



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)
KOHIMA BENCH**

Case No. : Crl. Pet./4/2019

ENGINEERING PROJECTS(INDIA) LIMITED AND 4 ORS
A GOVT. OF INDIA ENTERPRISE,
REGISTERED AND CORPORATE OFFICE AT CORE – 3,
SCOPE COMPLEX,7, INSTITUTIONAL AREA, LODHI ROAD,
NEW DELHI,
PIN - 110003,
REPRESENTED BY ITS AUTHORISED ATTORNEY

3: AJAY KUMAR
SENIOR MANAGER(FINANCE)
ENGINEERING PROJECTS(INDIA) LIMITED
CORE - 3 SCOPE COMPLEX 7 INSTITUTIONAL AREA
LODHI ROAD
NEW DELHI
PIN – 110003

4: BISWAJIT BISWAS GROUP GENERAL MANAGER
NORTH EASTERN REGIONAL OFFICE ENGINEERING PROJECTS
(INDIA) LIMITED
4TH FLOOR HINDUSTAN TOWER JAWAHAR NAGAR
NH 37 GUWAHATI PIN - 781022
ASSAM

5: Y.L SINGH DEPUTY GENERAL MANAGER
NORTH EASTERN REGIONAL OFFICE
ENGINEERING PROJECTS(INDIA) LIMITED
4TH FLOOR HINDUSTAN TOWER JAWAHAR NAGAR
NH 37 GUWAHATI PIN - 781022 ASSAM

6: D.D. BANERJEE GENERAL MANAGER
NORTH EASTERN REGIONAL OFFICE ENGINEERING PROJECTS
(INDIA) LIMITED 4TH FLOOR HINDUSTAN TOWER
JAWAHAR NAGAR NH 37 GUWAHATI
PIN - 78102

VERSUS

THE STATE OF NAGALAND AND ANR
KOHIMA

2:M/S J.A BROTHERS REPRESENTED
BY SHRI JAMES AKHAM PROPRIETOR
M/S J.A BROTHERS JINENDRA TOWER OLD DAILY MARKET
DIMAPUR

Advocate for the Petitioner : ANGSHUMAN BORA, SR. ADV

Advocate for the Respondent : GOVT ADV NL

**BEFORE
HONBLE MR JUSTICE KARDAK ETE**

**JUDGMENT AND ORDER ::
[CAV]**

Date : 29-04-2023

Heard Mr. A. Bora, learned Senior counsel for the petitioners assisted by Mr. V. Chowdhury, learned counsel, Mr. P. Goswami, learned counsel and Mr. Pfosekho Pfotte, learned counsel. Also heard Mr. P. Chowdhury, learned counsel for respondent No. 2 and Mr. K. Angami, learned PP for the State of Nagaland.

2. This criminal petition under section 482 of Cr.PC, 1973 has been filed by the petitioners for quashing of the criminal proceedings in Complaint Case- CR Case No.06/2017 filed under Section 190 read with section 200 of the Cr.PC, 1973 against the petitioners and also assailing the impugned order dated 09.04.2019 passed by the learned Chief Judicial Magistrate,

Dimapur, Nagaland in C.R. Case No. 06/2017 whereby the learned Magistrate had taken cognizance of offences under Sections 405/406/409/415/420 IPC read with Sections 34/120B of the IPC and issued process against all the 7(seven) persons arraigned therein as accused including the present petitioners.

3. The petitioner No. 1, Engineering Projects (India) Limited is a company, Government of India Enterprise and the petitioner Nos. 2 to 6 are employees in the company functioning in different capacities. Pending present petition, the petitioner No. 2 & 3 died, Respondent 2 has been struck off by the order dated 04.07.2022. The petitioners have approached this Court jointly as the reliefs sought for are common and identical in nature.

4. The case of the petitioners is that a complaint petition was filed by M/S J.A. Brothers, represented by its proprietor, Sri. James Akham before the Court of learned Chief Judicial Magistrate, Dimapur, Nagaland against the petitioners alleging inter-alia, commission of offences under Sections 405/406/409/415/420 of IPC read with Sections 34/120B of IPC. The learned Chief Judicial Magistrate, Dimapur, Nagaland on receipt of the complaint petition took cognizance on 12.06.2017 and issued process against all the 7 (seven) accused named in the complaint including the present petitioners directing them to appear before the said Court. On receipt of the summons, the petitioners approached this Court being Criminal Petition No. 9(K)/2017 challenging the cognizance order dated 12.06.2017 whereby this Court by order dated 28.02.2019 set aside the impugned order dated 12.06.2017 on the ground of non-

compliance with the provisions of Section 200 and 202 of Cr.PC and remanded back the case to the learned Chief Judicial Magistrate, Dimapur, Nagaland. In compliance with the order of this Court , the learned Chief Judicial Magistrate, Dimapur, Nagaland again took cognizance of the case on 09.04.2019 against the petitioners under Sections 405/406/409/415/420 of IPC read with Sections 34/120B of IPC without compliance of the mandatory provisions under Section 200 Cr.PC.

5. The facts behind the institution of the complaint by the respondent no. 2 are as follows:

(i) That Engineering Projects (India) Limited (hereinafter referred to as Petitioner No. 1.) being desirous of "Construction of Platoon Level- 10 Nos. and Company Level – 03 Nos. of BOP along Indo- Bangladesh Border in the State of Mizoram", on behalf of the Ministry of Home Affairs, Department of Border Management, Government of India, had published a Notice Inviting Tender bearing No. DLI/CON/644/346 dated 14.09.2012 inviting Percentage Rate Tenders in two bids (Techno Commercial & Price Bid) for the construction work of 10 Nos. of Platoon Level Border Out Posts (BOP) and 03 Nos. Company Level of Border Out Posts (BOP) along India – Bangladesh Border in the State of Mizoram at an Estimated Cost of Rs. 65.24/- Crores. The time of completion of the Work was 18 (eighteen) months.

