

(2023) 03 MP CK 0050

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 33356 Of 2022

Swapnil Bhatt And Others

APPELLANT

Vs

Central Bureau And Others

RESPONDENT

Date of Decision : 14-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Criminal Procedure, 1973 — Section 41A, 155(2), 156(1), 482
Information Technology Act, 2000 — Section 43(b), 65, 66A, 66D, 71, 74, 85
Evidence Act, 1872 — Section 65B
Foreign Contribution (Regulation) Act, 2010 — Section 15, 21(a), 21(c), 22, 23
Indian Penal Code, 1860 — Section 34, 409, 420, 467, 468, 471, 474
Forward Contracts (Regulation) Act, 1952 — Section 2(h), 20(c), 21(a) 21(c), 21(g), 21(h), 23
Securities Contracts (Regulation) Act, 1956 — Section 23S

Citation : (2023) 03 MP CK 0050

Hon'ble Judges : Virender Singh, J

Bench : Single Bench

Advocate : Anil Khare, Priyank Agrawal, Santosh Meshram, Vikram Singh, Somesh Gupta, Dilip Shrivastava

Final Decision : Disposed Of

Judgement

Virender Singh, J

1. This petition under Section 482 of Cr.P.C. has been filed invoking extraordinary jurisdiction of this Court, seeking quashment of FIR No. 498/2013 dated 28.10.2013 registered at P.S. Cyber and Hi-Tech Crime, Bhopal u/s 420 of IPC, 66A, 66D of I.T. Act which culminated into charge sheet no. 143 dated 27.01.2014 u/s 409, 420, 467, 468, 471, 474, 120B and 34 of IPC, u/s 43-B, 65, 66-A, 66-D, 71, 74 and 85 of Information Technology Act, 2000, u/s 20-C, 21-A, 21-C, 21-G, 21-H of Forward Contracts (Regulation) Act, 1952, u/s 23-S of Securities Contracts (Regulation) Act, 1956 and subsequently (sections have been mentioned according to the charge sheet), based on Notification issued by the State of Madhya Pradesh transferring the investigation to CBI, the crime was

reregistered vide FIR No. RC0682014E0002-CBI/EOW-Mum/EO-III/ND dated 19.03.2014 at P.S. CBI, EOW, Mumbai which later transferred to CBI/EO-III, New Delhi and ultimately culminated into a supplementary charge sheet no. 22/2020 dated 30.12.2020 u/s 420 and 120B of IPC, Section 66-D of IT Act, 2000.

2. Brief facts necessary for the disposal of this petition are that petitioner No. 6 Amit Soni along with his real brother Anurag Soni and complainant Lokesh Sharma had established a company named A.U. Commodities Pvt. Ltd. in 2010 which later changed to M/s Moneyhouse Commodities (here-in-after referred to as the 'Company'). This company was authorized for future trading by Multi Commodity Exchange (in short MCX). On 22.07.2011, complainant Hemant Soni was appointed director of the said company. Initially, in 2010-11, complainant Kamlesh Dave was an authorized signatory of the said company. He was authorized to deal with all sorts of financial and administrative operations of the company under his signature. From 2011 onward, the entire work of the said company was being managed by complainant Hemant Soni. Due to some personal difficulties, petitioner Amit Soni resigned from the directorship of the said company in February 2013 and in the same year 2013, petitioner No. 4 Vinay Mahajan was appointed as Director. At the time of filing of the charge sheet, Anurag Soni and Vinay Mahajan were Directors of the Company. Anurag Soni was the sleeping director and was not looking after the day-to-day affairs of the company. At one point of time, complainants Navin Raghuvanshi, Hemant Soni and Lokesh Sharma were also Directors of the Company. Accused Amjad Belim, Vijay Semre, Swapnil Bhatt, Rajesh Rupawat, and Amit @ Gopal Neema were working in different offices of the company either as workers or managers. Accused Kunal Chaumar @ George and Rakesh Batra were providing technical support to the Company.

