HIGH COURT OF CALCUTTA

Bench : The Hon'ble Justice Shampa Dutt (Paul)

Date of Decision: April 1, 2024

CRIMINAL REVISIONAL JURISDICTION

APPELLATE SIDE

CRR 1376 of 2019

Mr. Debapratim Neogie

Vs

The State of West Bengal & Anr.

Legislation:

Sections 420 and 406 of the Indian Penal Code, 1860

Electricity Act, 2003

Subject: The revision petition challenges the Charge Sheet filed under Sections 420 and 406 of the IPC in Durgapur Police Station Case No. 425 of 2018, related to a dispute over a sub-lease agreement and subsequent failure to provide promised electricity supply.

Headnotes:

Allegations of Fraud in Sub-Lease Agreement – Petitioner and complainant (Reliance Corporate IT Park Limited) entered into a sub-lease agreement with assurances of uninterrupted electricity supply – Complainant accused petitioner of not maintaining promises, leading to disconnection of electricity and demanding additional money or property purchase – Alleged criminal intent to deceive and cheat [Paras 2, 18-19, 32-33]

Petitioner's Defense – Petitioner claims fulfillment of all obligations, including payment of dues to DPL under a Bank Guarantee – Contends allegations as civil disputes and not criminal fraud or cheating [Paras 3-6]

Civil Nature of Dispute – Complaint's allegations primarily related to contractual obligations and financial transactions – Absence of prima facie criminal intent or fraudulent inducement at inception of agreement [Paras 9, 32, 33, 35].

Arbitrability of Dispute – Presence of arbitration clause in agreement – Dispute suited for resolution through arbitration rather than criminal proceedings [Paras 26, 27, 34].

Legal Principles Applied – Supreme Court judgments emphasizing non-arbitrability of disputes involving serious allegations of fraud – However, simple allegations of fraud related to internal affairs of parties can be subject to arbitration [Paras 34, 36-37]

Decision – Revision petition allowed – Proceedings against the petitioner in the aforementioned case quashed – Held that continuation of proceedings would constitute an abuse of process of law [Paras 36-38]

Referred Cases:

- Sarabjit Kaur vs State of Punjab and Anr., (2023) 5 SCC 360
- M N G Bharateesh Reddy v. Ramesh Ranganathan & Anr., 2022 SCC OnLine SC 1061
- Vijay Kumar Ghai & Ors. Vs. State of West Bengal & Ors., (2022) 7 SCC 124
- Vivo Communication Device (P) Ltd. V. State of W.B., 2023 SCC OnLine Cal 49
- Jully Techi v. State of W.B., 2019 SCC OnLine Cal 588
- Anand Kumar Mohatta & Anr. V. State (NCT of Delhi), Department of Home & Anr., (2019) 11 SCC 706
- Soumajit Bag and Anr. Vs State of West Bengal & Anr., 2023 SCC OnLine Cal 1577
- Trisuns Chemical Industry vs Rajesh Agarwal and Ors., (1999) 8 SCC 686
- S.W. Palanitkar and Ors. Vs State of Bihar and Anr., (2002) 1 SCC 241
- Rajesh Bajaj vs State NCT of Delhi and Ors., (1999) 3 SCC 259
- Indian Oil Corpn. Vs NEPC India Ltd. And Ors., (2006) 6 SCC 736
- State of M.P. V. Awadh Kishore Gupta and Ors., (2004) 1 SCC 691

Representing Advocates:

For the Petitioner: Mr. Karan Dudhwewala, Mr. Soumalya Ganguly.

For the State: Mr. Md. Anwar Hossain, Ms. Sreyashee Biswas.

For the Opposite Party No. 2: Mr. Sandipan Ganguly, Ld. Sr. Adv., Mr. Sourav Chatterjee, Ms. Manasrita Mukherjee, Mr. Amitava Das, Mr. Deb Kumar Sen.

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of Charge Sheet filed in Durgapur Police Station Case No. 425 of 2018 under Sections 420 and 406 of the Indian Penal Code, 1860 pending before the Court of the Learned 3rd Chief Judicial Magistrate at Durgapur, Paschim Bardhaman.

2. **The allegations made by the Opposite Party No. 2 in the Written Complaint are as follows:-**

i) *—We, M/s Reliance Corporate IT Park Limited, are having our Regd. Office at Reliance Corporate Park Building No. 4, 5, TTC Industrial Area, Thane–Belapur Road, Ghansoli, Navi Mumbai – 400701 and local Office at a Neogie Auto Mansion, South NH2 City Centre Phaze II Durgapur District–Burdwan presently Paschim Burdwan, Circle office now at 17 & 18th Floor, Tower No.–2, Godrej Waterside, Plot No. 5, Block DP, Sector – V, Salt Lake City, Kolkata – 700 091, formerly at Eco Space Business Park, 4th Floor, Block 3B, Rajarhat, New Town, Kolkata–700 015.*

ii) *We were looking for a suitable accommodation for our office and commercial purpose. In course of our search, we came in contact with above named Mr. Debapratim Neogie, Mr. Debabrata Neogie and Mr. Subrata Neogie, all Directors of —Neogie Auto (P) Ltd‖., and persons-in-charge, control and responsible for day to day affairs of their company —Neogie Auto (P) Ltd., who represented that their company*

is having sufficient space to let out and offered us to take their premises for our office purpose.