(ii) that the complainant- M/s J.A. Brothers (hereinafter referred to as R2) had participated in the above- referred tender process vide their Tender dated 28.09.2012 and Engineering

Projects (India) Limited, Petitioner No. 1, had accepted the tender of M/s J.A. Brothers, R2, and a Letter of Intent (LoI) dated 19.11.2012 was issued in favour of M/s J.A. Brothers, R2, for the work of Civil Work, Structural Work, Plumbing Work, Electrical Work, Side Development Work, Approach Work, Any other work not specified but required at the Order Value (-) 2.00% of the Estimated Amount put to tender which worked to Rs. 63,93,03,809.48/- as per Bill of Quantities (BoQ) inclusive of all Taxes, Duties, Levies, Octroi, Royalty, Toll Tax, Cess, Labour Cess, Service Tax, etc and all other terms and conditions shall be as per NIT No. DLI/CON/644/346 dated 14.09.2012. It was clearly indicated that total work was to be completed in 18 months from the date of LoI in accordance with the Time Schedule of Completion of Works in the Tender Documents.

(iii) that after compliance of the requisite formalities by M/s J.A. Brothers, R2, as per the Notice Inviting Tender (NIT) and the Letter of Intent(LoI), a Contract Agreement dated 28.12.2012 was executed between Petitioner No.1 and R2. The Contract Agreement, inter-alia, stipulated that time was the essence of the contract and it shall be strictly adhered to. The progress of work shall have to conform to the agreed works schedule/contract documents and Letter of Intent. It was made clear in the General Conditions of Contract and the Additional Conditions of Contract that the Border Security Force is the user of the Border Out Posts (BOPs). It was further mentioned that notwithstanding anything, the handing over of sites for all BOPs might be in parts progressively in phases to the Contractor. The Contractor shall

take up the construction activities on such released fronts in parts/ phase without any reservation whatsoever. But in case of any delay in handing over of the Site to the Contractor, Owner/EPI shall only consider suitable extension of time for the execution of the work. It should be clearly understood that Owner/ EPI shall not consider any other compensation whatsoever towards idleness of Contractor's labour, equipment, etc.

(iv) that the Contractor R2 had failed to mobilize the men and materials while undertaking the construction work of 10 Nos. of Platoon Level Border Out Posts (BOPs) and 03 Nos. Company Level of Border Out Posts (BOPs) along Indo- Bangladesh Border and had repeatedly failed to adhere to the terms and conditions of the Contract after being handed over the sites to them. Despite repeated extension of the deadline, R2 had repeatedly failed to complete the stage-wise targets fixed by Petitioner No. 1 from time to time. Finally, a Meeting was held on 18.10.2016 between the representatives of Petitioner No. 1 and R2 in respect of the works of balance 9 Nos. of Border Out Posts (BOPs) out of the works of 13 Nos. of Border Out Posts (BOPs) originally granted, as the works of 4 Nos. of Border Out Posts(BOPs) were mutually agreed upon and withdrawn from R2, in the meantime, on 21.11.2014. As a very special case Petitioner No. 1 had provisionally extended the time of period of completion of the works to R2 upto May,2017 by fixing month-wise targets upto 31.10.2016, 30.11.2016 and 31.12.2016 respectively with the strict stipulation that the job completion targets fixed for those

periods would be critically reviewed and based on performance of R2 upto 31.12.2016 a Report would be submitted to the Chairman cum Managing Director where a final decision shall be taken as to whether to continue with R2 or not and to terminate and forfeit securities, equipment, etc of R2.

(v) that the progress of works made by R2 was reviewed by the authorities of Petitioner No. 1 from to time vis-a-vis the targets set by the Minutes of Meeting held on 18.10.2016. It was found that R2 had failed to carry out the contractual obligations with due diligence and had failed to maintain the targets committed by them and also failed to mobilize resources in all the areas, thereby, committed breach of the contract. Intimating the above facts, 2 (two) Nos. of Notices were served by Petitioner No. 1 upon R2 on 03.03.2017 and 10.03.2017 respectively under Clause Nos. 72.2 (iii) and (iv) of the General Conditions of Contract to achieve the targets mentioned therein within 7 (seven) days of issuance of the said letters. It was further informed to R2 that on its failure to achieve the targets made therein, Petitioner No. 1 would be constrained to get the works withdrawn/ terminated and get them executed at risk and cost of R2.

(vi) that on receipt of the said notices, R2 made representations before the authorities of Petitioner No. 1 expressing their inabilities to complete the works within the previously stipulated time period under one or another untenable pretext and made prayers to extend the time period. Noticing the lack of earnestness on the part of R2 and no possibility of completion of

the works within the stipulated time period by R2 in any manner, it was decided by the then Chairman cum Managing Director of Petitioner No. 1, arraigned as accused No. 2 in Complaint Case- C.R. Case No. 06/2017, to determine/ cancel the contract of the works of construction of 9 Nos. of Border Out Posts (BoPs) along Indo- Bangladesh Border in the State of Mizoram in full with immediate effect and get the same executed by engaging agencies at risk and costs of R2. It was further decided that upon termination of the contract all bank Guarantees/ securities/ retention money, etc would be forfeited and Petitioner No. 1, Engineering Projects (India) Limited would take possession of the site and unused materials, construction plant and machinery, implements stores, etc lying thereon. The said decision of the then Chairman cum Managing Director of Petitioner No. 1, Engineering Projects (India) Limited was conveyed to the North Eastern Regional Office of Engineering Projects (India) Limited at Guwahati and the North Eastern Regional Office, in turn, had communicated the said decision to R2 vide a Termination Letter dated 20.03.2017 issued under the hand of the petitioner No. 6.

