

CRIMINAL REVISION

Present:

The Hon'ble Mr. Justice Syamal Kanti Chakrabarti

Judgment on 02.09.2010

C.R.R. No. 3385 of 2009

C.R.A.N. No. 2210 of 2010

Smt. Sangeeta Upadhyay

Vs.

The State of West Bengal & Anr.

With

C.R.R. No. 3386 of 2009

C.R.A.N. No. 2209 of 2010

Smt. Nisha Kapoor

Vs.

The State of West Bengal & Anr.

Points:

Breach of contract- Breach of a contract without intention to deceive whether criminal proceeding lies or parties have to seek remedies from civil court.-Indian Penal Code –Ss. 406.420

Facts:

Complainant is a manufacturer of Solar Water Heater. A contract was entered into between the complainant and the accused for installation of Solar Water Heater and accordingly accused made advance as per agreement. Complainant delivered some materials at the site of the accused and asked for payment without installing the said water heater though in the agreement there was no stipulation to make full payment on delivery of materials. Accused cancelled the work order and thereafter the complainant

lodged F.I.R. and case was started against the accused. A search warrant was issued and materials were recovered from the site of the accused. Accused prayed for quashing of the proceeding.

Held:

The demand made by the complainant for payment of the balance amount after delivery of some goods are prima facie not within the purview of terms of payment and other conditions and failure to meet such demand on the part of the accused cannot be treated as their intention to deceive the complainant after receipt of some materials. It also appears from the seizure list dated 01.09.2009 that the articles supplied by the accused were seized from inside the campus and within the boundary wall of 16, Raja Santosh Road, Kolkata – 700 027. Therefore, it was recovered from open campus and not unlawfully detained by the accused persons as alleged in the FIR with a view to deceiving the complainant. Para 19

From the nature of such commercial transaction it is, therefore, apparent that both parties are blaming each other for breach of contract for which ultimately the contract was cancelled. The FIR was lodged on 30.03.2009, i.e., after cancellation of the work order as per letter dated 18.03.2009 (annexure P-4). Therefore, Court have no hesitation to say that the dispute and differences by and between the parties arising out of the work order is purely civil in nature and the accused have never any intention from the very inception of entering into such contract to deceive the complainant company by fraudulent means and to cheat them as alleged in the FIR. Para 21

Cases cited:

(2006) 2 SCC (Cri) 310 (Minu Kumari and Anr. –Vs.- State of Hihar and Ors.); 1999 SCC (Cri) 401 (Rajesh Bajaj –Vs.- State NCT of Delhi and Ors.)
2005 SCC (Cri) 1185 (Devender Kumar Singla –Vs.- Baldev Krishan

Singla); 2000 SCC (Cri) 47 (Trisuns Chemical Industry –Vs._ Rajesh Agarwal & Ors.); 2000 SCC (Cri) 615 (Medchl Chemicals & Pharma (P) Ltd. –Vs.- Biological E. Ltd. & Ors.); 2001 SCC (Cri) 275 (Lalmuni Devi (Smt.) –Vs.- State of Bihar & Ors.); 2002 SCC (Cri) 129 (S. W. Palanitkar & Ors. –Vs.- State of Bihar and Anr.); 2007(3) E Cr 190 (Veer Prakash Sharma –Vs.- Anil Kumar Agarwal & Anr.); (2005) 13 SCC 699 (Murari Lal Gupta –Vs.- Gopi Singh) ; 2005(1) CHN 92; (2008) 1 C Cr LR (Cal) 789 (Kingshuk Neogi –Vs.- The State of West Bengal & Anr.) ; (2008) 1 C Cr LR (Cal) 508 (Krishna Kumar Bangur –Vs.- State of West Bengal & Anr.) ; (2009)1 C Cr LR (SC) 899 (Sharon Michael & Ors. –Vs.- State of Tamilnadu & Anr.); 1990 C Cr LR (Cal) 1 (J Th Zwart & Ors. –Vs.- Indrani Mukherjee)

For the petitioner : Mr. Sekhar Basu,

Mr. Milon Mukherjee,

Mr. Sandipan Ganguly,

Mr. Rana Mukherjee,

Mr. Rudradipta Nandy.

For the O.P. No. 2 : Mr. Tirthankar Ghosh,

Mr. Satadru Lahiri.

For the State : Mr. S. S. Roy.

Syamal Kanti Chakrabarti, J:

Some common questions are involved in both these revisional applications, which are accordingly taken up for consideration together. The petitioners in both these revisional applications have prayed for quashing of the proceedings

being Case No. C-14761 of 2009 along with order dated 5.6.2009 passed therein

which is now pending before the 8th Court of Learned Metropolitan Magistrate,

Kolkata. It is contended that at the instance of O.P. no. 2, the aforesaid complaint case was instituted on the allegation that the complainant is a Private

Limited Company and O.P. no. 2 is a manufacturer of Solar Water Heater.

