

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1868 OF 2011
(Arising out of SLP (Crl.) No. 590 of 2008)

M/s Thermax Ltd. & Ors.

.... Appellant(s)

Versus

K.M. Johny & Ors.

.... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

- 1) Leave granted.
- 2) This appeal is directed against the final judgment and order dated 11.01.2008 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 1622 of 2007 wherein the Division Bench of the High Court dismissed the writ petition filed by the appellants herein as misconceived.

3) **Brief Facts:**

(a) M/s Thermax Ltd.–the appellant-Company, is a Public Limited Company having its registered office at Chinchwad, Pune and is engaged in the field of energy and environment management. Mr. K.M. Johny-the original complainant, Respondent No. 1 herein, is the proprietor of M/s Rini Engineers and M/s Sherly Engineers, which are small-scale industries undertaking fabrication job work for the appellant Company for the past several years.

(b) On 26.05.1995, the appellant-Company placed three Purchase Orders on Respondent No.1 being Order No. 260062 for designing and manufacturing two numbers of stationary L.P.G. Storage Tanks and Order Nos. 260063 and 260064 were for the supply of consumables and other accessories to the said Tanks. On 01.06.1995, M/s Unique Engineering Services, the Consultants of the appellant Company addressed a letter specifying that they had assessed the companies of the Respondent No. 1 and in their opinion even though they have not made any static bullets and have made quite a few mobile

L.P.G. Tanks, however, they were capable of manufacturing the same, but needed design help.

(c) On 20.06.1995, Respondent No. 1 informed the appellant-Company their inability to procure the material (steel) and requested to supply the same and to deduct the material cost from the final bill. On 04.08.1995, the Respondent No. 1 was provided with the necessary steel of the technical specification. On 06.08.1995, an Engineer of the appellant-Company visited the company of the Respondent No. 1 and submitted a report stating that Respondent No. 1 had carried out certain work using the material purchased from the appellant-Company. It was also pointed out in the report that Respondent No. 1 agreed that they would send the material to M/s Bureau Veritas for checking. The report also stated that Respondent No. 1 had not ordered for consumables and no rectification and drawings had been carried out.

(d) By letter dated 10.08.1995, the Consultants informed the appellant-Company that there was no progress in the work status for the last 45 days and it was observed that Respondent No. 1 was not interested in executing the

assignment. In pursuance of the same, a meeting was held between the officials of both the Companies and the Respondent No. 1 agreed to complete the job by all means by 22.09.1995. Since Respondent No. 1 failed to carry out the work as per the Schedule, the appellant-Company, vide letter dated 13.09.1995 cancelled the order placed and it was made effective from 26.05.1995 i.e., from the date when the order was placed.

(e) On 06.05.2000, Respondent No. 1 filed a complaint with the Crime Branch, Pune alleging that they had carried out several fabrication job works for the appellant-Company and huge amount of Rs. 91,95,054/- was outstanding till date despite several requests. In the said complaint, it was further alleged that the appellant-Company also placed Purchase Order being No. 240307 dated 22.03.1993 for Rs. 8,00,000/- for fabrication and erection of Tower Support Structural etc., for the Mehasana District Taluka Sanstha (Gujarat) Project and also represented that they will hire the machinery of the Respondent No. 1 for the said job at the rate of Rs. 2,400/- per day and believing the same the Respondent No. 1 allegedly

purchased brand new machinery worth Rs. 5,80,000/- specially for the said project and dispatched the same to the Mehasana site. Respondent No. 1 completed the said job according to schedule and to the satisfaction of the appellant-Company and also carried out additional work at the site as per their request. It was alleged that balance outstanding for the said work of Rs.2,47,570/- was still receivable from the appellant-Company. An amount of Rs.58,32,000/- towards hiring charges for the machinery is yet to be paid by the appellant-Company. Therefore, a total sum of Rs.68,79,750/- became due from the appellant-Company to respondent No.1 and the same was not paid till date. Since the Crime Branch did not take any cognizance, the said complaint was filed in the Court of Judicial Magistrate, First Class, Pimpri being RCC No. 12 of 2002 and by order dated 30.05.2002, the Judicial Magistrate issued a direction under Section 156(3) of the Code of Criminal Procedure, 1973 (in short 'the Code') and referred the same to Crime Branch, Pune, Respondent No. 2 herein, for investigation. Pursuant to the same, Respondent No. 2

registered an offence being C.R. No. 91/2002 and initiated proceedings thereunder against the appellant-Company.