(vii) that since with the decision to terminate the contract, another decision to encash the 4 (four) bank guarantees, submitted by the Contractor towards advance taken and security, was taken, 4 (four) nos. of letters dated 20.03.2017 were addressed to the concerned Branch Manager, Allahabad Bank, Dimapur Branch with the request to make payment of the amounts of the bank guarantees as there was breach of contract on the part of the complainant- R2.

6. On the basis of the statements made in the complaint, the complainant has alleged the commission of breach of trust, cheating, criminal conspiracy, etc.

7. Mr. A. Bora learned Senior counsel submits that on a bare perusal of the complaint it is abundantly clear that the ingredients of the offense of criminal breach of trust, cheating and criminal conspiracy are absolutely absent in the instant case.

8. The learned Senior counsel submits that as the law relating to invocation of bank guarantees is concerned, it is settled position of law that the bank guarantees are payable by the guarantor on demand and when in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. An injunction is not granted to restrain the realization of such a bank guarantee. Only two exceptions have been carved out. The first is when there is a clear fraud and the fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is obliged to honour its

guarantee as long as it is an unconditional and an irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. None of the above exceptions are present in the instant case and it is an admitted case of the complainant- R2 that they had failed to complete the works even within the extended time which Petitioner No. 1, Engineering Projects(India) Limited had granted as a very special case. He submits that it is settled that if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amount under the guarantee. What is relevant are the terms incorporated in the guarantee executed by the bank. The terms and conditions of the bank guarantees in the present case, clearly establishes that the guarantees are unconditional and irrevocable ones. Neither the customer M/s J.A. Brothers, R2, nor the bank- Allahabad Bank, Dimapur Branch, Nagaland can raise any dispute and prevent Petitioner No. 1 from encashing the bank guarantee.

9. The learned Senior counsel submits that a criminal breach of trust is an offence committed by a person to whom the property is entrusted. In the instant case, there is no entrustment of property and the decision to encash the 4(four) bank guarantees was taken only after termination of the contract. Moreover, once the bank guarantees were issued in favour of the petitioner No. 1 then the bank guarantees are no longer the property of the complainant. Criminal breach of trust is defined in

Section 405 of the IPC. The ingredients of an offence of the criminal breach of trust are:

(i) a person should have been entrusted with property or entrusted with dominion over property;

(ii) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so;

(iii) that such misappropriation conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust. Section 409 defines Criminal breach of trust by public servant, or by banker, merchant or agent, as follows, whoever, being in any manner entrusted with property or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

That the offence of cheating is defined in Section 415 of the IPC. The essential ingredients of the offence of "cheating" are as follows:

(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act

or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part of a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

Moreover, it is a settled proposition of law that, if a person is accused of having committed an offence of 'criminal breach of trust', he cannot, on the same facts and in the same breath, be accused to have committed the offence of 'cheating' too.

That criminal conspiracy has been defined in Section 120A of the IPC, 1860 and Section 120B of the IPC provides for punishment for criminal conspiracy. Its ingredients are-

(i) an agreement between two or more person;

(ii) an agreement must relate to doing or causing to be done either (a) an illegal act; (b) an act which is not illegal in itself but is done by illegal means.

Criminal conspiracy is an independent offence. The offence of criminal conspiracy can be said to have been committed only when there is meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. The bald statements in the complaint do not even indicate any kind of any agreement, not to speak any criminal conspiracy against any of the present petitioners. The decision to invoke the bank guarantees submitted by R2 towards security and performance guarantee for the contract awarded to the R2 by Petitioner No. 1 in view of the failure of the complainant R2 to execute the contract works in time does not, by stretch, amount to an offence. These are actions taken as per terms and conditions provided in the contract for non-performance/breach of contract. Save and except raising the untenable grievance of breach of contract which could only be of civil nature, no other valid grievance can be raised by the complainant. Similar is the case in respect of the acts done in furtherance of common intention. By no means, the complainant is permitted to give criminal colour to it.

10. The learned Senior counsel submits that the complaint contains details of the terms of contract entered into between the parties and also the mode and manner in which they were implemented. Allegations have been made in the complaint in relation to execution of the contract. In so far as the present

petitioners are concerned, there is nothing to show to the present petitioner Nos. 2 to 6 who hold different positions in petitioner No. 1 made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of petitioner No. 1 and no allegations has been made that they had done anything personally. Admittedly, the bank guarantees were drawn in the name of petitioner No. 1, even if it is considered the present petitioner nos. 2 to 6 are holding various positions in petitioner No. 1, the present petitioner Nos. 2 to 6 cannot be said to have committed the offences defined under Sections 405 and Section 415 and, consequently, Section 406, Section 409 and Section 420 of the IPC. In absence of any provision laid under the statute, an employee cannot be held to be vicariously liable for any offence committed by the company itself. Statutes indisputably must contain provisions fixing such vicarious liabilities. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefore. 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. Since IPC does not contain any provisions for attaching vicarious liability, the arraignment of the present petitioner Nos. 2 to 6 for alleged commission of offences under the aforesaid sections are absolutely illegal and issuance of process against the present petitioner Nos. 2 to 6. Since the decision to terminate the contract with the R 2 and to invoke the unconditional bank guarantees under reference was not taken by the petitioner Nos. 2 to 6 and in the absence of

any averments as regards their specific roles, if any, made in the complaint, their impleadment as accused is clear abuse of the process and the same is made only with the malafide intention to harass.