Accused no. 1 is a Director of the accused company and the petitioner is purportedly the Chairman of the said company and the accused no. 3 is the Consultant of the accused company and all of them are looking after the day-today

business of the accused company. The accused in the letter dated 20.5.2008 placed an order with the complainant company for supply and installation of “British Consol Make 6500 Litres per day evacuated Tube Collector based Solar

Water Heating System” for Jacuzzi Sauna Treatment etc. for Health Spa.

The

officers of the O.P. no. 2 company stated to the accused persons that the said water heating system shall have to be manufactured and installed as per the specification and order placed by the accused persons and the total cost would

be about Rs. 13,00,000/-. The O.P. no. 2 company accordingly asked for an advance of Rs. 3,61,616/- out of the total price of the same and accused assured

that payment of the balance would be made by them immediately on receipt of

supply of the materials as per the purchase order dated 20.5.2008. On the basis of such assurance of the accused persons, O.P. no. 2 company started manufacturing the said water heating system as per the Map and specification given by the accused persons in respect of the roof plan with dimension for installation of the Solar Panel System, which is to be installed at 16, Raja Santosh Road, Kolkata. As per such specification, the O.P. no. 2 manufactured the requisite materials and supplied various equipments valued at Rs. 11,41,500/-. The O.P. no. 2 company requested the accused persons to make balance payment in respect of the goods supplied to them to the tune of Rs. 7,79,884/- and also informed that the remaining goods as per order of the accused persons were ready for delivery but the accused persons did not pay the said sum of Rs. 7,79,884/- and ultimately refused to make such payment. Thus, it is alleged by the O.P. no. 2 that the accused persons made a criminal conspiracy and in furtherance of such conspiracy and criminal design by their false and fraudulent representations intentionally deceived the O.P. no. 2 and other persons of the company and dishonestly induced the O.P. no. 2 company to supply them goods and materials worth Rs. 11,41,500/- against initial payment of only Rs. 3,61,616/- and refused to make balance payment and thus, committed an offence punishable under Sections 120B/406/420 of the Indian

Penal Code.

2. On receipt of such complaint, the Learned Chief Metropolitan Magistrate, Kolkata, by his order dated 30.3.2009 took cognizance of the offence and transferred this case to the file of the Learned Metropolitan Magistrate, 8th Court, Kolkata for disposal. On receipt of such record by transfer, Learned Court below examined the authorized representative of the O.P. no. 2 and directed Officer-in-Charge, Bowbazar Police Station to investigate into the allegations as per the provisions of Section 202 of Cr.P.C. In the meantime, the O.P. no. 2 has also filed an application under Sections 93/94 of the Cr.P.C. On receipt of the police report, Learned Magistrate has been pleased to hold that a prima facie case under Sections 406/420/120B of the I.P.C. has been made out against the accused persons including the petitioners herein and directed to issue search warrant but refused the prayer made by O.P. no. 2 for issue of search warrant. Subsequently on 14.07.2009, the O.P. no. 2 again prayed for issue of search warrant against the accused persons on the ground that the accused persons are trying to remove articles, which they have illegally retained in their custody. Subsequently, the search warrant was executed and the goods brought by the O.P. no. 2 at the work site for execution of the work entrusted to it on 01.09.2009, were found stacked beneath one of the sheds on the southern side of premises no. 16, Raja Santosh Road, Kolkata- 700 027.

3. Learned Lawyer for the petitioner has contended that the primary ingredients of an offence under Section 406 of the Indian Penal Code are –

- (a) entrustment of property by the aggrieved to the accused ;
- and
- (b) subsequent misappropriation of the said property by the accused.

In the instant case, there is no such entrustment within the meaning of Section 405 of the I.P.C. It is admitted in the petition of complaint that there had been grant of a work order dated 20.5.2008 for supplying and installation of Water Heating System. Mere supply of components of the Water Heating System was not the scope of the work order, which relates to installation/commissioning of such Water Heating System. The raw materials/components of such Water Heating System had been brought by the O.P. no. 2 to the work site for the purpose of proceeding towards completion of the job granted under the work order issued in favour of M/s. Multirise Towers Pvt. Ltd. The same cannot constitute the act of entrustment. It would also appear that through a letter dated 18.3.2009, the said company had cancelled the work order granted in favour of the O.P. no. 2 and asked them to take back the materials, which had been brought by them at the work site. The instant criminal proceeding was initiated thereafter on 30.3.2009. From the subsequent seizure list, it also appears that the said components supplied had not been misappropriated by the petitioner or by any other accused persons, which were seized in execution of the search warrant from the place where it had been left by the O.P. no. 2 herein. Mere retention of property by itself does not constitute any offence of criminal breach of trust. Therefore, the charge under Section 406 of the I.P.C. is clearly misconceived and the proceeding is liable to be quashed.