iii) *On expressing our requirements that we need round the clock supply of electricity, the above named persons assured to give us round the clock electric supply up to 60KV from their transformer already installed at the premises. We having expressed that we need additional power of 37KV of electricity Power over and above 60KV to run our office, the above named persons agreed and assured to increase the load as required by us.*

iv) *Believing in good faith in their representation and assurances, we agreed to enter into long term Sub-Lease agreement at their premises.*

v) *Accordingly a registered sub lease deed dated 21st April, 2015 was executed by and between the above named company and ourselves. In terms of sub-lease, the above named —Noegie Auto (P) Ltd.‖, as Lessor granted lease in our favour in respect of 5000 sqt. little more or less area situated at Ground Floor and 1st floor comprised in Holding No. N/19, NH-2 South, Touzi No. 01 Mouza–Faridpur City Centre Durgapur – 16 J.L. No. 74 C.S. Plot No. 3395 (P) NH-2, Khatian No. 1362, L.O.P. No. 1 Ward No. 22 within Durgapur Municipal Corporation under the jurisdiction of the Office of the Additional District Sub-Registrar Durgapur District– Burdwan, Durgapur – 713216 (W.B.) on the terms and conditions mentioned in the said Sub-Lease.*

vi) *Thereafter,* ***agreement dated 09.04.2016 executed between said "Neogie Auto (P) Ltd.", and ourselves,*** *the above named persons agreed to provide us additional 37KV of electricity Power over and above 60KV to run our office.* ***vii)*** *At the time of making such sub-lease Deed and subsequent agreement, the above named persons have promised and assured that there would be no impediment from any corner, what so ever it may be, for smooth running of our business. Amongst others, it was also assured that there would be uninterrupted supply of electricity.*

viii) *Believing upon their promises and assurances, we parted with an onetime payment of Rs. 2,50,00,000/- (Rupees Two crore and fifty lacs) only at the time of execution of Sub-lease Deed and Rs 20,00,000/- (Rupees twenty lacs) towards refundable security deposit amount and Rs. 5,00,000/- (Rupees five lacs) only towards non-refundable mobilization fees at the time of making such subsequent agreement for obtaining 121KVA from DPL power supply. We also invested huge*

amount of money to the extent of Rs. 1,00,00,00.00 Crore (approx.) for setting up infra-structure of our business at the aforesaid premises.

ix) *It was agreed that until we obtain separate electric meter in our name, we shall enjoy supply of electricity through the Transformer of above named persons and that the above named persons would provide us copy of electric Bill raised by supply provider and we would reimburse the same to the above named persons.*

x) *At the beginning, the above named persons used to show the bill of the electric supplier, Durgapur projects Limited (DPL) after which the above named persons used to raise their bill and we used to reimburse the same. But after few months, they told us that it was becoming hazardous for them to show the bill every time and asked us to reimburse the bill raised by them as it became a monthly routine work. We did not disbelieve them and reposing trust on the above named persons we continued reimbursing electric charges in terms of bill raised by the above named persons.*

xi) *Very strangely, on 31st July, 2018 all on a sudden, DPL power supply authority disconnected the power supply connection of Neogie Auto (P) Ltd. Situated at premises Neogie Auto Mansion, South NH2 City Centre Phaze II Durgapur, District–Burdwan presently Paschim Burdwan which is actually the source of our power supply.*

xii) *We tried to contact Mr. Debapratim Neogie and/or its office several times, but could not able to get any response from them. Then on enquiry, it revealed that the above named persons stopped making payment of electricity bills from December, 2017 to DPL though we paid and/or reimbursed bills of electricity bills till May, 2018 as raised by the above named persons. It also revealed that the Bank Guarantee furnished by the above named persons to DPL also expired in the month of May, 2018. Moreover it could also be learnt that the above named persons have asked DPL power supply to lower down the KVA capacity.*

xiii) *As a result of disconnection of supply of electricity at the said premises wherefrom supply of electricity was being provided to us, our business at the aforesaid premises seriously hampered and we started facing losses and causing disturbance and inconvenience in our day to day activities.* ***xiv)*** *We repeatedly asked the above named person to solve the matter immediately, as without electricity our whole*

businesses are going to be ruined. Every day we are facing huge recurring losses.

xv) *Later on they contacted and finding us in trap, the above named persons stated demanding from us more money or alternatively pressurizing us to purchase the whole building including infrastructure therein.*

xvi) *Through our Ld. Advocate we also sent a notice dated 09.08.2018 under speed post calling upon the above named persons to immediately restore the electric connection with the agreed KVA by making payment to DPL power supply and to complete all other formalities. But after the said notice, the above named persons became more daring and adamant to any how pressurizing us to purchase the whole building and threatening that they would not clear the dues of DPL and stated either to pay them additional money as per their demand or purchase the entire building at the consideration as may be fixed otherwise to leave their premises.*

xvii) *From the fact, circumstances and conduct of the above named persons, it has become clear that from the beginning all the above named persons, had a dishonest common intention to extort huge additional money from us by putting us in trap. Pursuant to their common dishonest intention, all the above named persons, in criminal conspiracy with each other, by their false representation and assurance of providing round the clock uninterrupted electric supply, induced us to take accommodation at their premises on lease in terms of registered sub-lease executed as aforesaid. And for taking the accommodation the above named persons by their false assurances also induced us to part with a sum of Rs. 2,75,00,000/- (Rupees Two Crore Seventy Five Lac only) in the manner as explained above for taking the aforesaid accommodation. Thereafter the above named persons through realized from us reimbursement of electric charges but intentionally failed and neglected to make payment of electric bills to the Durgapur Projects Ltd. and also did not regularize their Bank Guarantee and thereby allowed the electric connection wherefrom supply of electricity was being provided to us to be disconnected by DPL., causing total disruption of our business. Moreover, after putting us in difficult situation, they started pressurizing us for excess payment illegally.*

xviii) *We say that had it been known to us that he above named persons would not keep their assurances and would allow the supply of*

electricity to be disconnected by not making payment to Durgapur Project Ltd., certainly we would not have taken said lease-hold accommodation incurring huge amount of money of Rs. 2,75,00,000/- (Rupees Two Crore Seventy Five Lac only) and we also would not have invested huge amount of money in setting up infrastructure for our business.

xix) *By their willful dishonest, act and omission as stated above, the above named persons caused wrongly loss to ourselves and wrongful gain to themselves to the tune of money incurred for acquiring the accommodation and the amount invested for setting up infrastructure as aforesaid. The above named persons in cool mind and in a pre-planned manner cheated us. The fact and circumstances stated above disclose commission of serious cognizable criminal offence by the above named persons. In the aforesaid circumstance we would request you to take immediate appropriate action against the above named persons in accordance with law, treating this letter of complaint as FIR.*‖

3. **The petitioner's case is that the petitioner's company namely M/s. Neogie Auto (P) Ltd. entered into a sub-lease agreement with the complainant's company namely M/s. Reliance Corporate IT Park Limited** on 21st April, 2015, whereof in a specific clause it was mentioned that in case of any additional requirement above 60 KW, the sub lessee, i.e. the complainant herein shall apply before the appropriate authority.