11. The learned Senior counsel submits that the final decision to terminate the contract was taken by the then Chairman cum Managing Director of petitioner No. 1. On being conveyed the decision to terminate the contract with the R 2 and consequently, to invoke the unconditional bank guarantees under reference by the then Chairman cum Managing Director of petitioner No. 1, such decision was communicated to the R 2 vide the Termination Notice dated 20.03.2017. On the same date when the decision of termination was communicated, letters in respect of four bank guarantee were also communicated and R2 by making specious plea that the letters dated 20.03.2017 invoking the bank guarantees were received at an early point of time on 20.03.2017, the instant complaint has been instituted with malafide intention.

12. The learned Senior counsel submits that the contract was awarded to the complainant firm, R2 under the Contract Agreement and as per the terms and conditions of the General Conditions of Contract and the Additional Conditions of Contract. The bank guarantees were furnished by the R 2 in respect of the Contract Agreement as regards construction work of 10 Nos. of Platoon Level Border Out Posts (BoPs) and 03 Nos. Company Level of Border Out Posts (BoPs) along Indo-Bangladesh Border in the State of Mizoram and it was

specifically provided therein that in the event of failure on the part of the R 2 to complete the contract work in time, petitioner No. 1 would be at liberty to determine/ terminate the contract and to invoke the bank guarantees. It was made clear vide Notice dated 03.03.2017 and Notice dated 10.03.2017, served by petitioner No. 1 upon the R 2, that in the event the R 2 fail to achieve the targets mentioned therein within 7(seven) days of issuance of the said letters, it would amount to breach of the contract and petitioner No. 1 would be constrained to get the works withdrawn/terminated and get them executed at risk and cost of the R2 and the consequences of invocation of the bank guarantees was inevitable as per the terms and conditions of the contract. He has referred to the relevant part of Clause 72.2 of the general Conditions of Contract. In view of the aforesaid facts he submits that it can by no stretch, be said that the petitioner No.1 by the act of terminating the contract and invoking the bank guarantees, or the petitioner Nos. 2 to 6 by reason of being the employees petitioner No. 1 in regard to the contract agreement, deceived the R 2 in any manner. As the ingredients of criminal breach of trust and cheating as stated in Section 405 and Section 415 are not found, it cannot be said that there was commission of offences under Section 406, Section 409, Section 420 and Section 34 or Section 120B of the IPC.

13. The learned Senior counsel has submitted that the R 2 has assailed the decision to terminate the contract vide Termination Notice dated 20.03.2017 and the invocation of the

bank guarantees under reference vide letters dated 20.03.2017 by a writ petition being WP(C)/40/2017 before the Aizawl Bench and the same was dismissed by the Court on 09.11.2018. In the said writ petition, there was no allegation as regards commission of any criminal breach of trust, cheating and criminal conspiracy against the petitioner company and the petitioner Nos. 2 to 6. Therefore, it is ex-facie apparent that the instant complaint case, which was filed at a much later point of time, has been instituted as an afterthought with the mala fide intention to harass the petitioners with the false and baseless allegations and the same is abuse of process of law. The allegations of common intention and the misappropriation of bank guarantee amount is brought in CR. Case No. 06/2017 as exception to give criminal colour to the CR Case No. 06/2017 although illegal termination of bank guarantee is discussed in the judgment dated 09.11.2018 passed in WP(C)/40/2017. In para 51 of the judgment, the Hon'ble High Court has stated that, "*the remedy of the aggrieved person lies in approaching a competent Civil Court of some other appropriate forum*". It can be safely presumed that it is a civil dispute which needs to be decided by a competent Civil Court and some other appropriate forum stated in the order has some relationship to the word competent used in the order and hence some other appropriate forum has to be some alternative forum to Civil Court like arbitration, etc, but cannot be a Criminal Court as the Hon'ble Court has not stated anything as to criminality of the dispute to be taken up by a Criminal Court.

14. The learned Senior counsel finally submits that the complaint contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made in the complaint in relation to execution of the Contract. In so far as the present petitioners are concerned, no case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show in the impugned order that the present petitioner Nos. 2 to 6 herein who hold different positions in petitioner No. 1 made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of petitioner No. 1. Throughout the complaint petition, no allegation had been made as against any of the present petitioner Nos. 2 to 6 herein that they had done anything personally. Thus it is manifestly clear that Magistrate has failed to apply his mind to the facts of the case and the law applicable thereto. Therefore, it is abundantly clear that the impugned criminal proceedings in Criminal complaint case No. 06/2017 before the learned Chief Judicial Magistrate, Dimapur, Nagaland is manifestly attended with malafide and the proceeding is maliciously instituted with the ulterior motive of abusing the process of the Court. Therefore, the impugned proceedings of the Complaint case being CR. Case No. 06/2017 and the process issued therein against the petitioners vide order dated 09.04.2019 are liable to be set aside and quashed.