4. It is further submitted by Learned Lawyer for the petitioner that an offence under Section 420 of the Indian Penal Code contains the following ingredients –

a) false and fraudulent representations made by the accused

to the aggrieved;

b) consequent delivery of valuable property by the aggrieved to the accused; and

c) subsequent misappropriation of the said valuable property by the accused.

5. Therefore, it is apparent that false and fraudulent representations made at the inception of the transaction is an essential ingredient of the offence.

From the relevant work order, it will appear that the same is a contract with the O.P. no. 2 containing certain terms and conditions. Acceptance of such contract by O.P. no. 2 will be effective from their initial payment of Rs.

3,61,616/- being an advance paid for effecting such contract. It will also appear that the O.P. no. 2 has also not concluded the work entrusted to him by the company of the petitioner and thus, O.P. no. 2 also had no legal right to claim the value provided for execution of the contract/work order. From the work order, it will appear that there was no obligation on the part of the M/s. Multirise Towers Pvt. Ltd. to make payment for the supplied articles.

Therefore, the basic requirement of offence under Section 420 of I.P.C. is absent in the FIR. The fact of advance payment in terms of the contract indicates that the party making such advance had no intention to cheat the O.P. no. 2 and there is no existence of false and fraudulent representations at the inception of such transaction. Mere breach of contract ipso facto cannot give rise to the offence of cheating and so, the charge under Section 420 of I.P.C. is also misconceived and such proceeding is liable to be quashed.

6. It is further contended by Learned Lawyer for the petitioners that the primary ingredients of the offence under Section 406 of the I.P.C. are –

(a) entrustment of property by the aggrieved to the accused ;

and

(b) subsequent misappropriation of the said property by the accused.

Whereas the essential ingredients of an offence under Section 420 of the I.P.C. are –

- a) false and fraudulent representations made by the accused to the aggrieved;
- b) consequent delivery of valuable property by the aggrieved to the accused and
- c) subsequent misappropriation of the said valuable property by the accused.

7. Therefore, in an offence under Section 420 of the I.P.C. there must exist false

and fraudulent representations by the accused to the aggrieved prior to delivery of the valuable property by the aggrieved to the accused and as such, transfer of property in respect of an offence under Section 420 of the I.P.C. is not voluntary but is a result of inducement. On the contrary, in an offence under Section 406 of the Indian Penal Code, the transfer of the valuable property from the possession of the aggrieved to the accused is not due to any result of inducement but is a voluntary act. Thus, it is apparent that in respect of solitary transaction relating to transfer of position of valuable property from the aggrieved to the accused and subsequent misappropriation, both the charges under Sections 406/420 of the Indian Penal Code cannot lie together since the transfer of property is the vital component of a bundle of facts which form the cause of action. From this point of view, Learned Magistrate has committed error in taking cognizance of both the offences under Sections 406/420 of the I.P.C. in respect of the

single transaction between the petitioners and the O.P. no. 2 and as such, the impugned proceeding is liable to be quashed.

8. From the petition of complaint, it will appear that the defacto complainant is

the Accounts Manager of complainant company, M/s. G.P. Tronics Private Limited and accused no. 1 is one of the Directors and accused no. 2 is the Chairman of the accused no. 1 and accused no. 3 is the Consultant of accused company, M/s. Multirise Tower Pvt. Ltd. The accused persons by their letter dated 20.5.2008 placed an order with the complainant company for supply and installation of British Consol Make 6500 Litres per day (LPD)

evacuated Tube Collector based "Solar Water Heating System" for Jacuzzi Sauna Treatment etc. for Health Spa. Then the petitioner company estimated the cost for supply of manufacturing articles as per the specification of Rs. 13,00,000/- and requested the accused company to give an advance payment of Rs. 3,61,616/- which was complied with. In para 10 of the complaint, it is stated that on receipt of such advance the petitioner company manufactured the requisite materials and supplied them various equipments valued at Rs. 11,41,500/- which was received by accused no. 3 and others. Then the petitioner company demanded payments of balance amount of Rs. 7,79,884/-, which was not paid by the accused persons and this is the foundation of criminal conspiracy alleged against them and thereby they have intentionally deceived the petitioner company and dishonestly induced the petitioners to supply them goods and materials in respect of such Solar Water Heating System against initial payment of Rs. 3,61,616/-. It is also alleged in para 15 of the petition of complaint that the accused persons were also party to a criminal conspiracy in respect of the

dishonest misappropriation of the goods and articles and the materials entrusted to them and as such, they have committed the offence punishable under Sections 120B/406/420 of the I.P.C.