3. On 17.10.2013, complainants Vishal Garg, Lokesh Sharma, Navin Raghuvanshi, Samit Bule (since dead), Rajesh Soni, Kamlesh Dave, Hemant Soni, and Chandra Prakash Rathore filed a written complaint at P.S. Cyber and Hi-Tech Crime, Bhopal, M.P. on the basis of which Crime No. 498/2013 u/s 420 of IPC, Sections 66A and 66D of Information Technology Act, 2000, was registered on 28.10.2013 against the petitioners & others. Finding irregularities in the investigation, ADG (Cyber) recommended the transfer of the same to the Crime Investigation Department (for short CID), pursuant thereto; the investigation was handed over to the CID on 04.11.2013. Thereafter, vide Notification No. F-12-91/2013 B-1/(Two) dated 02.12.2013, the Home Department, Government of Madhya Pradesh requested the Ministry of Personnel, Public Grievances and Pension, Government of India to transfer the investigation of this FIR to the Central Bureau of Investigation (hereinafter referred to as 'CBI'). Vide Notification No. 228/84/2013- AVD-II dated 10.03.2014 Ministry of Personnel, Public Grievances and Pension, Government of India handed over the investigation of this FIR No. 498/2013 to CBI. But, after the request was made by the State Govt. to the Central Govt. but before the order of transfer of the FIR could be passed, the CID filed charge-sheet no. 143 dated 27/28.01.2014 u/s

409, 420, 467, 468, 471, 474, 120B and 34 of IPC, u/s 43(b), 65, 66A, 66D, 71, 74 and 85 of Information Technology Act, 2000, u/s 20(c), 21(a), 21(c), 21(g), 21(h) of Forward Contracts (Regulation) Act, 1952, u/s 23 of Securities Contracts (Regulation) Act, 1956 against applicant Nos. 1 to 3 and applicant Nos. 5 & 6 before the Court of Chief Judicial Magistrate, Bhopal. The CBI investigated the crime and after about 7 years filed a supplementary charge sheet no. 22/2020 dated 30.12.2020 u/s 420, 120B of IPC and Section 66-D of IT Act, 2000 against applicant No. 4 as well as u/s 420 & 120B of IPC against applicant No. 7 i.e. the Company, which is pending trial for framing of charges.

4. The complainants have made following allegations in their complaint:

(i) Petitioners Amit Soni and Anurag Soni instigated them to trade in commodities on MCX. On their behest, petitioner Swapnil Bhatt gave a demo of software on his mobile. As they agreed, Amit and Anurag charged Rs. 2 lakh each from all of them totaling Rs. 16 lakh and provided each of them with different login IDs and passwords to log into their accounts and trade in commodities.

(ii) By using those user IDs and passwords they traded in commodities for some time and also earned profit, but when after some time they tried to see their profit in their accounts, it was not visible. When they inquired, Amit got annoyed and refused to return their money as well as the profit earned by them stating that they are free to do whatever they can. At that time he also admitted that he is the owner of "Meta Trade-5".

(iii) Later, they came to know that link provided by Amit Soni was not linked with MCX, That their transactions were not on MCX and that Amit and Anurag were operating a fake commodity exchange and minting money by using software "Meta Trade-5". They also caused loss of crores of rupees to the State Exchequer. Rakesh Batra, Kunal, Umesh Balwani, Dheeraj Solanki, Gopal Neema, Amjad Velim, Sujit Sharma, Vijay Semre, Madhwi Khandelwal, Vinay Mahajan and Rajesh Rupawat were working with them at their different offices in all over India.

5. During the investigation, MCX informed that 'Moneyhouse Commodities Pvt. Ltd.' was its registered member with member ID 40855 and was legally authorized for 'Forward Trading' and that using its platform, had 'Forward Trades' turnover of Rs. 22,635.37 crores and earned profit of Rs. 1,68,54,905/-during 2011-13.

6. According to the investigator, some persons were indulged in unauthorized 'Forward Trading' or 'Dabba Trading' outside the portal of MCX by using 'Meta Trade-5' software (here-in-after referred to as MT-5). This software was developed and owned by MetaQuotes Inc, Cyprus. Its price was \$75,000/- (Rs.45 lacs). In reply to a query, authorized representative of 'MetaQuotes' in India Manoj Chaudhary informed the police that he had not sold 'Meta Trade-5' to anyone in India. He further informed that the company (MetaQuotes) had sold 'MT-5' to 'Wintrade Pvt Ltd, Dubai' and for this purchase, one Rakesh Batra had

contacted MetaQuotes, but the Director of 'Wintrade Pvt Ltd' Manish Chetwani informed that he had never purchased this software. He also denied any business relation or even acquaintance with Amit Soni. It was found that Rakesh Batra was a technical associate of 'Moneyhouse Commodities Pvt. Ltd.' (of the accused persons). The police arrested him and based on his information, seized a server.

The analysis of data stored in this server by the Central Forensic Science Laboratory (CFSL), unearthed that using 'MT-5' software, trade/turnover worth Rs.72 crore had been done by backtracking the MCX. The competent authority of the 'Forward Markets Commission' (for short FMC) also confirmed this unauthorized trade in its interim as well as final opinion dated 26.01.2014 and 28.03.2014.