(f) Aggrieved by the said order, the appellant-Company filed two separate Criminal Writ Petitions being Nos. 209 and 443 of 2003 before the Bombay High Court for quashing and setting aside the order dated 30.05.2002 passed by the Judicial Magistrate, First Class, Pimpri. Vide order dated 10.06.2003, the High Court set aside the order dated 30.05.2002 and remitted the matter back to the Judicial Magistrate for reconsideration of the entire prayer and to decide the case afresh, after giving adequate opportunity of hearing to both the sides. Pursuant to the same, the appellant Company preferred an application dated 16.07.2003 under Section 91 of the Code before the Judicial Magistrate praying that the Assistant Commissioner of Police, Crime Branch, Pune City be directed to produce all the records and proceedings of the complaint dated 06.05.2000. After hearing the respective parties, the Judicial Magistrate, vide order dated 11.08.2003 rejected the said application.

(g) Aggrieved by the same, the appellant-Company preferred Criminal Application No. 3666 of 2003 before the High Court. The High Court, vide order dated 18.10.2006, issued rule and interim relief by directing the Assistant Commissioner of Police, Crime Branch-II, Pune city to produce the documents within six weeks in the Court of Judicial Magistrate, Pimpri. Pursuant to the said direction, Shri S.B Oahal, Inspector of Police, submitted a reply dated 12.03.2007 stating that the records and proceedings in respect of Crime Register No. 11 of 2000 were destroyed. Pursuant to the same, the Judicial Magistrate, vide order dated 20.08.2007, called for a report under Section 156(3) of the Code from the Respondent No. 2.

(h) Being aggrieved, the appellant-Company preferred Criminal Writ Petition being No. 1622 of 2007 before the High Court. The High Court, vide order dated 11.01.2008, dismissed the writ petition as misconceived on the ground that the Magistrate has adhered to the directions and has given reasons for coming to his conclusion. Aggrieved by the said decision, the appellant-Company has preferred this appeal before this Court by way of special leave petition.

4) Heard Dr. A.M. Singhvi and Mr. C.S. Vaidyanathan, learned senior counsel for the appellant-Company and Mr. K.T.S. Tulsi, learned senior counsel for the respondent No.1.

Contentions:

5) Dr. A.M. Singhvi, learned senior counsel for the appellant/accused, after taking us through all the earlier complaints including the last complaint and earlier orders closing those complaints, the order of the Judicial Magistrate, First Class, Pimpri dated 20.08.2007 in Criminal Case No. 12 of 2002 and the impugned order of the High Court dated 11.01.2008, at the outset, submitted that the courts below ought to have considered that the dispute arose out of a contract and a constituted remedy is only before a civil court. He further contended that similar claim on earlier occasions were indeed investigated and finally categorized as civil in nature, while such is the position, the direction of the Magistrate calling for a report under Section 156(3) of the Code from the Crime Branch, Pune is not sustainable. He further submitted that the High Court ought to have intervened and quashed the same. According to him, the

complaint and the allegations made therein do not disclose any offence and, therefore, the direction under Section 156(3) of the Code is untenable. He further pointed out that the essential ingredients for an offence under Sections 405 and 420 of the Indian Penal Code, 1860 (in short 'IPC') have not been made out, no such dishonest intention can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligations between the parties. In any event, according to him, in view of long delay, namely, filing of the complaint in the year 2002 with reference to the alleged disputes which pertain to the period from 1993-1995, that is, after nine years, cannot be maintained as it amounts to abuse of process of law. He finally submitted that roping in of appellant Nos. 2-8 in the alleged offence on the hidden principle of vicarious liability is untenable. Mr. C.S. Vaidyanathan, learned senior counsel for the appellant also reiterated the same contentions.

6) On the other hand, Mr. K.T.S. Tulsi, learned senior counsel for the Respondent No. 1/complainant submitted that interference by the court at the stage of passing orders under

Section 156 (3) of the Code is not warranted. He further pointed out that the accused has no right to address at this stage and the High Court is right in refusing to entertain the petition filed under Section 482 of the Code.