9. The petition dated 30.3.2009 was moved before the Court of Learned Chief

Judicial Magistrate, Calcutta with a prayer for search warrant under Section 156(3) Cr.P.C. In his order dated 30.03.2009 the Learned Chief Judicial Magistrate, Calcutta took cognisance and rejected the prayer for search warrant made under Section 156(3) Cr.P.C. and transferred the case to the file of the Learned Chief Metropolitan Magistrate, 8th Court for inquiry and disposal. The Learned Transferring Magistrate examined the complaint on SA and perused the documents filed by him and decided that the case requires investigation under amended provision of Section 202 Cr.P.C. Such accused persons were residing beyond the jurisdiction of His Court so by order dated 08.04.2009 he directed the OC, Bowbazar Police Station to investigate the case under Section 202 Cr.P.C. and to report on 05.06.2009. On that day, i.e., on 08.04.2009 the Learned Transferring Magistrate again rejected the prayer for search warrant in view of the order dated 30.03.2009 as well as on perusal of oral and documentary evidence on the ground that the Learned Court did not file any extreme urgency to issue the search warrant. On 30.04.2009, i.e., three weeks thereafter the record was again put up by the petitioner at the instance of the complainant with prayer for issuing search warrant and on that date also the Learned metropolitan Magistrate, 8th Court, Calcutta held that he has already rejected such prayer under order dated 08.04.2009 so if any further order is passed it will amount to modification of his own order which is barred by law. On 05.06.2009 the OC, Bowbazar Police Station submitted his report which

discloses prima facie offence under Section 406/420/120B IPC. So process was issued against the accused persons. But on that date also the prayer for issuing search warrant was rejected. On 14.07.2009 the record was again put up by the petitioner praying for issuing search warrant. On this occasion the Learned Magistrate held that on earlier two occasions on 08.04.2009 and 30.04.2009 he rejected such prayer but after receiving and perusing the police report dated 05.06.2009 he finds prima facie case and extreme urgency to issue search warrant against the accused persons so the prayer was allowed.

10. Learned lawyer for the petitioner has drawn my attention to the above fact

where in fact, the Learned Trial Court has reviewed his own earlier orders and passed an order contradicting his own earlier decisions which is not permissible under the code.

11. Learned lawyers for the State and O.P. No. 2 have, however, opposed the move and contended that though the inherent jurisdiction of the Hon'ble High Court under Section 482 Cr.P.C. is wide enough, it should be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in Section 482 Cr.P.C. They have referred to the case of Minu Kumari in (2006) 2 SCC (Cri) 310 (Minu Kumari

and Anr. –Vs.- State of Hihar and Ors.) it has been held by the Hon'ble Apex

Court that Section 482 Cr.P.C. envisages three circumstances under which the inherent jurisdiction may be exercised, namely,

- i) to give effect to an order under the Code;
- ii) to prevent abuse of the process of court; and

iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction.

12. He has further contended that from the averment made in the complaint prima facie case of cheating has been made out in course of the impugned criminal transactions. Therefore, such a proceeding should not be quashed and though there are insufficient materials in the complaint within the meaning of Section 2(d) Cr.P.C. the same should not be quashed before trial. He has relied upon the principle laid down in 1999 SCC (Cri) 401 (Rajesh Bajaj –Vs.- State NCT of Delhi and Ors.). It is held therein by the Hon'ble Apex Court that it is not essential that it should verbatim contain all the ingredients of the offence alleged so long as the factual foundation for the offence has been laid. In the instant case the petition of complaint contains the factual foundation for the offence of cheating and as such the said principle should be relied upon. Learned lawyer for the State has further contended that direct evidence of cheating within the meaning of Section 415 IPC may not be always available or apparent and direct evidence of mens rea or dishonest intention is not always possible in respect thereof. In such cases reasonable inference should be drawn from a number of circumstances which are available in the instant case as laid down in 2005 SCC (Cri) 1185 (Devender Kumar Singla –Vs.- Baldev Krishan Singla) in the

said case the essential requirements of cheating has been identified as

- i) deception of any person;
- ii) whereby fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property, or

iii) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. Deception of any person is common to the second and third requirements of the provision. The said requirements are alternative to each other and this is made significantly clear by use of disjunctive conjunction “or”.

It is also held therein that the essential ingredients to attract Section 420 are:

- i) cheating;
- ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security; and
- iii) the mens rea of the accused at the time of making the inducement. The making of a false representation is one of the ingredients for the offence of cheating under Section 420 IPC.