4. However violating the terms and conditions of the said Registered Deed of Sub-Lease dated 21st April, 2015, the complainant was using 37 KW over and above 60 KW, which is an admitted position by the complainant herein in their letter dated 9th August, 2018. The petitioner by a letter dated 12th September, 2018 requested to stop sharing arrangement of electricity which is actually prohibited under Electricity Act, 2003 and the petitioner offered their Primary Electricity Infrastructure along with other electrical equipments and accessories on outright basis vide email dated 20.06.2015 to facilitate that the complainant get individual main-meter in the name of the complainant's company and in this regard, the petitioner already mailed an estimate of Rs. 44,19,822.67/- to the complainant, but the complainant's official proposed for sub-meter option on the same date vide reply email dated 20.06.2015 and for their own vested interest made illegal arbitrary agreement dated 9th April, 2016.

5. The petitioner further states the petitioner has already paid and settled all dues to DPL in full, under Bank Guarantee No. 0007416BG0000027 by State Bank of India, Durgapur Branch on 08.08.2018, whereas the complainant till the date of filing this instant petition failed to reimburse the petitioner, but the above mentioned facts are not reflected in the complainant's letter dated 09.08.2018 which shows willful dishonesty, act and omission on the part of the complainant.

6. The petitioner states that the entire premise for filing such criminal case by lodging an FIR is false and frivolous and is not legally sustainable in the eyes of law since the entire crux of the criminal case arises out of non-execution of the deed of sub-lease deed dated 21st April, 2015 in favour of the opposite party no. 2 as per the terms of the said agreement and/or disconnection of electricity and specially when the complainant is obliged to perform its part of duty as specifically mentioned in the said agreement. As such, there cannot be any fraud or cheating by the petitioner upon the opposite party no.2 for willful, dishonest, act and omission, which is the main ground in the FIR.

7. As per the case made out by the opposite party no. 2, the said FIR has been initiated in gross abuse of the process of court and gross abuse of the process of law and as such should be quashed by this Hon'ble Court.

8. The petitioner states, that in absence of ingredients in regard to cheating and dishonesty inducing delivery of property by the petitioner, Sections 406/420 has no application in the facts and circumstances of this case.

9. That from the four corners of the main complaint in the FIR it will be evident that there are no cogent allegation against the present petitioner and that the allegations made in the impugned complaint are civil in nature and as such no cognizance can be taken of the same.

10. Hence the revision.

11. By filing an affidavit in opposition the opposite party no.2/complainant has reiterated his case as made out in his written complainant and further relied upon Section 43 of the Indian Penal Code, 1860, which reads as follows:-

Section 43 IPC : *The word —illegal‖ is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be —legally bound to do‖ whatever it is illegal in him to omit.*

12. It is thus stated that, the aforesaid definition of the expression "illegal" would clearly include disputes which furnish ground for civil actions, as after all, the petitioner was legally bound to deposit the electric charges collected from RCITPL to DPL and it was illegal for the petitioner from having omitted to deposit the same.

13. It is further stated that the intention of the accused who induces the victim by way of his fraudulent and dishonest representations is the crux of the postulate and not the nature of the transaction and hence, so far as the instant case is concerned, it is clear that the inducements were given to deceive and persuade RCITPL to part with a sum of Rs. 2.75 crores at the inception, which clearly attracts the essential ingredients of cheating.

14. In reply, the petitioner/accused has reiterated his case and denied the case of the complainant/opposite party no. 2.

15. Written notes of Argument has been filed by both the parties.

16. In the present case the charge sheet has been submitted only in respect of the petitioner Debapratim Neogie for offences punishable under Sections 406/420 IPC.

17. The other accused persons namely Debabrata Neogie has expired and Subrata Neogie has not been charge sheeted.

18. Though the written complaint has been filed against the company and its directors, the FIR has been registered only in respect of the directors. The company has not been made a party/accused in the present case even though the agreement has been executed between the companies.

19. The Hon'ble Supreme Court of India in ***Himanshu -versus- B. Shivamurthy & Another, (2019) 3 SCC 797, on January 17, 2019,*** has held:-

"In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."

20. The Hon'ble Apex Court similarly in ***Aneeta Hada -versus- Godfather Travels And Tours Private Limited, (2012) 5 SCC 661,*** held that ***"in view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself."***

21. The Supreme Court in ***Himanshu vs. B. Shivamurthy & Anr.***

(Supra) has further held:-

*—**11.** In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. **The complaint was lodged only against the appellant without arraigning the company as an accused.***

***12.** The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.*‖

22. In the present case:-

a) The company has not been made an accused, though the agreement has been admittedly executed between the two companies.

b) The petitioner has been made the sole accused as a director of the company who was in-charge of its affairs.