15. The learned Senior counsel has placed reliance on the

following judgements of the Hon'ble Apex Court:

(i) ***Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd***, reported in (2021) SCC Online SC 806,

(ii) ***Sunil Bharti Mittal***, reported in (2015) 4 SCC 609,

(iii) ***Maksud Saiyed v. State of Gujarat***, reported in (2008) 5 SCC 668,

(iv) ***Pepsi Foods Ltd v. Special Judicial Magistrate***, reported in (1998) 5 SCC 749,

(v) ***GHCL Employees Stock Option Trust v. India Infoline Ltd***, reported in (2013) 4 SCC 505,

(vi) ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.***, reported in (2007) 8 SCC 110,

(vii) ***Hindustan Construction Co. Ltd v. State of Bihar***, reported in (1999) 8 SCC 436,

(viii) ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd***, reported in (2020) 13 SCC 574,

(ix) ***Vesa Holdings (P) Ltd. v. State of Kerala***, reported in (2015) 8 SCC 293,

(x) ***Sushil Sethi v. State of Arunachal Pradesh***, reported in (2020) 3 SCC 240,

(xi) ***MNG Bharateesh Reddy v. Ramesh Ranganathan***,

reported in (2022) SCC Online SC 1061,

(xii) **Neelu Chopra v. Bharti**, reported in (2009) 10 SCC 184.

16. Refuting the contentions/submissions of the learned Senior Counsel for the petitioners, Mr. P. Chowdhury, learned counsel for the R2 submits that the present complaint is in respect of the fraudulent act of misappropriating the amount of Rs. 6,04,40,057/- (Rupees Six Crores Four Lakhs Forty Thousand and Fifty Seven) which were the value of the 4 bank guarantees by the petitioners furnished by the respondent No.2 towards Mobilization Advances and Security cum Performance Guarantee. The petitioners by the illegal encashment of the 4 bank guarantees which were not even permitted by the GCC, ACC, LOI and Contract Agreement had thereby committed the offence of cheating with the common intention and conspiracy by the petitioners. The said amount was encashed with the common intention to cheat and misappropriate the said amount which the petitioners are not at all entitled under law. All these 4 bank guarantees are Conditional Bank Guarantees and the same could only be encashed in case the conditions prescribed in those bank guarantees are fulfilled and not otherwise. The said conditions prescribed in those bank guarantees were not at all satisfied nor the respondent No. 2 had violated the terms of the contract to enable the petitioners to encash the 4 bank guarantees even before the termination of the said contract. The encashment of these bank guarantees were done by the petitioners with the sole intention to derive illegal financial

benefits without terminating the contract as the contract and the other documents did not permit the termination of the contract. The petitioners had made a vain attempt to project the 4 bank guarantees as Unconditional Bank Guarantees by relying on a particular expression used in one paragraph of the bank guarantees ignoring the other expressions used in the said bank guarantees as if those expressions had no relevance in determining the nature of the 4 bank guarantees.

17. The learned counsel submits that the principal issue which needs to be determined is whether the 4 bank guarantees are Conditional Bank Guarantees or not and the same could only be decided in the trial of the Criminal Complaint before the Chief Judicial Magistrate by leading evidences and could not be agitated in exercise of the jurisdiction under Section 482 of the Cr.PC, 1973. This Hon'ble Court would refuse to exercise the powers and jurisdiction under Section 482 of the Cr.PC, 1973 in case there are provisions of the Cr.PC, 1973 which take care of such situations. In other words, one of the principles laid down by the catena of decisions is that the power under Section 482 Cr.PC, 1973 is to seek enforcement of the provisions of the Cr.PC, 1973 and not to override and nullify the said provisions of the Cr.PC, 1973.

18. The learned counsel for the respondent No. 2 submits that regarding the writ petition being WP(C)/40/2017 filed by the respondent No. 2 at Aizawl Bench of this Court and the complaint filed before the Court of CJM, Dimapur by the respondent No. 2, it is necessary to demarcate the scope of

both these proceedings. The writ petition is concerned with the illegal termination of the contract of the 9 BoPs even prior to the expiry of the time even though time was not the essence of the contract. The 4 bank guarantees furnished by the respondent No. 2 was illegally encashed by the petitioners even prior to the termination of the contract.

19. The learned counsel for R 2 submits that in case the same were encashed by the petitioners, the said amount to be returned to the Allahabad Bank, Dimapur Branch since the respondent No. 2 had regularized the CCA with the Allahabad Bank by depositing the amount of the bank guarantees. It is the further submission of the learned counsel for respondent No. 2 that the respondent No. 2 has also challenged the constitutional validity of the Clause 71 & Clause 72.2(iii) & (iv) of the GCC. The hearing of the said writ petition before the Aizawl Bench of this Court remained inconclusive.

20. Mr. P. Chowdhury, learned counsel for respondent No. 2 has submitted that the principal objection raised in the present petition is the non-compliance of the provision contained in Section 202 of the Cr.PC, 1973 by the learned CJM, Dimapur while issuing summons to the petitioners. To which the learned Senior counsel for the petitioners has objected to and submitted that the challenge is to the criminal proceedings and the consequential orders and also taking cognizance as on the ground, there is no criminality against the petitioners, the termination and the encashment of the bank guarantee if at all is civil in nature. The complaint is nothing but an attempt to

cloak a civil dispute with a criminal nature despite the absence of the ingredients necessary to constitute criminal offence.