7. It further emerged in the investigation that with intent to host 'MT-5', a dedicated space on the server of 'Cyber Futuristics Pvt Ltd', Noida was taken on the lease of Rs.23,000/- per month by 'Skytel Services', Secunderabad, Hyderabad, which, when investigated, was not found on the given address. Rohan Raj Reddy and Anoop Kumar Dhali were found Directors of 'Skytel Services' but they also could not be traced. Skytel Services took the server on 29.07.2013 but closed it on 09.11.2013. The rent was paid through e-payment.

8. CA of 'Moneyhouse Commodities Pvt. Ltd.', Satya Narayan Agrawal produced balance sheet and IT returns of the company showing profit of Rs. 1274/-, 90436/- and 14,73,000/- earned by the company in the year 2010-11, 2011-12, and 2012-13 respectively, while it had paid Rs.49.50 lacs as rent and advance for its offices at 509, New Delhi House, Barha Khamba Road and P-15, Connaught Place New Delhi in the financial year 2013-14. On inquiry of e-mails of Rakesh Batra, "Yahoo" informed that as per one e-mail, the accused persons had paid \$45,000/- to buy 'Meta Trade-5'. Thus, according to the police, in the last about 5 months prior to registration of the offence, the accused persons invested about Rs.75,00,000/- lacs, which was not possible, considering the income of the company in FY 2012-13 and this indicates that by concealing their actual income, the accused persons had invested a huge amount in 'Forward Trading' and earned a huge profit by trading on unauthorized portal created by them using 'MT-5' software through their computers, mobile phones etc. They run a parallel exchange for 'Forward Trading' illegally from their offices in Indore, Delhi, Mumbai, Jaipur etc., therefore, the CID filed the charge sheet as stated in para 3 above.

9. The petitioners have challenged aforesaid charge sheets on the grounds that this is an outburst of the action taken by petitioner Amit Soni against the complainants, who were otherwise his close relatives and were associated with him for years. 6 out of 8 complainants were themselves directors of or associated in various capacities with the same company wherein they say that they had invested the alleged amount for forward trading. Petitioner Amit Soni and Anurag Soni are real brothers while complainant Hemant Soni and Rajesh Soni are their first cousins. The financial disparities between them were apparent and this

reason was a seed for their enmity. The entire business of the company was being managed by experienced employees under the management of complainant Hemant Soni, who himself was the director of the company. Later, taking advantage of the faith deposited by Amit Soni in them due to close relations and misusing their position in the company, Hemant and Rajesh started manipulating the accounts of the company and started siphoning money from the accounts. After some time, Amit came to know about their misdeeds and objected to the same, but they didn't admit their fault and refused to settle the accounts, therefore, he (Amit) made several complaints against them and also lodged FIRs (Annexure P/5 colly). All this turned their relations sour. Disgruntled by the action taken by Amit Soni, with their associates Hemant and Rajesh conspired against him and taking advantage of their relations with the IG Cyber Crime, Bhopal Shri Anil Gupta, manage to get the present case registered at Cyber Police Station, Bhopal even when both the parties belong to Indore, all the alleged transactions had taken place in Indore and there is an independent Cyber Crime Police Station in Indore. No reason has been shown to usurp such jurisdiction by the Cyber Crime police station, Bhopal.

10. The respondents are answerless as to when the parties were residents of Indore, the disputed transaction had taken place at Indore and there is a Cyber Police station having territorial jurisdiction over the cause, why the case was registered at or investigated by the police station Cyber & Hi-Tech crime Bhopal. This speaks volumes about the allegation of malice, bias, arbitrariness, partiality, and misuse of authority by the officials concerned.

11. The police were surprisingly quick in taking action as just after registration of the offence; without giving notice u/S 41A of the Code of Criminal Procedure or following the due process, they picked up petitioner Swapnil Bhatt from Bhopal and petitioners Anurag Soni, Vijay Semre and Rakesh Batra at around 7 am on 30th October 2013 from their residences in Indore, took them in a vehicle of the complainants to Bhopal, detained them in illegal custody for more than 72 hours at the Cyber Police Station Bhopal and tortured them physically and mentally, which is clear from the statement of Shri Ashok Dohare ADG Cyber Crime, Bhopal and from the medical report of petitioner No. 5 done on 7.11.2013 at the Central Jail Bhopal confirming multiple injuries on his body and atrocities of the police they faced. All the time the complainants were present with the police. These facts have been admitted by various police officials in their respective statements.