23. The Supreme Court in ***Shiv Kumar Jatia vs. State of NCT of Delhi, Criminal Appeal nos. 1263, 1264 and 1265-1267 of 2019,*** held:-

*—**27.** The liability of the Directors/the controlling authorities of company, in a corporate criminal liability is elaborately considered by this Court in the case of **Sunil Bharti Mittal**. In the aforesaid case, while considering the circumstances when Director/person in*

charge of the affairs of the company can also be prosecuted, when the company is an accused person, this Court has held, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. At the same time it is observed that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless ***the Statute specifically provides for****. It is further held by this Court, an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Further it is also held that an individual can be implicated in those cases where statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*

29. *By applying the ratio laid down by this Court in the case of* ***Sunil Bharti Mittal*** *it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in the case of* ***Maksud Saiyed vs. State of Gujarat & Ors.*** *this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a Company.* ***It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the Statute****. It is further held that Statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.*

30. *In the judgment of this Court in the case of* ***Sharad Kumar Sanghi vs. Sangita Rane*** *while examining the allegations made against the Managing Director of a Company, in which, company*

was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 of Cr.P.C. In the case on hand principally the allegations are made against the first accused-company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is accused no.2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. ***Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are in charge of day to day affairs of the company****. In absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned.*‖

24. In ***Dayle De' Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in Criminal Appeal No. …. of 2021 (arising out of SLP (CRL.) No. 3913 of 2020), decided on October 29, 2021,*** the Supreme Court held:-

*—**24.** In **Sharad Kumar Sanghi v. Sangita Rane,* ***(2015) 12 SCC 781*** *this Court observed that:-*

—11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. in the context of the Negotiable Instruments Act, 1881.

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13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant.‖

***25.** This position was again clarified and reiterated by this Court in **Himanshu v. B. Shivamurthy and Another, (2019) 3 SCC 797.** The relevant portion of the judgment reads thus:*

—6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

7. The first submission on behalf of the appellant is no longer res integra. A decision of a three-Judge Bench of this Court in Aneeta Hada v. Godfather Travels & Tours (P) Ltd. governs the area of dispute. The issue which fell for consideration was whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The threeJudge Bench held thus: (SCC p. 688, para 58)

—58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words —as well as the company‖ appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.‖

In similar terms, the Court further held: (SCC p. 688, para 59)

—59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself.‖

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12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or 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.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.‖

*26. Applying the same proposition of law as laid down in **Aneeta Hada** (supra), this Court in **Hindustan Unilever Limited v. State of Madhya Pradesh, (2020) 10 SCC 751** applying pari materia provision in Prevention of Food Adulteration Act, 1954, held that:*

—23. Clause (a) of sub-section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the company as well as the nominated person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the company, the nominated person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellantnominated person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the nominated person as unsustainable.‖

27. In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.‖

25. Therefore, in the absence of the company being arraigned as an accused, a proceeding only against the petitioner as director, in-charge of the affairs of the company is not maintainable ***(Dayle De' Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., (Supra)).***

26. Admittedly there is a sub-lease agreement dated 17.11.2014 between the companies relating to supply of electricity to the extent of 60KW to be given to the Sub-lease/opposite party/complainant. A Deed of Sublease was executed between the companies on 21.04.2015 to give effect to the said agreement on 09.04.2016, **an Agreement executed between Neogie Auto Pvt. Ltd. and Reliance Corporate IT Park Limited,** to provide additional 37KW of electricity to Reliance. **Clause T of the said agreement provides for an arbitration clause**.

27. The complainant/opposite party without (invoking the Arbitration Clause in the agreement dated 09.04.2016 has initiated the Criminal Complaint.

28. **The following judgments have been relied upon by the petitioner:-**

i) In ***Sarabjit Kaur vs State of Punjab and Anr., (2023) 5 SCC 360, decided on March 1, 2023,*** the Supreme Court held:-

> ***"13.*** *A breach of contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Merely on the allegation of failure to keep up promise will not be enough to initiate criminal proceedings. From the facts available on record, it is evident that Respondent 2 had improved his case ever since the first complaint was filed in which there were no allegations against the appellant rather it was only against the property dealers which was in subsequent complaints that the name of the appellant was mentioned. On the first complaint, the only request was for return of the amount paid by Respondent 2. When the offence was made out on the basis of the first complaint, the second complaint was filed with improved version making allegations against the appellant as well which was not there in the earlier complaint. The entire idea seems to be to convert a civil dispute into criminal and put pressure on the appellant for return of the amount allegedly paid. The criminal courts are not meant to be used for settling scores or pressurise parties to settle civil disputes. Wherever ingredients of criminal offences are made out, criminal courts have to take cognizance. The complaint in question on the basis of which FIR was registered was filed nearly three years after the last date fixed for registration of the sale deed. Allowing the proceedings to continue would be an abuse of process of the court.*‖

ii) In ***M N G Bharateesh Reddy v. Ramesh Ranganathan & Anr., 2022 SCC OnLine SC 1061, decided on August 18, 2022,*** the Supreme Court held:-

*"**13.** The ingredients of the offence of cheating are spelt out in Section 415 of the IPC. Section 415 is extracted below:*

*—**415. Cheating** - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived 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, is said to —cheat‖.*

Explanation - A dishonest concealment of facts is a deception within the meaning of this section.‖

***14.** The ingredients of the offence under Section 415 emerge from a textual reading. Firstly, to constitute cheating, a person must deceive another. Secondly, by doing so the former must induce the person so deceived to (i) deliver any property to any person; or (ii) to consent that any person shall retain any property; or (iii) intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and such an act or omission must cause or be likely to cause damage or harm to that person in body, mind, reputation or property.*

***15.** Section 420 deals with cheating and dishonestly inducing delivery of property. It reads as follows:*

*"**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 capable of converting 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.‖*

***16.** In Hridaya Ranjan Prasad Verma v. State of Bihar, a two-judge bench of this Court interpreted sections 415 and 420 of IPC to hold that fraudulent or dishonest intention is a precondition to constitute the*

offence of cheating. The relevant extract from the judgment reads thus:

***"14.** On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.*

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. ***Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed****.‖*

(emphasis supplied)

***17.** In Dalip Kaur v. Jagnar Singh a two-judge bench of this Court held that a dispute arising out of a breach of contract would not amount to an offence of cheating under section 415 and 420. The relevant extract is as follows:*

—9. The ingredients of Section 420 of the Penal Code are:

—(i) Deception of any persons;

(ii) Fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.‖

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. ***If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code****. (See Ajay Mitra v. State of M.P. [(2003) 3 SCC 11 : 2003 SCC (Cri) 703])*‖

(emphasis supplied)