Discussion:

7) In order to understand the rival contentions, it is useful to refer the complaint of the Respondent No. 1 dated 30.05.2002 which was made before the Judicial Magistrate, First Class, Pimpri in Regular Criminal Case No. 12 of 2002. Respondent No. 1 herein is the complainant and all the appellants herein have been shown as accused. The said criminal complaint was made for the offences under Sections 420, 406 read with 34 IPC. The complaint proceeds that complainant is the Proprietor of M/s Rini Engineers and M/s Sherly Engineers which are small-scale industries doing fabrication job work for various industries, namely, TELCO, Ion Exchange Ltd., etc. The following averments in the complaint are relevant for our consideration:

“a) The complainant has been doing the said business in Maharashtra since last more than 27 years. The accused No. 1 is a company and accused No. 2 is the Chairperson of the Accused No. 1. Accused No. 3 was the Managing Director

and the Accused Nos. 4 to 15 was doing service as Manager of Accused No. 1 at the relevant time. The Accused No. 1 has its office at the above address. The Accused Nos. 2 to 15 were looking after the management and business of Accused No. 1.

b) The complainant was doing fabrication job work for the Accused for several years. The accused placed purchase order No. 260062 dated 24.04.1995 of Rs. 3,20,000/- for designing and manufacturing two numbers stationary LPG Storage Tanks. The complainant has been granted the necessary licenses by the Explosives Department for manufacturing LPG Storage Tanks and LPG Storage Tankers. The said job is a specialized job and requires Best quality material as it involves high risks. At the relevant time, the required material was not available in the market. Therefore, the complainant requested the Accused for the supply of material for the said order and to debit the material cost from the final bill. The accused initially agreed for the same. However, subsequently insisted for payment before delivery of material. Therefore, complainant paid Rs. 1,14,098/- by pay order dated 31.07.1995 drawn on the Sadguru Jangli Maharaj Bank, Chinchwad. The Company issued material after receipt of pay order, vide excise gate Pass No. 1328 and 175713 dated 04.08.1995. The complainant received the material and was surprised to see that the accused had supplied scrap material for the manufacturing of LPG Storage Tanks and same was useless for the job. The complainant immediately contacted the accused and informed about the same. The complainant requested the accused to take the scrap material back and issue genuine material. However, accused refused to do so, the complaint has spent the amount of Rs. 60,000/- for drawing and approval etc. and Rs. 1,14,098/- by pay order for the material to the accused. Thus, the accused have cheated the complainant and there by caused wrongful loss to the complainant.

c) The accused placed Purchase Order No. 240307 dated 22.03.1993 for Rs. 8,00,000/- for the fabrication and erection of Tower Support Structural etc. for the Mehasana (Gujarat) Project. The accused also represented that they will hire the machinery of the complainant for the said job at the rate of Rs. 2,400/- per day. Believing the same, the complainant purchased brand new machinery of Rs. 5,80,000/- specially for the said project and dispatched the

same to Mehasana site. The complainant has completed the said job according to schedule and to the satisfaction of the accused. The complainant also carried out additional work at the site as per the request of the accused. The balance outstanding for the said work is Rs. 2,47,570/- and is still receivable from the accused. The amount towards the hiring charges for the machinery is Rs. 58,32,000/- is yet to be paid by the accused. The accused have not returned the machinery of the complainant till the date and have been using the same for their other jobs also. Thus the accused owe the complainant Rs. 68,79,750/- and the same is not paid till the date.

d) The complainant states that he has carried out several fabrication job for the accused and huge amount of Rs. 91,95,054 is outstanding from the accused till the date. In spite of several requests of the complainant, since the accused are very influential, no body has taken cognizance of the complaints of the complainant. The complainant has also filed complaint dated 15.09.1998 with Pimpri Police Station against the accused but all in vain.

e) Thereafter the complainant filed complaint dated 06.05.2000 with Crime Branch, Pune against the accused, however, till the date police have not taken any cognizance of the same in spite of the positive opinion of the police prosecutor attached to the Officer Commissioner of Police, Pune. The accused are very influential and the complainant has no other option but to file the present complaint in Hon'ble Court.

f) The complainant is filing herewith all the relevant documents in support of this complaint and submits that the present case warrants detailed investigation under Section 156(3) of Cr.P.C. There is a separate cell of economic offences at Crime Branch, Pune and it is necessary to send the present complaint to Crime Branch, Pune for investigation under Section 156(3) of Cr.P.C. The complainant therefore prays that:-

i) The complaint be sent to Crime Branch, Pune for investigation u/s 156(3) of Cr.P.C. and;

ii) After receipt of the report of investigation, the accused be dealt with severally according to law and punished as per provision of law."