It is not necessary that a false pretence should be made in express words by the accused. It may be inferred from all the circumstances including the conduct of the accused in obtaining the property. In the true nature of things, it is not always possible to prove dishonest intention by any direct evidence. It can be proved by a number of circumstances from which reasonable inference can be drawn. Relying upon the above principle the Learned lawyer for the State has tried to impress upon me that from the

existing facts and circumstances disclosed in the petition of complaint sufficient materials are forthcoming to prove different set of circumstances to be proved in course of trial from which reasonable inference of cheating can be inferred. Therefore, the proceeding should not be quashed without giving the prosecution any chance of proving those circumstances in course of trial which would be denial of justice.

13. He has also contended that the Hon'ble Apex Court in 2000 SCC (Cri) 47

(Trisuns Chemical Industry –Vs._ Rajesh Agarwal & Ors.) has held that criminal prosecution cannot be thwarted merely because civil proceedings are also maintainable. Existence of arbitration clause in the contract for supply of goods between the appellant company and another company were, therefore, held by the Hon'ble Apex Court not a sufficient ground for quashing the complaint filed by appellant against the supplier company alleging offence of cheating by supplying inferior quality of goods. Such is the present case where the plea has been taken by the Learned lawyer for the petitioners that the facts essentially relate to breach of contract followed by claim of either performance of contract in terms of agreement or payment of damages for breach of contracts. Both such claims are essentially civil in nature which cannot be redressed through criminal courts.

14. Learned lawyer for the State has also drawn my attention to the principles

laid down in 2000 SCC (Cri) 615 (Medchl Chemicals & Pharma (P) Ltd. – Vs.-

Biological E. Ltd. & Ors.). It is held therein by the Hon'ble Apex Court that a

complaint has to be examined as a whole without going into merits of the

allegations made therein. If a prima facie case is made out disclosing the ingredients of the offence alleged against the accused, Court should not quash the proceedings. But if the allegations do not constitute any offence as alleged and appear to be patently absurd and improbable, Court should not hesitate to quash the complaint. But the Court's approach should be very circumspect, cautious and careful. Mere fact that the offences were committed during the course of a commercial transaction by itself not sufficient to quash the complaint. For quashing the complaint court has to see whether on the fact situation 'civic profile' outweighs the 'criminal outfit'.

In the nature of the alleged offence as disclosed in the petition of complaint the 'civic profile' does not outweigh the 'criminal outfit' and as such there is no merit in this revisional application which should be dismissed. The principles laid down in 2001 SCC (Cri) 275 (Lalmuni Devi (Smt.) –Vs.- State

of Bihar & Ors.) is an echo of the same principle.

15. In the above context if the petition of complaint is examined it will appear

from paragraph 1 of the same that the plaintiff company M/s. G. P. Tronics Pvt. Ltd. is a private limited company while the accused no. 1 is one of the directors of the accused company, namely, M/s. Multirise Towers Private Limited, accused no. 2 is the chairman and accused no. 3 is the consultant of the accused company all of whom were looking after the day to day business of the accused company and are responsible for the day to day conduct of the accused company.

16. In paragraph 4 of the petition of complaint it is averred that the accused persons by the letter dated 20.05.2008 placed an order with the complainant

company for supply of “British Consol Make 6500 Litres per day evacuated Tube Collector based Solar Water Heating System” for Jacuzzi Sauna Treatment etc. for Health Spa and in paragraph 5 it is claimed that they reported to the complainant and others that they require the said Solar Water Heating System urgently for installation at their site. The relevant portion of the work order dated 20.05.2008 (Annexure B to the complaint) runs as follows:

“Ref.: MTPL/KOL/GPT/01/08-09 May 20, 2008

G. P. Tronics Pvt. Ltd.

502, Kamalalaya Centre (5th Floor)

156A, Lenin Sarani,

Kolkata – 700 013.

Dear Sirs,

With reference to your offer vide your letter no. GPT/SWHS-QTN/2008-09/77 dated 22-04-2008 and subsequent discussion we had with you, we are pleased to place the order for supply and installatino of “British Consol make 6500 litres per day (LPD) Evacuated Tube Collector based Solar Water Heating System” for Jacuzzi, Sauna treatment etc. for Health Spa at 16, Raja Santosh Road, Kolkata – 700 027 as per the following terms and conditions:.....