18. *Applying the above principles, the ingredients of Sections 415 and 420 are not made out in the present case. The grievance of the first respondent arises from the termination of his services at the hospital. The allegations indicate that there was an improper billing in respect of the surgical services which were rendered by the complainant at the hospital. At the most, the allegations allude to a breach of terms of the Consultancy Agreement by the Appellant, which is essentially in the nature of a civil dispute.*

19. *The allegations in the complaint are conspicuous by the absence of any reference to the practice of any deception or dishonest intention on behalf of the Appellant. Likewise, there is no allegation that the complainant was as a consequence induced to deliver any property or to consent that any person shall retain any property or that he was deceived to do or omit to do anything which he would have not done or omitted to do if he was not so deceived. The conspicuous aspect of the complaint which needs to be emphasized is that the ingredients of the offence of cheating are absent in the averments as they stand.*

20. *Section 405 of the IPC deals with criminal breach of trust and reads as follows:*

"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 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‖.‖

21. *The offence of criminal breach of trust contains two ingredients : (i) entrusting any person with property, or with any dominion over property; and (ii) the person entrusted dishonestly misappropriates or converts to his own use that property to the detriment of the person who entrusted it.*

22. *In Anwar Chand Sab Nanadikar v. State of Karnataka a two-judge bench restated the essential ingredients of the offence of criminal breach of trust in the following words:*

"7. *The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (1) entrustment, and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime.‖*

23. *In Vijay Kumar Ghai v. State of West Bengal another two-judge bench held that entrustment of property is pivotal to constitute an offence under section 405 of the IPC. The relevant extract reads as follows:*

"28. *—Entrustment‖ of property under Section 405 of the Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, —in any manner entrusted with property‖. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of —trust‖. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.‖*

24. *None of the ingredients of the offence of criminal breach of trust have been demonstrated on the allegations in the complaint as*

they stand. The first respondent alleges that the Appellant caused breach of trust by issuing grossly irregular bills, which adversely affected his professional fees. However, an alleged breach of the contractual terms does not ipso facto constitute the offence of the criminal breach of trust without there being a clear case of entrustment. No element of entrustment has been prima facie established based on the facts and circumstances of the present matter. Therefore, the ingredients of the offence of criminal breach of trust are ex facie not made out on the basis of the complaint as it stands.‖

iii) In ***Vijay Kumar Ghai & Ors. vs. State of West Bengal & Ors., (2022) 7 SCC 124, decided on March 22, 2022,*** the Supreme Court held:-

"24. *This Court in G. Sagar Suri v. State of U.P. [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636 : 2000 SCC (Cri) 513] observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process, particularly when matters are essentially of civil nature.*

25. *This Court has time and again cautioned about converting purely civil disputes into criminal cases.*

This Court in Indian Oil Corpn. [Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188] noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The Court further observed that : (Indian Oil Corpn. case [Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188] , SCC p. 749, para 13)

—13. … Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.‖

27. *Section 405IPC defines —criminal breach of trust‖ which reads as under:*

*—**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 wilfully suffers any other person so to do, commits —criminal breach of trust‖.‖

The essential ingredients of the offence of criminal breach of trust are:

(1) The accused must be entrusted with the property or with dominion over it,

(2) The person so entrusted must use that property, or;

(3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,

(a) of any direction of law prescribing the mode in which such trust is to be discharged, or;

(b) of any legal contract made touching the discharge of such trust.

28. *—Entrustment‖ of property under Section 405 of the Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, —in any manner entrusted with property‖. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of —trust‖. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.*

29. *The definition in the section does not restrict the property to movables or immovables alone. This Court in R.K. Dalmia v. Delhi Admn. [R.K. Dalmia v. Delhi Admn., (1963) 1 SCR 253 : AIR 1962 SC 1821] held that the word —property‖ is used in the Code in a much wider sense than the expression —movable property‖. There is no good reason to restrict the meaning of the word —property‖ to movable property only when it is used without any qualification in Section 405.*

30. *In Sudhir Shantilal Mehta v. CBI [Sudhir Shantilal Mehta v. CBI, (2009) 8 SCC 1 : (2009) 3 SCC (Cri) 646] it was observed that the act of criminal breach of trust would, inter alia mean using or disposing of the property by a person who is entrusted with or has otherwise dominion thereover. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust.*

31. *Section 415 IPC defines —cheating‖ which reads as under:*

*—**415. Cheating**.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived 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, is said to —cheat‖.‖*

The essential ingredients of the offence of cheating are:

1. *Deception of any person*
2. *(a) Fraudulently or dishonestly inducing that person—*

(i) to deliver any property to any person; or

(ii)to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were no 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.

32. *A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.*

33. *Section 420IPC defines —cheating and dishonestly inducing delivery of property‖ which reads as under:*

*—**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. *Section 420IPC is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.*

35. *To establish the offence of cheating in inducing the delivery of property, the following ingredients need to be proved:*

(i) The representation made by the person was false.

(ii)The accused had prior knowledge that the representation he made was false.

(iii) The accused made false representation with dishonest intention in order to deceive the person to whom it was made.

(iv) The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.

36. *As observed and held by this Court in R.K. Vijayasarathy v. Sudha Seetharam [R.K. Vijayasarathy v. Sudha Seetharam, (2019) 16 SCC 739 : (2020) 2 SCC (Cri) 454] , the ingredients to constitute an offence under Section 420 are as follows:*

(i) a person must commit the offence of cheating under Section 415; and

(ii) the person cheated must be dishonestly induced to:

(a) deliver property to any person; or

(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420IPC.

37. *The following observation made by this Court in Uma Shankar Gopalika v. State of Bihar [Uma Shankar Gopalika v. State of Bihar, (2005) 10 SCC 336 : (2006) 2 SCC (Cri) 49] with almost similar facts and circumstances may be relevant to note at this stage : (SCC pp. 338-39, paras 6-7)*

—6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of the complaint any criminal offence whatsoever is made out much less offences under Sections 420/120-BIPC. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs 4,20,000, they would pay a sum of Rs 2,60,000 to the complainant out of that but the same has never been paid. … It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the consumer forum in relation to the claim of Rs 4,20,000. It is well settled that every

breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case, it has nowhere been stated that at the very inception that there was intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420IPC.