8) For our purpose, we are concerned with Sections 405, 406, 420 and 34 IPC which read thus:

“405. Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.

406. Punishment for criminal breach of trust.- Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

420. Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

34. Acts done by several persons in furtherance of common intention.- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

9) Now, we have to find out whether the ingredients of Sections 405, 420 read with Section 34 have been made out from the complaint and whether the Magistrate is justified in calling for a report under Section 156(3) of the Code from the

Crime Branch, Pune. Simultaneously, we have to see whether the High Court is justified in confirming the action of the Magistrate and failed to exercise its power and jurisdiction under Section 482 of the Code.

10) Before considering the validity or acceptability of the complaint and the consequential action taken by the Judicial Magistrate under Section 156(3) of the Code, let us advert to various decisions on this aspect. In **Suresh vs. Mahadevappa Shivappa Danannava & Anr.**, (2005) 3 SCC 670, this Court, on the ground of delay/laches in filing the complaint and the dispute relates to civil nature finding absence of ingredients of alleged offence of cheating under Section 420 IPC, set aside the order of the Magistrate and that of the High Court. In that case, the alleged agreement to sell was executed on 25.12.1988. A legal notice was issued to the appellant therein on 11.07.1996 calling upon him to execute the sale deed in respect of the premises in question. Thus, the complaint was submitted after a gap of 7½ years of splendid silence from the date of the alleged agreement to sell i.e. 25.12.1988. The appellant therein responded to the legal

notice dated 11.07.1996 by his reply dated 18.07.1996 through his lawyer specifically denying the alleged agreement and the payment of Rs 1,25,000/- as advance. Nothing was heard thereafter and the complainant after keeping quiet for nearly 3 years filed private complaint under Section 200 of the Code before the IVth Additional CMM, Bangalore on 17.05.1999. The Magistrate, on the same date, directed his office to register the case as PCR and referred the same to the local police for investigation and to submit a report as per Section 156(3) of the Code. A charge-sheet was filed on 04.08.2000 by the police against the appellant-Accused No. 1 only for offence under Section 420 IPC. The Magistrate took cognizance of the alleged offence under Section 190(1)(b) of the Code and issued summons to the accused-appellant therein. Aggrieved by the aforesaid process order dated 04.08.2000 passed by the Magistrate, the appellant-accused preferred the criminal revision which was dismissed by the High Court. The order of the High Court was under challenge in that appeal. It was contended that as per the averments in the complaint, even as per the police report, no offence is made out against

Accused Nos. 2-4 therein. Despite this, the Magistrate issued process against Accused Nos. 2-4 as well which clearly shows the non-application of mind by the Magistrate. It was further pointed out that a perusal of the complaint would only reveal that the allegations as contained in the complaint are of civil nature and do not *prima facie* disclose commission of alleged criminal offence under Section 420 IPC. After finding that inasmuch as the police has given a clean chit to Accused Nos. 2-4, this Court concluded that the Magistrate ought not to have taken cognizance of the alleged offence against Accused No.1 and that the complaint has been made to harass him to come to terms by resorting to criminal process. Regarding the delay, this Court pointed out that the complaint was filed on 17.05.1999, after a lapse of 10½ years and, therefore, the private complaint filed by respondent No.1 therein is not at all maintainable at this distance of time. It was further observed that it is also not clearly proved that to hold a person guilty of cheating, it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise and finding that the order of the Magistrate and of the High Court

requiring Accused No.1/appellant therein to face trial would not be in the interest of justice, set aside the order of the High Court and of the Magistrate. It is clear that in view of inordinate delay and laches on the part of the complainant and of the fact that the complaint does not disclose any ingredients of Section 420 IPC and also of the fact that at the most it is the dispute of civil nature, this Court quashed the orders of the Magistrate and the High Court.

11) In ***Madhavrao Jiwarelao Scindia & Ors. vs. Sambhajirao Chandrolal Angre & Ors.*** (1988) 1 SCC 692, this Court, after pointing out the grounds on which the criminal proceedings be quashed under Section 482 of the Code at preliminary stage by the High Court highlighted that a case of breach of trust is both a civil wrong and a criminal offence. While elaborating the same, this Court further held that there would be certain situations where it would predominantly be a civil wrong and may or may not amount to criminal offence. Based on the materials in that case, the Court concluded that the case is one of that type where, if at

all, the facts may constitute a civil wrong and the ingredients of the criminal offences are wanting.