Payment Terms & Other Conditions:

- i) Payment terms a) 30% of the price of the system, pumps and pipe fittings as advance against order.
- b) 40% of the price on delivery of the Solar Heating System at site

against running bill

40% of price of pumps, valves &

pipe fittings on delivery at site

against running bill.

c) 20% of the price of system and 50%

of installation charges after

satisfactory installation and

commissioning of the entire system.

d) Balance 10% of the price of system

and 50% of installation charges

after successful operation of the

complete system for 15 days.

ii) Delivery &

Installation

Free of cost at 16, Raja Santosh Road,

Kolkata – 700 027 within two months

from the date of this order. Part supply

of 2000 LPD & 4500 LPD system is not

allowed.

iii) Price

Escalation

There will be no Price-Escalation.

iv) Warranty Three (3) years from the date of

successful commissioning against any

manufacturing defects of Solar water

Heating Systems, pumps, backup

heater and control panel. Any items

requiring replacement during the period of warranty shall be replaced free of cost.

v) Annual
Maintenance
Contract
(AMC)

In the 1st year from the date of commissioning you have to provide free service on quarterly basis for Solar Water Heating System as well as pipe lines and pumps along with backup heater and control panel.

For 2nd and 3rd years you will be paid Rs. 25,000/- per year for the maintenance of Solar Water Heating System including maintenance of pumps along with back up heater and control panel.

Kindly return one copy of this order duly signed as a token of your acceptance.”

17. From the contents of the said work order it will appear that no time limit has been stipulated for completion of the assignment. But under the payment terms it was decided that the total amount payable will be made at five stages. Such work order also does not contain any clause for settlement of any dispute at the instance of third party arising out of such contract. But

there is provision for annual maintenance contract with warranty for three years from the date of successful commissioning against any manufacturing defects of Solar Water Heating System, pumps, backup heater and control panel and any item requiring replacement during the period of warranty shall be replaced free of cost. Learned lawyer for the petitioner has rightly pointed out that where time is not the essence of contract and there is provision for replacement of essential components under the terms of warranty for three years free of cost, the allegation made in the FIR seems to be premature to avoid compliance with the terms of contract after supply of major components to complete the agreement and further payment cannot be a condition precedent to the completion of the job.

18. It is further admitted in paragraph 7 of the petition that the petitioner's company requested the accused persons to give an advance payment to the complainant company towards initial payment to the tune of Rs. 3,61,616/- and the accused persons assured that the rest of payment would be made by them immediately on receipt of the supply of the material as per the purchase order dated 25.05.2008 (Annexure B to the complaint). I have already mentioned that in the relevant work order (Annexure B to the complaint), there is no such stipulation that the rest payment would be made immediately on receipt of supply of the materials. But it would be paid in phases and final payment will be made after discharging of the contractual obligations that means, commissioning of the plant. Be that as it may, the offer made by the complainant company to make advance of Rs. 3,61,616/- and acceptance of such offer by the accused gives rise to a valid contract by and between the parties in course of commercial transactions and there is no prima facie

element of deception at the very inception of such contract. Learned lawyer for the petitioner has drawn my attention to the principles laid down in 2002 SCC (Cri) 129 (S. W. Palanitkar & Ors. –Vs.- State of Bihar and Anr.). It has been held by the Hon'ble Apex Court therein that every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in a civil court for a breach of trust without mens rea. It is further stipulated therein that in case of a complaint under Section 200 Cr.P.C. a Magistrate has to examine the complaint and the witnesses, if any, to ascertain whether a prima facie case is made out against the accused and then he can take cognizance and issue process to prevent a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is sufficient ground for proceedings. The words "sufficient ground" used under Section 203 Cr.P.C. have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction.

19. In the instant case Learned Trial Court issued process after examining the complainant on SA who has reiterated the allegations made in the petition of complaint on same terms. In paragraph 10 of such petition of complaint it is

averted that after receipt of the drawing from the accused persons the petitioner manufactured the requisite materials and supplied them various equipments value of which is Rs. 11,41,500/- and those components were received by accused no. 3 and others. In paragraph 11 of the petition of complaint it is alleged that immediately after receipt of the goods the petitioner company requested the accused to make balance payment in respect of goods supplied to the tune of Rs. 7,79,884/- with further intimation

that the balance goods as per work order have been made ready but unless the aforesaid amount is paid it would be difficult for them to install the Solar Water Heating System as per work order. It has also been pointed out that in the relevant work order (Annexure B to the petition) the mode of payment has

been specifically mentioned in four instalments as already mentioned above. Therefore, the demand made by the complainant for payment of the balance amount after delivery of some goods are prima facie not within the purview of

terms of payment and other conditions and failure to meet such demand on the part of the accused cannot be treated as their intention to deceive the complainant after receipt of some materials. It also appears from the seizure list dated 01.09.2009 that the articles supplied by the accused were seized from inside the campus and within the boundary wall of 16, Raja Santosh Road, Kolkata – 700 027. Therefore, it was recovered from open campus and

not unlawfully detained by the accused persons as alleged in the FIR with a view to deceiving the complainant. It has been held by the Hon'ble Apex Court

in 2007(3) E Cr 190 (Veer Prakash Sharma –Vs.- Anil Kumar Agarwal & Anr.)

that non-payment or underpayment of the price of the accused by itself does not amount to commission of an offence of cheating or criminal breach of trust within the meaning of Section 405 IPC. In the instant case it appears to me that the complaint has been lodged to put the accused persons under pressure for realization of the balance amount of Rs. 7, 79,884/- which the accused persons were not bound to pay in terms of the mode of payment mentioned in the work order. Therefore, criminal forum has been chosen by the complainant company for realization of their balance dues by filing a suit in the civil court for breach of contract.