7. In our view petition of complaint does not disclose any criminal offence at all much less any offence either under Section 420 or Section 120-BIPC and the present case is a case of purely civil dispute between the parties for which remedy lies before a civil court by filing a properly constituted suit. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and to prevent the same it was just and expedient for the High Court to quash the same by exercising the powers under Section 482CrPC which it has erroneously refused.‖

38. *There can be no doubt that a mere breach of contract is not in itself a criminal offence and gives rise to the civil liability of damages. However, as held by this Court in Hridaya Ranjan Prasad Verma v. State of Bihar [Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168 : 2000 SCC (Cri) 786] , the distinction between mere breach of contract and cheating, which is criminal offence, is a fine one. While breach of contract cannot give rise to criminal prosecution for cheating, fraudulent or dishonest intention is the basis of the offence of cheating. In the case at hand, complaint filed by Respondent 2 does not disclose dishonest or fraudulent intention of the appellants.*

39. *In Vesa Holdings (P) Ltd. v. State of Kerala [Vesa Holdings (P) Ltd. v. State of Kerala, (2015) 8 SCC 293 : (2015) 3 SCC (Cri) 498] , this Court made the following observation : (SCC pp. 297-98, para 13)*

—13. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case, there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is

a condition precedent for an offence under Section 420IPC. In our view, the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be mala fide or otherwise an abuse of the process of the court. The superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of the court and the High Court committed [Maniprasad v. State of Kerala, 2011 SCC OnLine Ker 4251] an error in refusing to exercise the power under Section 482CrPC to quash the proceedings.‖

40. *Having gone through the complaint/FIR and even the charge-sheet, it cannot be said that the averments in the FIR and the allegations in the complaint against the appellant constitute an offence under Sections 405 and 420IPC, 1860. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making promise being absent, no offence under Section 420IPC can be said to have been made out. In the instant case, there is no material to indicate that the appellants had any mala fide intention against the respondent which is clearly deductible from the MoU dated 20-8-2009 arrived at between the parties.*‖

iv) ***Vivo Communication Device (P) Ltd. v. State of W.B., 2023 SCC OnLine Cal 49 (Para 11, 18, 19, 37).***

v) ***Jully Techi v. State of W.B., 2019 SCC OnLine Cal 588 (Para 5, 6, 17, 18, 22).***

vi) ***Anand Kumar Mohatta & Anr. v. State (NCT of Delhi), Department of Home & Anr., (2019) 11 SCC 706.***

29. The following judgments have been relied upon by the opposite party/complainant:-

i) In ***Soumajit Bag and Anr. vs State of West Bengal & Anr., 2023 SCC OnLine Cal 1577,*** the Court came to the finding that there is prima materials on record making out a criminal offence.

ii) Trisuns Chemical Industry vs Rajesh Agarwal and Ors.,

(1999) 8 SCC 686.

*"**A.** Criminal Procedure Code, 1973 - S. 482 - Quashing of complaint or FIR - Cheating alleged - criminal prosecution, held, cannot be thwarted merely because civil proceedings are also maintainable - Existence of an arbitration clause in the contract for supply of goods between appellant Company and another company, held, not a sufficient ground for quashing the complaint filed by the appellant against the supplier company alleging cheating by supplying inferior goods - Penal Code, 1860, Ss. 415 and 420 – Arbitration – Generally –*

Possibility of cannot thwart criminal proceedings – Arbitrator not competent to adjudge an offence.‖

iii) S.W. Palanitkar and Ors. vs State of Bihar and Anr. (2002)

1 SCC 241.

*"**E.** Penal Code, 1860 – Ss. 405, 406 and 420 – Prosecution under – Agreement providing for remedy of arbitration no bar – Agreement in relation to commercial transaction containing an arbitration clause – Criminal Prosecution for breach of such contract, if such breach even prima facie constituted a criminal offence, held, not barred merely because of the presence of the arbitration clause in the agreement – Criminal Procedure Code, 1973, Ss. 200, 203 and 204 – Arbitration and Conciliation Act, 1996, Ss. 7 and 8.*‖

Rest of the judgment divide as to when an offence under Sections 406/420 IPC is made out.

iv) Rajesh Bajaj vs State NCT of Delhi and Ors., (1999) 3 SCC 259.

"B. Criminal Procedure Code, 1973 – S. 2(d) – "Complaint" – 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…….

It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is

alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence.

(Para 9)

It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions.

(Para 10)

The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold then to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.

(Para 11)

In the present case the High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients under Section 415 IPC. Such an endeavour may be justified during trial, but certainly

not during the stage of investigation. At any rate, it is too premature a stage for the High Court to step in and stall the investigation by declaring that it is a commercial transaction simpliciter wherein no semblance of criminal offence is involved.

(Para 12)

State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335: 1992 SCC (Cri) 426, relied on.‖

v) ***Indian Oil Corpn. Vs NEPC India Ltd. and Ors., (2006) 6 SCC 736.***

"A. ***Criminal Procedure Code, 1973 S. 482 - Petition under S. 482 CrPC for quashing criminal complaint alleging commission of various offences under Penal Code - Disputes arising from breach of contract - Civil remedy available and availed of - Remedy under criminal law, held not barred if the allegations disclose a criminal offence Allegations contained in the complaint, taken on their face value, if, on facts, constituted offences under Penal Code - Maintainability of the petition under S. 482 However, current practice of misuse of criminal process to put undue pressure in civil disputes deprecated - Penal Code, 1860, Ss. 378, 403, 405, 415 and 425."***

vi) ***State of M.P. V. Awadh Kishore Gupta and Ors. : (2004) 1 SCC 691 : Para – 8, 11, 13.***

30. Thus with the judgments relied upon by both sides, the principle guiding such cases remains the same.

31. In the present case admittedly there were agreements between the parties (companies) since the year 2014. The present case has been initiated in 2018.