12) In ***Alpic Finance Ltd. vs. P. Sadasivan & Anr.*** (2001)

3 SCC 513, this Court highlighted the grounds on which criminal proceedings are to be quashed under Section 482 of the Code and noted the ingredients of Section 420 IPC. In that case, the appellant was a registered company having its head office at Mumbai. It was a non-banking financial institution functioning under the regulations of Reserve Bank of India. It was carrying on business, *inter alia*, of leasing and hire purchase. The first respondent therein was the Chairman and founder-trustee of a trust by name “Visveswaraya Education Trust”. The second respondent was wife of the first respondent, and was also a Trustee. The Trust runs a dental college by name Rajiv Gandhi Dental College. The respondents therein entered into an agreement with the appellant-Company therein whereby the appellant agreed to finance the purchase of 100 hydraulically-operated dental chairs. The total cost of the chairs was around Rs.92,50,000/-. The appellant-Company agreed to finance the

respondents for the purchase of these chairs through a lease agreement and as per the agreement, the respondents were liable to pay rentals quarterly. The respondents agreed to pay quarterly a sum of Rs 7,50,000/- for the first year; Rs 12,50,000/- for the second year; Rs 8,00,000/- for the third year and Rs 6,25,000/- for the fourth year. As per the agreement, the appellant-Company, the lessors would have sole and exclusive right, title and interest in the dental chairs supplied till the entire hire-purchase amount was paid. In accordance with the agreement, the appellant made payments to M/s United Medico Dental Equipments and they delivered the dental chairs to the respondents. The appellant-Company alleged that the respondents were not regular in making the payments and committed default in payment of the instalments and that the bank had dishonoured certain cheques issued by the respondents. The appellant-Company also alleged that on physical verification, certain chairs were found missing from the premises of the respondents and thus they have committed cheating and caused misappropriation of the property belonging to the appellant. The appellant-

Company filed a private complaint under Section 200 of the Code before the Chief Metropolitan Magistrate, Bangalore alleging that the respondents had committed offences under Sections 420, 406 and 423 read with Section 120-B IPC. In that proceeding, the appellant-Company moved an application under Section 93 of the Code to issue a search warrant to seize the property in dispute and also to hand over these items to the complainant. The Magistrate took cognizance of the alleged complaint and issued summons to the respondents and passed an order on the application filed under Section 93 of the Code to have a search at the premises of the respondents and to take possession of the properties involved in the case. These proceedings were challenged by the respondents under Section 482 of the Code before the learned Single Judge of the Karnataka High Court at Bangalore. The learned Single Judge was pleased to quash the entire proceedings and directed the appellant-Company to return all the properties seized by the police pursuant to the warrant issued by the Magistrate. Thus, the order of the Magistrate taking cognizance and issuing process to the respondents as

well as the order of search and the direction for restoration of the property to the appellant Company were set aside. Aggrieved by the same, the appellant-Company preferred appeal before this Court. It was contended on behalf of the appellant that the learned Single Judge has seriously erred in quashing the proceedings under Section 482 of the Code. It was further contended that the allegations in the complaint clearly made out offences punishable under Sections 420, 406, 423, 424 read with Section 120-B IPC. On behalf of the respondents, it was contended that the complaint was filed only to harass the respondents and it was motivated by mala fide intention. It was further argued that the entire transaction was of civil nature and that the respondents have made a substantial payment as per the hire-purchase agreement and the default, if any, was not wilful and there was no element of misappropriation or cheating. The respondents also denied having removed any of the items of the disputed property clandestinely to defeat the interest of the appellant. After considering the power under Section 482 of the Code and advertent to series of decisions including

Nagawwa vs. Veeranna Shivalingappa Konjalgi , (1976) 3

SCC 736 and ***State of Haryana vs. Bhajan Lal***, 1992 Supp

(1) SCC 335, this Court concluded thus:

“7. In a few cases, the question arose whether a criminal prosecution could be permitted when the dispute between the parties is of predominantly civil nature and the appropriate remedy would be a civil suit. In one case reported in *Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre* this Court held that if the allegations in the complaint are both of a civil wrong and a criminal offence, there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. That was a case relating to a trust. There were three trustees including the settlor. A large house constituted part of the trust property. The respondent and the complainant were acting as Secretary and Manager of the Trust and the house owned by the Trust was in the possession of a tenant. The tenant vacated the building and the allegation in the complaint was that two officers of the Trust, in conspiracy with one of the trustees and his wife, created documents showing tenancy in respect of that house in favour of the wife of the trustee. Another trustee filed a criminal complaint alleging that there was commission of the offence under Sections 406, 467 read with Sections 34 and 120-B of the Indian Penal Code. The accused persons challenged the proceedings before the High Court under Section 482 of the Code of Criminal Procedure and the High Court quashed the proceedings in respect of two of the accused persons. It was under those circumstances that this Court observed: (SCC Headnote)