12. When the petitioners raised their voice against the illegal action of the police, head of the department Additional Director General of Police (ADG) Cyber and Hi-tech Crimes, Bhopal Shri Ashok Dohare himself inquired into the matter and taking an extraordinary step to establish rule of law, withdrew the investigation from his own subordinates and handed it over to the Crime Investigation Department (CID) just within 4 days of registration of the FIR. He further went to the extent that he deposed on oath before the Judicial Magistrate First Class,

Bhopal about the irregularities and illegal acts of his subordinates (Annexure P/6) in the inquiry of complaint filed by petitioner Amit Soni.

13. In his statement dated 16.07.2018 recorded by JMFC, Bhopal; ADG Cyber Crime Shri Dohare stated that on 31st October 2013 IG Anil Gupta informed him that petitioners Swapnil Bhat, Rakesh Gupta, and Anurag Soni were in their custody. On 01.11.2013, at around 5 pm, while the police officers and Complainants were subjecting the petitioners to physical torture, he saw the complainants and the petitioners were present together in the Cyber Crime police station, Bhopal. He further stated that on 2.11.2014 at around 11:45, he spoke to Anurag Soni, but as per the arrest memo, he was arrested at 16:45 hours on 02.11.2013. Further, it may be seen that the arrest was made at Bhopal and the witnesses belong to Indore.

14. It is also argued that pursuant to the atrocities that the Petitioners were subjected to, followed by the improper investigation, the Madhya Pradesh Police Department initiated a Departmental Inquiry on the investigation team of the Cyber Police officers named SHO Seetaram Jha, T.I. KS Baghel, T.I. Sunita Katara, A.S.I. Charan Sumer, Head Constable Ishrat Pravin, Constable Ritesh Singh, and Kailash Chourasiya under Departmental Inquiry No 02/16. It is also pertinent to note that Dy. S.P. Deepak Thakur and Head Constable Ishrat Pravin were already facing a trial in a similar case pertaining to Cyber Police, Bhopal where Deepak Thakur, who was then posted at the Cyber Police Bhopal initiated a similar case u/s 420 of Indian Penal Code and u/s 66A and 66D of the I.T. Act on two women who were not only arrested in a manner which contravened all the provisions laid down by law and leading judgements rendered by the Hon'ble Supreme Court and further demanded bribe from them. The aggrieved women filed the petition in the Supreme Court for quashing of FIR and the Petition was subsequently allowed and the FIR was quashed by the Hon'ble Supreme Court vide Rini Johar vs State of M.P. (2016) 11 SCC 703 and a departmental inquiry was initiated on the said officers. The Hon'ble Supreme Court in the said case has ordered to pay compensation of Rs. 5-5 lacs each to both the lady victims.

15. It is further pleaded that in the complaint all the complainants made allegations that they all paid money to Amit Soni while in their police statements, they all named different accused persons to whom they paid that money. The seizure of hard discs, mobile phones, electronic gadgets, and documents were not done as per the procedure. This evidence was tampered with by the officials of Cyber Crime, evidence of which was subsequently collected by the CBI and CID. This fact has been mentioned in the CID charge sheet.

16. It is also submitted that the core of the complaint was that the Petitioners were running a parallel exchange through Meta Trade 5 and that the Complainants have traded and incurred losses. The investigating agency claims that seized data contains all trade details of the alleged business done through Meta-Trader by the Petitioners/Accused. However, the data retrieved from the server did not contain the names of the Complainants. If the Complaint was true,

the names of the Complainants should have appeared in the data which was extracted from the seized server.

17. It had been alleged that the petitioners earned crores of Rupees in profit towards the brokerage for the trading on the MT-5 software. However, there is no such document to prove this. SEBI the nodal agency to prosecute such crimes did not initiate any inquiry on any of the accused persons. The alleged profit earned on this dummy software did not reflect on the books of accounts of petitioner number 7. Even after intimation given by the investigator, the income tax authorities did not initiate any inquiry on the alleged profit earned. The GST authority had passed an order to recover a penalty of rupees 24 lacs on the basis of a notional figure. This penalty was quashed by the CGST and Central Excise and Customs, Indore on 28.1.2021 and remitted the matter back for reconsideration. All this shows that without any concrete evidence, the investigator has filed the charge sheet only on the basis of assumptions and presumptions.