32. As such it is clear that **the parties had no disputes during their initial period of contract.** Thus there are no materials to support the contention of the opposite party that the petitioner had intention to deceive/cheat right from the inception of the agreement.

33. The case of entrustment also is absent as the transaction between the parties was only on the basis of the agreements, for letting out their premises (the petitioner company's).

34. In ***A. Ayyasamy Vs A. Paramasivam & Ors., AIR 2016 SC 4675, decided on 4th October, 2016,*** the Supreme Court held:-

—The two courts below have preferred to adopt the dicta laid down in N. Radhakrishnan while dismissing the application of the appellant under Section 8 of the Act holding that as there are serious allegations as to fraud and malpractices committed by the appellant in respect of the finances of the partnership firm and the case does not warrant to be tried and decided by the arbitrator and a civil court would be more competent which has the requisite means to decide such complicated matter. ***In this backdrop, it would be appropriate to revisit the law on this aspect before adverting to the question as to whether the approach of the High Court was correct in following the judgment in N. Radhakrishnan in the instant case.***

In this behalf, we have to begin our discussion with the pertinent observation that insofar as the Arbitration and Conciliation Act, 1996 is concerned, it does not make any specific provision excluding any category of disputes terming them to be non-arbitrable. Number of pronouncements have been rendered laying down the scope of judicial intervention, in cases where there is an arbitration clause, with clear and unambiguous message that in such an event judicial intervention would be very limited and minimal. However, the Act contains provisions for challenging the arbitral awards. These provisions are Section 34 and Section 48 of the Act. Section 34(2)(b) and Section 48(2) of the Act, inter alia, provide that an arbitral award may be set aside if the Court finds that the 'subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.' Even when such a provision is interpreted, what is to be shown is that there is a law which makes subject matter of a dispute incapable of settlement by arbitration. The aforesaid position in law has been culled out from the combined readings of Sections 5, 16 and 34 of the Act. When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non-obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such

arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the Court for an adjudication. Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the Court in proceedings under Section 34 of the Act while challenging the arbitral award. The aforesaid scheme of the Act is succinctly brought out in the following discussion by this Court in Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr.[3]:

—3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.

4. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.

5. In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner, who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of

nonexistence of any arbitration agreement in the so-called dispute in question, and on such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.॥ Aforesaid is the position when Arbitral Tribunal is constituted at the instance of one of the parties and other party takes up the position that such proceedings are not valid in law.

What would be the position in case a suit is filed by the plaintiff and in the said suit the defendant files an application under Section 8 of the Act questioning the maintainability of the suit on the ground that parties had agreed to settle the disputes through the means of arbitration having regard to the existence of an arbitration agreement between them?

Obviously, in such a case, the Court is to pronounce upon arbitrability or non-arbitrability of the disputes.

In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non-arbitrable[4]:

(i) *patent, trademarks and copyright;*

(ii) *anti-trust/competition laws;*

(iii) *insolvency/winding up;*

(iv) *bribery/corruption;*

(v) *fraud;*

(vi) *criminal matters.*

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

'Fraud' is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. Fraud can be of diffeent forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. The Black's Law Dictionary defines 'fraud' as a concealment or false representation through a statement or conduct that injures another who relies on it[5]. However, the moot question here which has to be addressed would be as to whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject matter of dispute from arbitration and decision thereof necessary by the civil court.

In Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak[6], serious allegations of fraud were held by the Court to be a sufficient ground for not making a reference to arbitration. Reliance in that regard was placed by the Court on a decision of the Chancery Division in Russell v. Russell[7]. That was a case where a notice for the dissolution of a partnership was issued by one of the partners, upon which the other partner brought an action alleging various charges of fraud, and sought a declaration that the notice of dissolution was void. The partner who was charged with fraud sought reference of the disputes to arbitration. The Court held that in a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration. But where the objection to arbitration is by a party charging the fraud, the Court will not necessarily accede to it and would never do so unless a prima facie case of fraud is proved. The aforesaid judgment was followed by this Court in N. Radhakrishnan while considering the matter under the present Act. In that case, the respondent had instituted a suit against the appellant, upon which the appellant filed an application under Section 8 of the Act. The applicant made serious allegations against the respondents of having committed malpractices in the account books, and manipulation of the finances of the partnership firm. This Court held that such a case cannot be properly dealt with by the arbitrator, and ought to be settled by the Court, through detailed evidence led by both parties.

When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court. The judgment in N. Radhakrishnan does not touch upon this aspect and said decision is rendered after finding that allegations of fraud were of serious nature.

As noted above, in Swiss Timing Ltd. case, single Judge of this Court while dealing with the same issue in an application under Section 11 of the Act treated the judgment in N. Radhakrishnan as per incuriam by referring to the other judgments in the case of P. Anand Gajapathi Raju v. P.V.G. Raju[8] and Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums[9]. Two reasons were given in support which can be found in para 21 of the judgment which makes the following reading:

—21. This judgment was not even brought to the note of the Court in N. Radhakrishnan's case. In my opinion, judgment in N. Radhakrishnan's case is per incuriam on two grounds; Firstly, the judgment in Hindustan Petroleum Corpn. Ltd., though referred has not been distinguished but at the same time is not followed also. The judgment in P. Anand Gajapathi Raju & Ors. Was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provision contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in N. Radhakrishnan does not lay down the correct law and cannot be relied upon.‖ We shall revert to the question of per incuriam at a later stage. At this juncture, we may point out that the issue has been revisited by another Division Bench of this Court in Booz Allen &

Hamilton Inc. v. SBI Home Finance Limited and others[10]. In this case, one of the questions that had arisen for determination was, in the context of Section 8 of the Act, as to whether the subject matter of the suit was 'arbitrable' i.e. capable of being adjudicated by a private forum (Arbitral Tribunal). In this context, the Court carried out detailed discussion on the term
'arbitrability' by pointing out three facets thereof, viz.:

1) whether the disputes are capable of adjudication and settlement by arbitration?