“Though a case of breach of trust may be both a civil wrong and a criminal offence but there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. The present case is one of that type where, if at all, the facts may constitute a civil wrong and the ingredients of the criminal offences are wanting. Having regard to the relevant documents including the trust deed as also the correspondence following the creation of the tenancy, the submissions advanced on behalf of the parties, the natural

relationship between the settlor and the trustee as mother and son and the fall out in their relationship and the fact that the wife of the co-trustee was no more interested in the tenancy, it must be held that the criminal case should not be continued.”

10..... The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any wilful misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.”

After finding so, this Court concluded that the learned Judge of the High Court was perfectly justified in quashing the

proceedings and disinclined to interfere in such matters dismissed the appeal.

13) In **Anil Mahajan vs. Bhor Industries Ltd. & Anr.** , (2005) 10 SCC 228, again, a three-Judge Bench of this Court considered the issuance of process by a Magistrate for an offence under Sections 415, 418 and 420 IPC. This Court also analysed the difference between breach of contract and cheating. The appellant therein was the accused in a complaint filed against him by the respondent-Company for offence under Sections 415, 418 and 420 IPC. Based on the averments in the complaint, the Magistrate, by order dated 25.06.2001, issued the process against the accused. The order of the Magistrate notices that the complainant has filed the documents on record in which the accused promised to pay the amount but has not paid with the intent to deceive the complainant and, therefore, the complainant has made out a case to issue process against the accused under Sections 415, 418 and 420 IPC. The said order of the Magistrate was challenged before the Court of Sessions. The learned Additional Sessions Judge, Pune by order dated 19.10.2001,

set aside the order of the Magistrate issuing process. The order of the learned Additional Sessions Judge was set aside by the High Court. This Court, in paragraphs 8 & 9 of the judgment, observed as under:

“8. The substance of the complaint is to be seen. Mere use of the expression “cheating” in the complaint is of no consequence. Except mention of the words “deceive” and “cheat” in the complaint filed before the Magistrate and “cheating” in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay.....”

“9. In *Alpic Finance Ltd. v. P. Sadasivan*, (2001) 3 SCC 513, this Court was considering a case where the complainant had alleged that the accused was not regular in making payment and committed default in payment of instalments and the bank had dishonoured certain cheques issued by him. Further allegation of the complainant was that on physical verification certain chairs were found missing from the premises of the accused and thus it was alleged that the accused committed cheating and caused misappropriation of the property belonging to the complainant. Noticing the decision in the case of *Nagawwa v. Veeranna Shivalingappa Konjalgi*, (1976) 3 SCC 736, wherein it was held that the Magistrate while issuing process should satisfy himself as to whether the allegations in the complaint, if proved, would ultimately end in the conviction of the accused, and the circumstances under which the process issued by the Magistrate could be quashed, the contours of the powers of the High Court under Section 482 CrPC were laid down and it was held: (SCC p. 520, paras 10-11)

“10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim

and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. *Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any wilful misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.*

11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by wilful misrepresentation. We are told that the respondents, though committed default in paying some instalments, have paid substantial amount towards the consideration.”

(Emphasis supplied)

By applying the above principles, this Court examined the complaint and concluded that it is clear from its substance that present is a simple case of civil disputes between the parties. This Court further held that the requisite averments so as to make out a case of cheating are absolutely absent. It further held that the principles laid down in ***Alpic Finance Ltd.'s case*** (supra) were rightly applied by the learned Additional Sessions Judge and it cannot be said that the ratio of the said decision was wrongly applied and on due consideration, the learned Additional Sessions Judge had rightly set aside the order of the Magistrate issuing process to the appellant. After holding so, this Court set aside the impugned judgment of the High Court and restored that of the Additional Sessions Judge.

14) In ***S.K. Alagh vs. State of Uttar Pradesh & Ors.***, (2008) 5 SCC 662, this Court considered the ingredients of Sections 405 and 406 IPC - Criminal breach of trust and vicarious liability. In the said decision, after finding that the complaint petition did not disclose necessary ingredients of criminal breach of trust as mentioned in Section 405 IPC and

also pointing out the ingredients of offence under Section 406 IPC, interfered with the order passed by the High Court.