20. The claims made by the complainant in the petition of complaint also indicates that unless they complete the job they cannot insist for full payment of the contractual amount against the terms and conditions laid down in the work order. Moreover, on 18.03.2009 the accused company wrote a letter cancelling the contract on the grounds stated therein. For proper appreciation the contents of the said letter dated 18.03.2009 are reproduced hereunder:

“Date: 18-03-2009

To

G. P. Tronics Pvt. Ltd.

502, Kamalalaya Centre (5th Floor)

156A, Lenin Sarani

Kolkata – 700 013

Kind Attn: Mr. S. Burman

Dear Sir

This is in reference to the work order issued to you by

MULTIRISE TOWERS PVT. LTD., for supply and installation of the solar water heating system for the SPA project at 16, Raja Santosh Road, Kolkata – 700 027.

I am totally unsatisfied with the progress of work since the time you supplied materials on the site. I would like to bring to your attention the following issues:

- 1) You have failed to furnish a detailed drawing of the system in spite of repeated calls.
- 2) In spite of having taken a 30% advance no progress has been made by you on the work front.
- 3) The project was to be completed within 6 months from the date the order was placed i.e., 20th May, 2008 and it was impressed upon you that time was the essence of the contract and completion of the SPA was essentially dependent on your speedy installation. This delay is incurring a huge financial loss on us per day because supply of materials does not help us in any way if not installed. Your materials are lying unaccounted for and blocking space on our premises.
- 4) The installation scheme that you gave to our engineer was faulty and you have not been able to furnish any solution to the queries posed upon you. In fact the drawing you submitted was ridiculous.

Our handover date has been fixed by our client and we are working on completion schedules. Your installation work should have been completed much in advance but there has been absolutely no effort in that direction from your side in spite of

repeated phone reminders. Instead you choose to register a complaint in the Police Station against Mrs. S. Upadhyay, Mr. B. N. Das, & me and tried to harass us in that process.

Pl. note that on instruction from the client I have to inform you that your order stands cancelled and I request you to return the advance paid to you and remove your materials from the site within 7 (seven) days of receipt of this letter failing which we shall not be responsible for any loss of material from the site.

For MULTIRISE TOWERS PVT. LTD.

16, Raja Santosh Road

Sd./

NISHA KAPOOR

(Consultant) ”

21. From annexure P-5 to the petition it will also appear that before such cancellation the complainant company was informed by registered letter dated 25.06.2009 to lift back their consignment by sending their representative and to refund the advance amount paid by the accused company since the equipment or parts supplied by them were lying uninstalled for a long time. From the nature of such commercial transaction it is, therefore, apparent that both parties are blaming each other for breach of contract for which ultimately the contract was cancelled. The FIR was lodged on 30.03.2009, i.e., after cancellation of the work order as per letter dated 18.03.2009 (annexure P-4). Therefore, I have no hesitation to say that the dispute and differences by and between the parties arising out of the work order is purely civil in nature and the accused have never any intention from the very inception of entering into such contract to deceive the complainant company by fraudulent means and to cheat them as alleged in

the FIR.

22. In a similar case reported in (2005) 13 SCC 699 (Murari Lal Gupta –Vs.- Gopi Singh) the Hon'ble Apex Court has quashed the proceeding. In the said case the petitioner entered into an agreement to sale certain property in Delhi for a consideration of Rs. 4.50 lacs out of which Rs. 3.50 lacs was paid by the complainant respondent, balance amount due was to be paid at the time of registration of sale deed and delivery of possession. But it was alleged

in the FIR that in spite of three legal notices, the petitioner failed to honour the agreement and thus cheated him. Their Lordships held in such a case that filing complaint under Section 406 and 420 IPC is an abuse of the process of court and as such was liable to be quashed since no inference can be drawn from the facts and circumstances that any fraudulent or dishonest inducement was made by the petitioner pursuant to which the respondent parted with the money. Their Lordships were further pleased to hold that merely because the petitioner had failed to honour the agreement, it cannot be said that he had cheated the respondent. In 2005(1) CHN 92 this Hon'ble Court also followed the same principle and held that the chargesheet discloses contractual obligation and breach thereof, for which the remedy is available in civil court. There is no prima facie material to show that the present petitioner committed offences under Section 406, 467, 468, 420 and 120B IPC. His Lordship was pleased to hold that the nexus between offences committed and the offender is found absent in the chargesheet. The concept of vicarious liability is also not found under the Indian Penal Code and as such continuation of such criminal proceeding will be sheer abuse of the process of court. The same principle has been followed by this Hon'ble Court

in (2008) 1 C Cr LR (Cal) 789 (Kingshuk Neogi –Vs.- The State of West Bengal & Anr.) and also in (2008) 1 C Cr LR (Cal) 508 (Krishna Kumar Bangur –Vs.- State of West Bengal & Anr.).