2) whether the disputes are covered by the arbitration agreement?

3) whether the parties have referred the disputes to arbitration?

As we are concerned with the first facet of the arbitrability of dispute, on this aspect the Court pointed out that in those cases where the subject matter falls exclusively within the domain of public fora, viz. the Courts, such disputes would be non-arbitrable and cannot be decided by the Arbitral Tribunal but by the Courts alone. The justification and rationale given for adjudicating such disputes through the process of Courts, i.e. public fora, and not by Arbitral Tribunals, which is a private forum, is given by the court in the following manner:
—35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the

parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and windingup matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.‖ The Law Commission has taken note of the fact that there is divergence of views between the different High Courts where two views have been expressed, one is in favor of the civil court having jurisdiction in cases of serious fraud

and the other view encompasses that even in cases of serious fraud, the Arbitral Tribunal will rule on its own jurisdiction. It may be pertinent here to reproduce the observations of the Law Commission as contained in paragraphs 50 & 51 of the 246th Law Commission Report, which are as under:

——50. The issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue. While it has been held in Bharat Rasiklalv. Gautam Rasiklal, (2012) 2 SCC 144 that when fraud is of such a nature that it vitiates the arbitration agreement, it is for the Court to decide on the validity of the arbitration agreement by determining the issue of fraud, there exists two parallel lines of judgments on the issue of whether an issue of fraud is arbitrable.

In this context, a 2 judge bench of the Supreme Court, while adjudicating on an application under section 8 of the Act, in Radhakrishnan v. Maestro Engineers, 2010 1 SCC 72 held that an issue of 28 fraud is not arbitrable. This decision was ostensibly based on the decision of the three judge bench of the Supreme Court in Abdul Qadir v. Madhav Prabhakar, AIR 1962 SC 406. However, the said 3 judge bench decision (which was based on the finding in Russel v. Russel [1880 14 Ch.D 471]) is only an authority for the proposition that a party against whom an allegation of fraud is made in a public forum, has a right to defend himself in that public forum. Yet, following Radhakrishnan, it appears that issues of fraud are not arbitrable.

51. A distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable (Seelvory Properties and Hotels Private Ltd v. Nusli Neville Wadia, 2011 (2) Arb LR 479 (Bom); CS Ravishankar v. CK Ravishankar, 2011 (6) Kar LJ 417). The Supreme Court in Meguin GMBH v. Nandan Petrochem Ltd., 2007 (5) R.A.J 239 (SC), in the context of an application filed under section 11 has gone ahead and appointed an arbitrator even though issues of fraud were involved. Recently, the Supreme Court in its judgment in Swiss Timing Ltd v. Organising

Committee, Arb. Pet. No. 34/2013 dated

28.05.2014, *in a similar case of exercising jurisdiction under section 11, held that the judgment in*
Radhakrishnan is per incuriam and, therefore, not good law.‖ A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognized that in cases of serious fraud, courts have entertained civil suits. Secondly, it has tried to make a distinction in cases where there are allegations of serious fraud and fraud simplicitor. ***It, thus, follows that those cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simplicitor and such allegations are merely alleged, we are of the opinion it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal.***

Before we apply the aforesaid test to the facts of the present case, a word on the observations in Swiss Timing Ltd.'s case to the effect that judgment of N. Radhakrishnan was per incuriam, is warranted. In fact, we do not have to labour on this aspect as this task is already undertaken by this Court in State of West Bengal & Ors. v. Associated Contractors[11]. It has been clarified in the aforesaid case that Swiss Timings Ltd. was a judgment rendered while dealing with Section 11(6) of the Act and Section 11 essentially confers power on the Chief Judge of India or the Chief Justice of the High Court as a designate to appoint an arbitrator, which power has been exercised by another Hon'ble Judge as a delegate of the Chief Justice. This power of appointment of an arbitrator under Section 11 by the Court, notwithstanding the fact that it has been held in SBP & Co. v. Patel Engineering Ltd. & Anr.[12] as a judicial power, cannot be deemed to have precedential value and, therefore, it cannot be deemed to have overruled the proposition of law laid down in N.Radhakrishnan.

In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations

of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non- arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public for a, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and

meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.

When we apply the aforesaid principles to the facts of this case, we find that the only allegation of fraud that is levelled is that the appellant had signed and issued a cheque of Rs. 10,00,050/- dated 17.06.2010 of 'Hotel Arunagiri' in favour of his son without the knowledge and consent of the other partners i.e. the respondents. It is a mere matter of accounts which can be looked into and found out even by the arbitrator. It does not involve any complex issue. If such a cheque is issued from the hotel account by the appellant in favour of his son, it is easy to prove the same and then the onus is upon the appellant to show as to what was the reason for giving that amount from the partnership firm to his son and he will have to account for the same. Likewise, the allegation of the respondents that daily collections are not deposited in the bank accounts is to be proved by the respondents which is again a matter of accounts."

35. **In the present case, the allegations are not so serious that it cannot be taken care of by an arbitrator if the parties invoke the Arbitration clause. The complainant/opposite party no. 2 also has the avenue of the Civil Courts for the grievances as made out, there being no prima facie materials to show any criminal intent on the part of the petitioner or the company.**

36. The materials on record prima facie do not contain the ingredients required for the offences alleged and as such, continuation of the said proceeding in the present case shall be an abuse of the process of law/court.

37. **CRR 1376 of 2019 is allowed.**

38. The proceeding in Durgapur Police Station Case No. 425 of 2018 under Sections 420 and 406 of the Indian Penal Code, 1860 pending before the Court of the Learned 3rd Chief Judicial Magistrate at Durgapur, Paschim Bardhaman, **is hereby quashed in respect of the petitioner.**

39. All connected applications, if any, stand disposed of.

40. There will be no order as to costs.

41. Interim order, if any, stands vacated.

42. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

43. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.