15) In ***Maharashtra State Electricity Distribution Company Limited & Anr. vs. Datar Switchgear Limited & Ors.***, (2010) 10 SCC 479, after perusal of the complaint, allegations therein, role of the directors mentioned therein and applicability of Section 34 IPC, this Court in paragraph 35 concluded as under:

“35. It is manifest that common intention refers to a prior concert or meeting of minds, and though it is not necessary that the existence of a distinct previous plan must be proved, as such common intention may develop on the spur of the moment, yet the meeting of minds must be prior to the commission of offence suggesting the existence of a prearranged plan. Therefore, in order to attract Section 34 IPC, the complaint must, prima facie, reflect a common prior concert or planning amongst all the accused.”

After saying so, verifying the complaint, this Court concluded that the complaint does not indicate the existence of any prearranged plan whereby Appellant No. 2 had, in collusion with the other accused decided to fabricate the document in question and adduce it in evidence before the Arbitral Tribunal. This Court further concluded that there is not even a whisper in the complaint indicating any participation of

Appellant No.2 in the acts constituting the offence, and that being the case, concluded that Section 34 IPC is not attracted. After saying so, allowed the appeal in relation to Appellant No.2 and quashed the order of the Magistrate taking cognizance against appellant No.2 in Complaint No. 476 of 2004.

16) The principles enunciated from the above-quoted decisions clearly show that for proceedings under Section 156(3) of the Code, the complaint must disclose relevant material ingredients of Sections 405, 406, 420 read with Section 34 IPC. If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge delay and in order to avoid the period of limitation, it cannot be resorted to a criminal proceeding.

17) Dr. A.M. Singhvi, learned senior counsel for the appellant/accused contended that not only material facts were suppressed from the Magistrate but the previous three complaints to various police authorities and their closure reports were kept away from the Magistrate so as to mislead the Court. It is seen from the materials placed that three

complaints containing similar allegations have been investigated previously and all were closed as the alleged claim was found to be of civil nature. In those circumstances, it did not lie for Respondent No.1-the complainant to approach the Magistrate with the same subject Complaint. Inasmuch as the dispute arose out of a contract and a constituted remedy is only before a Civil Court, the Magistrate ought to have appreciated that Respondent No.1 was attempting to use the machinery of the criminal courts for private gains and for exerting unjust, undue and unwarranted pressure on the appellants in order to fulfill his illegal demands and extract undeserving monetary gains from them.

18) The Courts below failed to appreciate that Ex. 61 is a reply filed by the Crime Branch-II and Ex. 63 is the statement of Shri V.B. Kadam, which categorically stated that the complaint preferred by Respondent No.1 registered at Crime Register No. 11/2000 was filed as being civil in nature. Even if we accept that the records were destroyed and notwithstanding such destruction, it was a matter of record that the complaint preferred by Respondent No.1 was indeed

investigated and categorized as civil in nature. This aspect has not been considered either by the Magistrate or by the High Court.

19) It is settled law that the essential ingredients for an offence under Section 420, which we have already extracted, is that there has to be dishonest intention to deceive another person. We have already quoted the relevant allegations in the complaint and perusal of the same clearly shows that no such dishonest intention can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligations between the parties. Since the very ingredients of Section 420 are not attracted, the prosecution initiated is wholly untenable. Even if we admit that allegations in the complaint do make out a dispute, still it ought to be considered that the same is merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction. Inasmuch as there are number of documents to show that appellant-Company had acted in terms of the agreement and

in a *bona fide* manner, it cannot be said that the act of the appellant-Company amounts to a breach of contract.

20) Though Respondent No.1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with appellant-Company by initiating the criminal prosecution, it is pointed out that appellant Nos. 2 to 8 are the Ex-Chairperson, Ex-Directors and Senior Managerial Personnel of appellant No.1-Company, who do not have any personal role in the allegations and claims of Respondent No.1. There is also no specific allegation with regard to their role.

21) Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant-Company.