23. Learned lawyer for the State has submitted that after delivery of the major components, parts of the Solar Water Heating System worth Rs. 11,41,500/- the accused persons refused to make the balance payment without any reasonable ground. The accused persons have taken a false plea in item no. 4 of their letter dated 18.03.2009 (Annexure P-4) that the installation scheme given to their engineer was faulty and the complainant company has not been able to furnish any solution to the queries posed upon them. In fact the drawing submitted by the complainant company was ridiculous. This type of plea taken for non-payment of the balance amount is a clear indication of dishonest intention from the very inception of the issue of work order for which the accused persons should be prosecuted as per law.

24. On the contrary Learned lawyer for the petitioner has drawn my attention to the principles laid down in (2009)1 C Cr LR (SC) 899 (Sharon Michael & Ors.

–Vs.- State of Tamilnadu & Anr.). In this case the appellant company did not pay the price of the goods rejected by the buyer. In the aforesaid case Their Lordships were pleased to hold, inter alia, that indisputably the respondent no. 2 is the producer of the agreements. The buyer is a German company. Rightly or wrongly, the buyer refused to accept goods, inter alia, on the premise that the same were defective and substandard. Their Lordships further assumed that the appellant company was assured payment for such

supplies. Even if that be so, it would be a del credere agent. Its liability is, therefore, a civil liability. The allegations contained in the First Information Report in such circumstances did not reveal that any misrepresentation was made at the time of formation of the contract. The goods were to be supplied by the respondent. They were presumably required to meet the requirements of the buyer. Even if the certificate granted by the appellant company was incorrect, an appropriate action against them would have been taken for breach of contract. Relying upon the above principle also I hold that the dispute in question, as disclosed in the FIR, is purely civil in nature and no criminal liability will lie against the accused persons for such breach of contract.

25. Learned lawyer for the petitioner has also contended that the contents of the complaint are not in conformity with the provisions laid down in Section 2(d) of the Cr.P.C. In 1990 C Cr LR (Cal) 1 (J Th Zwart & Ors. –Vs.- Indrani Mukherjee) the Division Bench of this Hon'ble Court has held that incorporation or inclusion of a false statement in a document would not ipso facto make the document false. For a document to be false it has to tell a lie about itself. Their Lordships were further pleased to hold that a Magistrate may take cognizance of an offence under Section 190(1)(a) of the code upon receiving a complaint of facts which constitute such offence. For taking such cognizance there should not only be a complaint, which means allegations of commission of offence, but it must contain facts which constitute the offence. That necessarily means that the basic facts and materials on which the allegation is founded are required to be stated. Unfortunately in the instant complaint the basic facts and materials related to the cheating of the

complainant company by the accused company are conspicuously absent. Therefore, the allegation is not founded on the basic facts and materials required to prosecute any person under Section 406/420/120B IPC.

26. From the conduct of the complainant company it is prima facie apparent that against part performance of contract and supply of some components or parts of Solar Water Heating System, they have demanded the entire value of the goods supplied without any regard for commissioning the Solar Water Heating System within reasonable time as desired by the accused company in anticipation of which they made 30% advance. Instead of completion of the work order the complainant company have tried to discharge their obligation in piecemeal manner and have tried to take recourse to the criminal court for realization of their balance dues without performing their contractual obligation as per the work order. Therefore, it is clear that such type of dispute is purely civil in nature and no prima facie material is forthcoming from the complainant which could be treated as foundation for commission of an offence under the aforesaid provisions.

27. Therefore, I hold that continuation of such a proceeding will be mere abuse of the process of law which should be prevented and as such the instant proceeding being case no. C-14761 of 2009 now pending before the Court of the Learned Metropolitan Magistrate, 8th Court, Calcutta is quashed and the petitioners in both the revisional applications are discharged and released from their respective bail bonds. Both the revisional applications being CRR 3385 of 2009 and CRR 3386 of 2009 are thus disposed of.

28. Urgent photostat certified copy of this order, if applied for, be given to all the parties upon compliance of all necessary formalities.

(Syamal Kanti Chakrabarti, J.)