18. It is asserted that in his letter dated 15.11.2013 Dy.S.P. Deepak Thakur has stated that after accessing the server Rakesh Batra had downloaded the data of the server on the desktop and copied the data in a DVD and thereafter the server was seized. The fact of copying the data on the DVD and seizure of the said DVD is not mentioned in the Panchnama dated 14.11.2013. The Seizure Report or the Panchnama of the server is devoid of the exhibit markings of the device as well as the Hard Drives. Instead of noting down the name of the device, the police have noted down the name of the Motherboard which is a replaceable component of the computer device. The details of the server seized in the Panchnama are not matching with the server that was rented for the said IP address. In the invoice raised by Cyber Futuristics on one Rohan Raj Reddy, it is mentioned that the server has 2 hard drives of 1TB each, while the Panchnama and the forensic report mention that the server consists of 3 hard drives of 1TB each. This shows that the said DVD is planted later. This DVD was sent for analysis to Forward Market Commission (FMC), but certificate as mandated by Section 65B Evidence Act, has not been issued. All these facts and circumstances render the DVD and authenticity of data contained therein unauthorized, seriously doubtful, and inadmissible in evidence. Since the report of FMC confirming Dabba trading is based on this inadmissible piece of evidence, the report of FMC is also inadmissible in evidence, and in absence of the report of FMC, nothing remains on record to prosecute the petitioners and their prosecution becomes a futile exercise.

19. It is asseverated that the investigating agencies have not identified the IP address of the devices, which can prove that the said data was created/accessed by the petitioners. In absence of such evidence, this cannot be said that the files were indeed created or accessed by the petitioners.

20. It is also contended that the CID was not competent to file a charge sheet dated 27.01.2014 as prior to that Home Department, State of Madhya Pradesh

vide its notification No. F-12-91/2013B-1/(Two) dated 22.12.2013 had already recommended to transfer the said investigation to C.B.I. While the matter was pending consideration before the Union Government, the CID which had seized to be in charge of the case & become functus officio, acted in haste and filed the aforesaid charge sheet in an illegal and arbitrary manner. This shows that the CID was also working under influence of IG Cyber Crime, Shri Anil Gupta, who was a close relative of the then home minister of the State, under whose administrative control the police department comes.

21. On all these grounds, the petitioners prayed for quashing both the FIRs and all subsequent proceedings carried out thereunder.

22. Learned counsel for the CBI controverted the arguments made by learned counsel for the petitioners and supported the case of the department.

23. The respondent CBI has contested the claim of the petitioners on the basis of the report of the CFSL and the opinion of an expert of FMC. The report of CFSL dated 24.01.2014 states that the MetaTrader 5 software is loaded on the server of M/s. Cyber Futuristics Pvt. Ltd. (para 10 & 12 of reply) and the expert of FMC opined that 'Dabba Trading' had been effected by the Moneyhouse; the company of the petitioners.

24. The opinion of the expert of the FMC states that besides the authorized trading, Moneyhouse was also indulged in illegal or Dabba trading and running a mini-like exchange. It (Moneyhouse) was using different servers for legal transactions and different servers for illegal transactions. It further states that except for a few minor differences, the commodities and contracts traded on the platform of the MCX by the Moneyhouse (as per the documents submitted by the MCX) are exactly tallied with the commodities traded and their prices in the other server located at Noida in the premises of Cyber futuristic Pvt. Ltd. (indicated in the documents seized), while the clients, whose names have appeared in the trading details extracted from the server located at Noida are totally different than the clients, whose list has been provided by the exchange (MCX). Since the names of the clients that appeared in the documents seized did not include in the list of the clients provided by the exchange (MCX), it can be concluded that the transactions entered on behalf of these clients by the member (Moneyhouse) have not been reported to the exchange. The transactions worth about Rs.72 crores recorded in the documents seized have not been reported to the MCX by the member (Moneyhouse). These transactions had been traded and settled by the member outside the MCX, while being a member of the MCX, it was obligatory for him to route the transactions through the exchange platform.

25. It is also opined that trade outside the platform of the MCX is in violation of provisions of Section 15 of the FCRA. This is a cognizable offence under Section 23 of the FCRA and is punishable under Sections 21(a) and 21(c) of the said Act. As per Section 22 of the FCRA, where the offence has been committed by a company, every person, who at the time the offence was committed, was in

charge of and was responsible to the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be prosecuted and punished.

26. The learned counsel for CBI further referred to a few e-mails sent from tc.dubai@yahoo.co.in to the mail ID amit99777@yahoo.com and smarty.anurag24@gmail.com and asserted that these emails very well confirm the allegation of forward trading done outside the exchange of the MCX by the petitioners.

27. Heard the counsels for the parties at length and perused the record.

28. Before dealing with the merits of case, it would be proper to consider the nature and scope of the inherent power of the High Court under Section 482 of the Code of Criminal Procedure. These are extraordinary powers and has to be used sparingly only to prevent abuse of the process of law or otherwise to secure the ends of justice. The Hon'ble Supreme Court vide two leading judgements has established guidelines for the High Courts to consider while exercising the said powers to quash FIR. In R.P. Kapur v. State of Punjab (1960) 3 SCR 388 : AIR 1960 SC 866 the Court held that such powers should be used:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings.