22) It is useful to demonstrate certain examples, namely, Section 141 of the Negotiable Instruments Act, 1881 which specifically provides that if the person committing an offence under Section 138 is 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 proceeded against and punished accordingly. Likewise, Section 32 of the Industrial Disputes Act, 1947 provides that where a person committing an offence under this Act is a company, or other body corporate, or an association of persons, every director, manager, secretary, agent or other officer or person concerned with the management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence. We have already noted that the offence alleged in the criminal complaint filed by respondent No.1 is under Sections 405 and 420 IPC whereunder no specific liability is imposed on the officers of the company, if the alleged offence is by the Company. In the

absence of specific details about the same, no person other than appellant No.1-Company can be prosecuted under the alleged complaint.

23) The Courts below failed to appreciate an important aspect that the complaint came to be filed in the year 2002 when the alleged disputes pertain to the period from 1993-1995. As rightly pointed out, the Courts below ought to have appreciated that respondent No.1 was trying to circumvent the jurisdiction of the Civil Courts which estopped him from proceeding on account of the law of limitation.

24) We have already pointed out that respondent No.1 had previously filed three complaints which were concluded after exhaustive enquiry with the respective police authorities. The first complaint was on 06.05.2000 being Javak No. 974/2000 with the Crime Branch-II, Pune which registered the same in its Criminal Register No. 11/2000. Pursuant thereto, the appellants were summoned and exhaustive enquiry was conducted by the Crime Branch-II and after recording the statements and perusal of documents and after undertaking an extensive interrogation, the Crime Branch-II closed the

case. The said closure of the case was informed to respondent No.1 by the police authorities by their letter dated 28.07.2000.

25) The materials placed further show that notwithstanding the complaint dated 06.05.2000 which was closed by the Crime Branch-II, another complaint on the same facts, was filed by respondent No.1 at the Bhosari Police Station being Javak No. 3142/2001. It is pointed out that the appellant and its officers attended the Bhosari Police Station, thereafter the said complaint was also closed after the facts were placed before the officers of the Bhosari Police Station.

26) Apart from these complaints, respondent No.1 once again filed a third complaint at the Commissioner's Office, Crime Branch, Pune being Javak No. 100/2001. The officers of appellant-Company appeared before the Crime Branch, who after perusing the documents and the written statements of appellant No.1, informed the appellants that the matter was closed.

27) It is the grievance of the appellants that without disclosing these material facts and suppressing the fact that the complainant had previously filed three different complaints to various police authorities and that the said complaints were closed on being classified as civil disputes, the complainant had filed the aforesaid criminal complaint before the Magistrate being RCC No. 12 of 2002.

28) Mr. K.T.S. Tulsi, learned senior counsel for respondent No.1 has pointed out that at this stage, namely, issuance of direction to the police for submission of report under Section 156(3) of the Code, the accused has no role and need not be heard. The said contention is undoubtedly in consonance with the procedure prescribed. However, in view of specific direction of the Division Bench of the High Court by a common order dated 10.06.2003, disposing off the cases by remitting the matter back to the Magistrate for reconsideration of the entire prayer as made by the complainant and to pass fresh orders, after giving adequate opportunity of hearing to both the sides, and decide afresh the application seeking direction under Section 156(3) by giving cogent reasons for coming to

such conclusion, the procedure adopted by the Magistrate cannot be faulted with. Though the appellant Company/accused has no right to be heard at this stage in view of the direction of the High Court, no exception be taken to the order of the Magistrate hearing the Complainant and the appellant Company/accused even at the stage of calling for a report under Section 156(3) of the Code.

29) The entire analysis of the complaints with reference to the principles enunciated above and the ingredients of Sections 405, 406, 420 read with Section 34 IPC clearly show that there was inordinate delay and laches, the complaint itself is inherently improbable contains the flavour of civil nature and taking note of the closure of earlier three complaints that too after thorough investigation by the police, we are of the view that the Magistrate committed a grave error in calling for a report under Section 156(3) of the Code from the Crime Branch, Pune. In view of those infirmities and in the light of Section 482 of the Code, the High Court ought to have quashed those proceedings to safeguard the rights of the appellants. For these reasons, the order passed by the

Judicial Magistrate First Class, Pimpri in CC No. 12 of 2002 on 20.08.2007 and the judgment of the High Court dated 11.01.2008 in Criminal Writ Petition No. 1622 of 2007 are set aside. The complaint filed by Respondent No.1 herein is quashed.

30) For the reasons stated above, the appeal is allowed.

.....J.
(P. SATHASIVAM)

.....J.
(DR. B.S. CHAUHAN)

NEW DELHI;
SEPTEMBER 27, 2011.

JUDGMENT