notes 2010(1) (CAL) 38 in the matter of Manoj Jalan v. State of West Bengal & Anr.; Unreported Decision in CRR 2977 of 2012 in the matter of Hanuman Mal Tater & Anr. v. The State of West Bengal & Anr.

32. The said judgments are authorities on the point that it is not necessary that each of the allegations against the accused persons should be mentioned in the petition of complaint. Rather, the petition of complaint should reflect the substance of the allegations against each of the individual petitioners.

33. Respectfully noticing the above judgments although in the field of Negotiable Instruments Act, 1881 this Court is of the view that the ratio applies to the facts pleaded in the present complaint. This Court is therefore unable to agree with the contention of Sri Basu that the present petitioners do not stand to be directly implicated in the criminal proceeding. It is not denied that the present petitioners are the Officers/Directors of South City Projects and were responsible for executing the same. The representation made to the OP2 in respect of the construction and facilities on offer at South City Projects was to the knowledge of each of the petitioners. Since the plain reading of the complaint discloses the substance of the allegations against the petitioners it is no longer an absolute requirement of law that there must be specific individual recording of allegations against each of the petitioners.

34. However, on a consideration of the charges u/s 504 and 506 IPC this Court is of the opinion that the only allegation in the complaint in connection with the explicit act under said sections is against the accused no. 9, who is not a petitioner to the present CRR 718 of 2013. In that view of the matter the charges u/s 504 and 506 IPC, which are essentially charges pertaining to intentional insult and provocation to breach of peace and criminal intimidation cannot be fastened on to each of the petitioners except the accused no. 9.

35. In the backdrop of the above discussion this Court finds no reason to interfere in the proceedings in case no. C-2144 of 2012 pending before the Learned 10th Judicial Magistrate at Alipore qua the present petitioners. However, this Court at the same time finds it fit to quash the charges under Sections 504 and 506 of the IPC qua the present petitioners, except the accused no. 9, who is not a petitioner before this Court.

CRR 718 of 2013 is accordingly disposed of.

CRR 3431 of 2012:-

In view of the analogous nature of the matters, CRR 3431 of 2012 is also disposed of on the above terms and, on a parity of reasoning, the prayer for quashing of proceedings in complaint-case no. 2794 of 2012 presently pending before the Learned 7th Judicial Magistrate, Alipore along with its connected orders, including the order dated 30th May, 2012, is refused, except to the extent indicated above.

36. There will be, however, no order as to costs.

Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.