(ii) where the allegations in the FIR or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

29. In the case of State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 at page 378 the Hon'ble Supreme Court held that:

"102. 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 under Section 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 under Section 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 under Section 155(2) of the Code.

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

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

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

30. The learned Senior Counsel Shri Khare referred to the third guideline of R.P. Kapoor’s case and 7th guideline of Bhajanlal’s case (supra) which states that “where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.” and that “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”, the FIR as well as charge sheet filed pursuant thereto may be quashed.

31. In the matter on hand, the prosecution has come with a case that in collusion with the other accused, the directors of Moneyhouse Commodities illegally utilized MT-5 software and conducted trades parallel to MCX between 15.09.2013 to 26.10.2013 (Para 10 of reply). Undisputedly, petitioner Amit Soni had resigned from the Moneyhouse in February 2013, therefore, his prosecution for this allegation is absolutely not tenable.

32. The respondents have not offered any comment on the allegations made by the petitioners and mentioned in para 9 to 13 above. They have created a jungle where nothing is clear. They have jumbled up the facts and knitted a web and made the entire case complicated. However, when we enter into deep, it appears that the very foundation of the entire case of the CID/CBI is missing and the

case is swinging in the air only.

33. The only evidence which is pointed out by the learned counsel representing the CBI is the report of CFSL to the effect that Meta Trade-5 software has been installed on some devices and the opinion of an expert of MCX to the effect that some illegal 'Dabba Trade' (trades in commodities outside the portal of MCX) has been done by the petitioners by using MT-5 software. Undisputedly both; the report and the opinion are based on the data retrieved from a server placed in the premises of a company named 'Cyber Futuristics Pvt. Ltd., Noida' and there is nothing on record to show that the 'Moneyhouse' or the petitioners have any connection with this server. There is nothing to show that the devices on which the software Meta Trade-5 is said to have been installed; belong to the petitioners or that they were using or had ever used those devices. A perusal of the entire record does not show that any efforts were ever made by the investigator to collect bills of purchase of those hardwires or software. There is no other evidence on record to show that the petitioner had purchased this hardware or the devices or the software.

34. The prosecution alleged that the petitioners used Meta Trade-5 software but the investigation itself revealed that the owner/developer of this software MetaQuotes, Cyprus had never sold their software to any of the petitioners or even to anyone in India. The investigation then tried to show that actually it was procured through a Dubai-based company 'Wintrade' but its director Manish Chetawani informed that he also had never sold this software to anyone in India. He stated that he himself had never purchased this software. He also stated that he neither knows Amit Soni nor has any business relations with him. Installation of Meta Trade-5 needs a dedicated server which was not available to the petitioners. Then the investigation went into the direction that such a dedicated server was procured from 'Cyber Futuristics Pvt Ltd', Noida on the lease of Rs.23,000/- per month, but here also it emanated that this deal was done by 'Skytel Services', Secunderabad, Hyderabad. The prosecution could not collect any evidence to show that this 'Skytel' has any connection with the petitioners or with their company. The investigation could not even trace this company or its directors Rohan Raj Reddy or Anoop Kumar Dhali. The existence of 'Skytel' could not be established. Any link to connect 'Skytel' and 'Cyber Futuristics' with 'Moneyhouse' could not be collected. Any connection between the director of these companies also could not be established.

35. All the complainants complained that Amit Soni had provided them with a mobile handset to each of them with a SIM and preinstalled Meta Trade-5 software to do forward trading, but when investigating officer served them notice to produce those mobiles, they failed to produce them pretending that Amit had taken them back. In their individual reply, they all cited a common reason that after some time all those handsets developed some fault and when they complained about this malfunctioning of the software, Amit and Anurag Soni took them back stating that there is some technical fault. They did not produce bills of

the mobile set given to them. This is a fact of common knowledge that even in absence of hardware i.e. mobile set, the data available on the server of the service provider is easily retrievable if the SIM number or user ID or password is available. But in the case on hand, the complainants even did not reveal the SIM or mobile number, or name of the service provider or their own user IDs or passwords stating that Amit Soni only knows all this information. Even if they would have revealed their user IDs and passwords, the data could have been retrieved and that would have substantiated their allegation. In absence of these devices or this information, the basic and prime evidence could not be made available to the experts of MCX or CFSL. Thus, this important link to connect the accused persons with the crime is completely missing in this case.

36. Hence, none of the sources explored by the investigator could lead the crime to the petitioners.

37. The report of the CFSL as well as the opinion of the expert of MCX is based on the devices seized by the CID, but when there is no evidence that those devices belongs to the petitioners, this report or opinion cannot be used against the petitioners.