21. Mr. P. Chowdhury, learned counsel for the respondent No. 2 submits that the petitioners during the subsistence of the Contract had approached the Allahabad Bank, Kalibari Road at Dimapur on 20.03.2017 at 10:54 AM for the purpose of the illegal encashment of the 4 Conditional Bank Guarantees with a malafide intention and without fulfilling all the prescribed conditions stated in the 4 Conditional Bank Guarantees. The petitioners subsequently had illegally terminated the said contract with the respondent No. 2 unilaterally on 20.03.2017 at 11:56 AM. The termination of the Contract is not an issue in the present Criminal Complaint filed by the respondent No.2 before the CJM, Dimapur. The present complaint is supported by 29 documents and the documents are mostly of the petitioner No. 1 which they had admitted to authenticity of the documents in the present petition. It is clear that the present complaint could be adjudicated basing on documents and for this reason the learned CJM, Dimapur after recording the statements on oath of the complainant, thereafter fulfilling the conditions specified under Section 202 of the Cr.PC, 1973 and after hearing the Advocate for the complainant, summons were issued vide order dated 09.04.2019 which was being put to challenge by the petitioners in this proceeding. He submits that the subject matter of the present Criminal complaint is the criminal intention of illegal encashment of the 4 conditional Bank Guarantees as the

petitioners have done so to cheat the respondent No. 2 by misappropriating the said amount to the account of the petitioner No. 1 which is a juristic person administered and controlled by the petitioner Nos. 2 to 6.

22. Mr. P. Chowdhury, learned counsel submits that the principle of vicarious liability will also be applicable in the case of the other petitioners and other Officers responsible for the works done for the petitioner No. 1. The fact that the said amount of money by virtue of the illegal encashment of the 4 Conditional Bank Guarantees at the instance of the other petitioners which had been transferred to the bank account of the petitioner No. 1 cannot be taken as a defence in the present criminal prosecution. The petitioners did not deny the fact that they were all concerned and took active part in the illegal encashment of the 4 Conditional Bank Guarantees on behalf of the petitioner No. 1. The argument that the money had gone to the bank account of the petitioner No. 1 and not the personal accounts of the petitioner Nos. 2 to 6 could not make these petitioners liable for the criminal offences is not tenable in law. It is the petitioner Nos. 2 to 6 who operate the said bank accounts of the petitioner No. 1 under their signatures, could not turn around and say that it is the petitioner No. 1 who could be charged for the criminal offences for which summons was issued by the learned CJM, Dimapur. The order dated 20.03.2017 issued to the Allahabad Bank, Dimapur Branch was issued by the petitioner No. 6 for the encashment of the 4 Conditional Bank guarantees who is a

Junior Officer of the petitioner No.1. The petitioner No. 6 is not competent to decide and instruct on his own to the Allahabad Bank for the said illegal encashment of the 4 Conditional bank guarantees. It has to be with the approval of the other petitioners who are senior officers than the petitioner No. 6 thereby make them vicariously liable for all the criminal offences committed alongwith the petitioner No. 1. Therefore, it is these officers who represent the petitioner No. 1 and operate the various bank accounts of the petitioner No. 1, therefore, it is a white colour crime committed by these petitioners and it is not essential to define the specific roles of each of the accused persons in the complaint made by the respondent No. 2 and that could not be a ground for invoking the jurisdiction of this Court under Section 482, Cr.PC, 1973. Moreover, Section 34 and Section 120B of the IPC had clearly spelt out the involvements of these petitioners to the commission of the offences stated in the complaint as well as in the Summoning Order passed by the learned CJM, Dimapur. The order dated 09.04.2019 passed by the learned CJM, Dimapur under Section 204 Cr.PC, 1973 issuing summons to the petitioners and the other accused, the learned CJM, Dimapur had depicted the proper application of mind and given justification of issuing summons by applying his mind and also by making an inquiry as envisaged under Section 202 of the Cr.PC, 1973. Therefore, there is no legal infirmity which could be pointed out by the petitioners in the Summoning Order.

23. Mr. P. Chowdhury submits that in the present case,

the disputed question of fact is the determination of the 4 bank guarantees as to whether they are Unconditional or conditional Bank Guarantees and the same is outside the scope of Section 482 of Cr.PC, 1973. Clause 8.0 of the GCC deals with Mobilization Advance, Clause 8.2 deals with the process of repayment of the said advance by the Contractor. Clauses 8.3 and 8.4 deals with the shortage in repayment of the Mobilization and the mode of recovery of the same. In the present case, no such demand nor any such action was initiated by the petitioners against the respondent No.2, as admittedly there is no amount payable by the respondent No. 2 towards Mobilization Advances. In fact, there is no such statement to that effect made by the petitioners in the present case. In the letter dated 20.03.2017 for encashment of the 4 Condition Bank Guarantees, there is no mention of any specific amount due and payable by the respondent No. 2 to the petitioners towards Mobilization Advance. The Advance Bank Guarantee furnished by the respondent No. 2 towards recovery of Mobilization Advance will clearly show that it is a Conditional Bank Guarantee which could be encashed on fulfilment of the conditions specified in the said Conditional Bank Guarantee. Further, the one said Conditional Bank Guarantee had stated that the guarantee was to the extend of Rs. 1,40,64,688/-. For claiming any amount from the said Conditional Bank Guarantee the petitioners had to specify the exact amount payable by the respondent No. 2 to the petitioners which was admittedly not done by the petitioners. Clause 9.0 of the GCC speaks about Security Deposit cum Performance Guarantee. Clause 72.2

speaks of the consequence after the termination of the Contract by the Engineer-in-Chief. According to it, the Security Deposit cum Performance Guarantee could only be forfeited after the termination of the contract of the respondent No. 2 by the petitioners. Admittedly, the letter dated 20.03.2017 did not mention that the said contract was terminated under Clause 72.2 of the GCC. The said Conditional Bank Guarantee had stated that the said Conditional Bank Guarantee Clause 1 stated it to be only against any loss, damages, costs, charges and expenses caused or suffered by the petitioner No.1. Clause 4 of the said bank guarantee states that the extent of loss, damages, costs, charges and expenses caused or suffered on account thereof has to be computed. In the present case, there was no such computation of any loss, damages, costs, charges and expenses caused or suffered by the petitioner No. 1 nor any claim under these heads were made by the petitioners before the respondent No. 2. Even in the termination order there was no statement of the extend of loss, damages, costs, charges and expenses caused or suffered on account thereof had been claimed nor was computed by the petitioners and the said Termination Order was not based on the non-repayment of the Advance Mobilization advanced by the respondent no. 2 to the petitioners as such the said bank guarantees could not have been encashed by the petitioners. Finally, the learned counsel for respondent No. 2 submits that there are two aspects of the entire case of the respondent No. 2, one is the civil nature of the case which are breach of contract and for recovery of the amount of the 4 Conditional bank guarantees,