38. There is not a bit of evidence to show that any computer or mobile phone or any other device on which software MetaTrader-5 was found installed belong to any of the petitioners, in such a situation even if it appears that this software was installed in those devices, the petitioners cannot be held responsible for the same. 39. All the complainants had made an identical complaints that they paid Rs.2 lakhs each to Amit and Anurag Soni to get a link for forward trading in commodities on the MCX, but when asked about the source of this money, they replied in a chorus that they had borrowed either from friends or from relatives without any further details of those friends or relatives or their sources of arranging funds. This entire money was paid in cash and that too without taking any receipt or without entering it in the accounts of the company even when most of them were on board of the company or directly connected with the company either as directors or as employees. Except for their verbal claim, there is nothing to show that they had ever paid any money to the petitioners. At the same time, they stated that while taking shares in the company in 2011, they paid the entire money either by cheques or through bank accounts. When they were asked as to when their relations with the petitioners were not good, why they believed them or invested money, they did not reply. Looking to the status of the complainants in the company, their bitter relations with petitioner Amit and Anurag Soni, their identical reply and non-disclosure of the source of money paid, nature of transaction i.e. cash without taking any receipt, absence of entry of alleged payment in the books of accounts of the company, in the peculiar facts and circumstances makes their allegations false on the face of it.

40. Admittedly, the company of the petitioners Moneyhouse commodities is a registered member of the MCX and was authorized to forward trade. Using MCX's portal and the authority of licence issued by the MCX, several clients of the

company of the petitioners, entered in thousands of forward trading contracts.

The number of such transactions, the turnover, or the profit earned by the company as brokerage does not make them liable for any prosecution. The company or the petitioners were indulge in forward trading since 2010. The total turnover of forward trading contracts done through the company of the petitioners is Rs. 22,635.37 crores. The total period of alleged 'Dabba trading', as alleged by the prosecution, is only 41 days starting from 15.09.2013 and ending on 26.10.2013. As per the prosecution itself, the total turnover of such trading is Rs.72 crores. Turnover means a total of price of a commodity bought or sold. Only one such transaction (buy+sale) may go into crores of rupees. In the backdrop of all these facts, in absence of any cogent and sterling quality evidence, only on the basis of oral evidence, that too of those who have malice, hatred, and jealousy towards the petitioners and whose conduct is dubious, the prosecution of the petitioner, in my considered opinion, is nothing but abuse of process of law.

41. The learned Counsel for the CBI referred to some e-mails sent from e-mail ID tc.dubai@yahoo.co.in to the mail ID amit99777@yahoo.com and smarty.anurag24@gmail.com and submitted that detailed scrutiny of data revealed that this e-mail account was created for Dabba Trading and transaction of Meta Trade-5 software. Various reports related to Dabba Trading were sent from tc.dubai@yahoo.co.in to Amit and Anurag Soni. The e-mail ID tc.dubai@yahoo.co.in also contains various transactions related to Dabba Trading on Meta Trade-5 software. He further averred that these emails were exchanged amongst the accused and various clients/ persons containing various PDF and Excel documents as attachments and indicates the fraudulent trading transactions with various persons undertaken on Meta Trade-5 software and reflect the magnitude at which the said fraudulent trading of commodities was done by the accused.

42. But, when asked that reply (para 21) is silent on the fact as to who created these mail IDs or who were the users thereof, the learned counsel had no reply to the query of the Court. It was further asked from the learned counsel for the CBI as to how does the investigator propose to prove the transactions reflected on these mail IDs as Dabba Trading, he again has no answer. None of the agencies have proved that the email IDs were indeed created or used by the petitioners. Investigation agencies utterly failed to prove that the emails were accessed from the devices which were used by any of the petitioners. There is no proof that the files which were found on the server as well as the said emails were generated through the computers which were in possession of the petitioners. If the data seized from the server belonged to the petitioners or if the said email IDs were used by the petitioners, then the same should have been corroborated through an IP address of a computer that was in use by the petitioners. In absence of any such evidence, this evidence also cannot be taken into account to decide the culpability of the petitioners.

43. The CID/CBI have filed the charge sheet against the petitioner under Sections 467, 468, 471, and 474 IPC but neither such charges have been pressed during the argument, nor any document has been pointed out which was forged or fabricated by the petitioners or anyone of them or has ever been used, claiming them genuine. In the complaint made by the complainants, there is no allegation that the complainants handed over any money in any capacity to any of the petitioners except Swapnil Bhatt who, according to the complaint, might have received that money on behalf of Amit and Anurag Soni and there is no evidence of handing over any money by the complainants to Amit and Anurag Soni or even to Swapnil Bhatt, therefore, the offence under Section 409 is also not made out.