pending payments of the works done by the respondent No. 2. The other aspect is the Criminal case which arose due to the fraudulent encashment of the 4 Conditional Bank Guarantees which had resulted in cheating, criminal misappropriation of the money belonging to the respondent No. 2 by the petitioners. He submits that the *mensrea* of the criminal offence occurred to the petitioners on 20.03.2017 when they went to the Allahabad Bank, Dimapur Branch with the intention to illegally encash the 4 Conditional bank guarantees without even terminating the contract in a surreptitious manner with the intention to cause financial loss to the respondent No. 2. Since it is a white colour crime, *actus reas* is equally important for the purpose of determining the criminality of the petitioners. Further, the present petition is not legally maintainable as there is no proper authorization to represent the petitioner No. 1 by the petitioner No. 4 and also the petitioner No. 4 could not have represented the other accused petitioners including the petitioner no. 2 who had expired. The learned counsel for the respondent No. 2 submits that there are several disputed questions of facts like determination of the 4 Conditional Bank Guarantees whether Conditional or Unconditional, presentation of the 4 Conditional Bank Guarantees prior to the termination of the contract on 20.03.2017, encashment of the 4 Conditional Bank Guarantees by the petitioners without any authority, filing the present petition without any authority from the petitioner No. 1 to challenge the Summoning Order dated 09.04.2019 passed by the CJM, Dimapur, determination of the time when the offences

had been committed by the petitioners. Therefore, these are the disputed facts raised in the criminal complaint filed by the respondent No. 2 which need to be determined by way of evidence. For such determination, the learned CJM, Dimapur have to invoke the power under Section 156(3) of the Cr.PC, 1973.

24. Responding to the judgments referred to by the Learned Senior Counsel for the petitioners, Mr. P. Chowdhury submits that the said judgments did not enunciate any legal principles that no criminal complaint can be filed on the same facts and are of no help to the petitioners in the present case. The encashment of the 4 Conditional Bank Guarantees by the petitioners illegally is no doubt a fraud committed by the petitioners and irretrievable injury to the respondent No. 2 and the petitioners did not approach this Court with clean hands. Therefore, the present Criminal petition under Section 482 of Cr.PC, 1973 is totally devoid of merit and should be dismissed with exemplary costs.

25. To buttress his points, the learned counsel for the respondent No. 2 has relied on the judgments of the Hon'ble Apex Court which are as follows:

(i) ***Standard Chartered Bank & Anr. V. Directorate of Enforcement & Others*** reported in 2005 (4) SCC 530,

(ii) ***Bhushan Kumar & Anr v. State(NCT of Delhi) & Anr.*** Reported in 2012 (5) SCC 424

(iii) ***Vadolal Panchal v. Ghadgaonkar*** reported in *AIR 1960 SC 1113*,

(iv) ***Anil Saran v. State of Bihar*** reported in *1995 (6) SCC 142*,

(v) ***Hindustan Constuction Co. Ltd. V. State of Bihar & Others*** reported in *1999(8) SCC 436*,

(vi) ***Vinitec Electronics Private Ltd. V. HCL Infosystems Ltd.*** reported in *2008 (1) SCC 544*,

(vii) ***K. Jagdish v. Udaya Kumar G.S.*** reported in *2020 (14) SCC 552*

(viii) ***Chirag M. Pathak & Ors v. Dollyben Kantital Patel & Ors*** reported in *2018 (1) SCC 330*,

(ix) ***State of Uttar Pradesh & Anr. V. Akhil Sharda & Ors*** reported in *2022 (9) Scale 888*.

26. I have considered the submissions advanced by the learned counsel for the parties and also carefully gone through the materials available on record.

27. The points for determination in the present proceeding are whether the necessary ingredients of offences punishable under Section 405, 406 ,409, 415, 420 of IPC read with Section 34/120B of IPC are prima facie made out, whether encashment of 4 Bank Guarantees amounts to mere breach of contract or constitutes an offence of criminal breach of trust or

cheating, And whether the dispute is one of purely civil nature and therefore liable to be set aside.

28. Before determining the points this Court would proceed to consider and appreciate the cases relied on by the learned counsel for the parties.

29. The Hon'ble Supreme Court in the case of ***Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd***, reported in (2021) SCC Online SC 806, observed as follows:

"23. Except the bald statement that accused nos. 2 to 5 and 7 & 8 have conspired with common intention to lay the pipeline within the schedule properties belonging to the complainant, without any lawful authority and right whatsoever and in furtherance they have committed to trespass into the schedule properties of the complainant and demolished the compound wall, there are no other allegations that at that time they were present."

30. The Hon'ble Supreme Court in the case of ***Sunil Bharti Mittal***, reported in (2015) 4 SCC 609, held as under:

" 42. No. Doubt, 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. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, 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. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision."

31. The Hon'ble Supreme Court in the case of ***Maksud Saiyed v. State of Gujarat***, reported in (2008) 5 SCC 668, observed as follows:

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of [Section 156\(3\)](#) or [Section 200](#) of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian [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 the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. 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."