44. When there is no proof that any of the devices having meta trader-5 software belongs to the petitioner or that it was got installed by the petitioner or that using those devices the petitioners traded outside the portal of the MCX, the offences under Section 15 read with section 20(c) or the offences under Section 21(a) 21(c), 21(g) and 21(h) of Forward Contracts (Regulation) Act, 1952 have not been made out.

45. Securities Contracts (Regulation) Act, 1956 was enacted with the object to prevent undesirable transactions in securities by regulating the business of dealing therein, by prohibiting operations, and by providing for certain other matters connected therewith. 'Securities' as defined in Section 2(h) of this Act, 'includes-

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or any incorporated company or other body corporate;

(ii) government securities; and (iii) rights or interests in securities. Section 23 of the Act prescribes penalties for contravention of various provisions of the Act, but "Securities" is not a subject of the present matter. There is no allegation, whatsoever it may be, that the petitioner dealt with any 'securities contract' or that they contravened any law regulating such contracts. There is nothing on record, except a mention of the provision of the Act in the charge sheet, to show that the petitioners effected any transaction relating to securities or they violated any provision of the Act, 1956 while dealing with such transaction.

46. Section 43(b) of the Information Technology Act, 2000 prescribes penalties and compensation for damage to computer, computer system etc. It says that if any person without the permission of the owner or any other person who is in charge of a computer, computer system or computer network downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium shall be liable to pay damages by way of compensation.

47. Section 65 of the IT Act makes intentional concealment, tampering,

destruction or alteration of any computer source code, computer programme, computer system or computer network punishable when the computer source code is required to be kept or maintained by law.

48. Section 66A of the said Act prescribes punishment for sending offensive messages through communication services, etc. It states that any person who sends, by means of a computer resource or a communication device (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punished for the such act under the Act.

49. Section 66D of the IT Act prescribes punishment for cheating by personation by using computer resources. Section 71 of the said Act prescribes a penalty for making any misrepresentation or suppressing any material fact from the Controller or the Certifying Authority for obtaining any licence or Electronic Signature Certificate. Section 74 makes creation or publication of an Electronic Signature Certificate for any fraudulent or unlawful purpose a punishable offence. It says that if any person knowingly creates, publishes or otherwise makes available an Electronic Signature Certificate for any fraudulent or unlawful purpose, he shall be punished under this Section. Section 85 provides that where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

50. There is no evidence to even prima facie show the availability of essential elements to constitute the offences under Section 43(b), 65, 66A, 66D, 71, 74 or 85 of the Information Technology Act, 2000. In the case on hand charge sheet filed by the CID as well as filed by the CBI does not say that any damage was caused to any computer, computer system or computer network etc. without permission of the owner or in charge of such computer or computer system or that any data stored in computer was altered, destroyed or tampered with or that any offensive messages were sent to any person by means of a computer resource or a communication device or that there was some misrepresentation or suppression of any material fact from the Controller or the Certifying Authority for obtaining any licence or Electronic Signature Certificate, therefore, these sections also do not attract in this case.

51. It would be apposite to note here that in this case the CBI had taken over the investigation of this case in March 2014. Investigated the same for next

about 7 years and ultimately submitted a supplementary charge sheet against the 3 accused persons who were left off by the CID stating that the investigation against them was pending. It does not appear from the record that during this long period the CBI could collect any fresh material evidence which supports the allegations made against the petitioners substantially, yet without disclosing any further details and without telling the particulars of the issues for which the investigation is being kept pending, the CBI has filed the charge sheet keeping the investigation pending. It is not a healthy practice to keep the investigation pending like this till eternity and keep the sword hanging over the heads of the petitioners.

52. In light of the above discussion, in my considered view when there is no evidence to show that any device, mobile phone, or server having MT-5 software belongs to the petitioners, when seizure of the server manifestly violets the procedure prescribed by law, when the procedure to retrieve data from the server is not in conformity with law and creates doubt, when the data provided for analysis is itself unreliable, then all reports based upon such data, which has been heavily relied upon by the prosecution are liable to be rejected at the threshold especially when the prosecution has nothing to say against an allegation of bias, arbitrariness, hi handedness and also against the conduct of the investigators. In such a state of the evidence, I have no hesitation to say that continuation of the prosecution of the petitioners is nothing but an abuse of the process of law, suffers with malice, and to secure the ends of justice deserves to be and is quashed hereby.

53. The bail bonds furnished by the petitioners stand discharged. The articles seized from the petitioners be returned them back and the server be returned back to the authorized person of 'Cyber Futuristice Pvt. Ltd.'

54. With the aforesaid the petition stands allowed and disposed off accordingly.