32. The Hon'ble Supreme Court in the case of ***Pepsi Foods Ltd v. Special Judicial Magistrate***, reported in (1998) 5 SCC 749, observed as follows:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

33. The Hon'ble Supreme Court in the case of ***GHCL Employees Stock Option Trust v. India Infoline Ltd***, reported in (2013) 4 SCC 505, which has been relied upon is reproduced herein below:

"19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against

respondent Nos.2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. In the case of [Thermax Ltd. & Ors. vs. K.M. Johny & Ors.](#) **(2011) 13 SCC 412**, while dealing with a similar case, this Court held as under :-

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

34. The Hon'ble Supreme Court in the case of **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.,** reported in (2007) 8 SCC 110, observed as follows:

"10. The law relating to grant or refusal to grant injunction in the matter of invocation of a bank guarantee or a letter of credit is now well settled by a plethora of decisions not only of this Court but also of the different High Courts in India. In **U.P. State Sugar Corpn. Vs. Sumac International Ltd. [(1997) 1 SCC 568]** this Court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a bank guarantee or a letter of credit is that in respect of a bank guarantee or a letter of credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a bank guarantee. It has also been held by this Court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of bank guarantee or letters of credit. However, this Court made two exceptions for grant of an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit: (i) fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself."

35. The Hon'ble Supreme Court in the case of **Hindustan Construction Co. Ltd v. State of Bihar,** reported in (1999) 8 SCC 436, has held as under:

"8. Now bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under

the guarantee, is entitled to realize the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, bank guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the Government "advance", the guarantee is invoked and the amount is recovered from the bank...

9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."

36. The Hon'ble Supreme Court in the case of ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd,*** reported in (2020) 13 SCC 574, observed as follows:

"23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.

26. In our conspired view, once the demand was made in due compliance with bank guarantees, it was open for the appellant Bank determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant Bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities. In

absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee."

37. The Hon'ble Supreme Court in the case of ***Vesa Holdings (P) Ltd. v. State of Kerala***, reported in (2015) 8 SCC 293, held that:

"12. From the decisions cited by the appellant, the settled proposition of law is 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 other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. 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 initial promise being absent, no offence under Section 420 of the Penal Code, 1860 can be said to have been made out."

38. The Hon'ble Supreme Court in the case of ***Sushil Sethi v. State of Arunachal Pradesh***, reported in (2020) 3 SCC 240, observed as follows:

"7.3. In Hira Lal Hari Lal Bhagwati vs. CBI, (2003) 5 SCC 257 : 2003 SCC(Cri) 1121], in para 40, this Court has observed and held as under:

40. It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation.

7.4. In V.Y. Jose v. State of Gujarat, (2009) 3 SCC 78: (2009) 1 SCC 996], it is observed and held by this Court that one of the ingredients of cheating is the existence of fraudulent or dishonest intention of making initial promise or existence thereof, from the very beginning of formation of contract. It is further observed and held that it is one thing to say that a case has been made out for trial and as such criminal proceedings should not be quashed, but it is another thing to say that the a person should undergo a criminal trial despite the fact that no case has been made out at all.

7.6. In Joseph Salvaraj A. v. State of Gujarat, (2011) 7 SCC 59, it is observed and held by this Court that when dispute between the parties constitutes only a civil wrong and not a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.

7.7. In *Inder Mohan Goswami v. State of Uttaranchal* (2007) 12 SCC 1, it is observed and held by this Court that the Court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurize the accused.

That it is stated and submitted that a criminal breach of trust is an offence committed by a person to whom the property is entrusted. In the instant case once the bank guarantees were issued in favour of the Petitioner No. 1 then the bank guarantees are no longer the property of the complainant. Criminal breach of trust is defined in Section 405 of the Indian Penal Code. The ingredients of an offence of the criminal breach of trust are:

- (i) a person should have been entrusted with property, or entrusted with dominion over property;
- (ii) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so;
- (iii) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

39. The Hon'ble Supreme Court in the case of **MNG Bharateesh Reddy v. Ramesh Ranganathan**, reported in (2022) SCC Online SC 1061, held as under:

"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* (2003) SCC 521 – 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* (2022) 7 SCC 124 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."

40. The Hon'ble Supreme Court in the case of **Neelu Chopra v. Bharti**, reported in (2009) 10 SCC 184, observed as follows:

"9. In order to lodge a proper complaint, mere mention of the sections and the language of those sections is not the be all and end all of the matter. What is required to be brought to the notice of the court is the particulars of the offence committed by each and every accuse and the role played by each and every accused in committing of that offence."

41. The Hon'ble Supreme Court in the case of **Standard Chartered Bank & Anr. V. Directorate of Enforcement & Others** reported in 2005 (4) SCC 530, observed as follows:

"30. As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants' pleas is accepted, no company or corporate bodies could be prosecuted for the grave offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under section 56(1) of the FERA Act, 1972, namely those under Section 13 clause (a) of sub-section (1) of Section 18; Section 18-A; clause (a) of sub-section (1) of Section 19; sub-section (2) of the section 44, for which the minimum sentence

of six months imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offence, if these offences involve the amount or value of more than Rs. One lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rs one lakh

31.*As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm of company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.*

41. *The main argument advanced on behalf of the appellant*

*in this behalf is that the statutes creating criminal liability have to be strictly construed. When a statute prescribes punishment of imprisonment and fine it is not permissible for the court to award punishment of fine alone. A corporation being a juristic person cannot be awarded the punishment of imprisonment. The appellants contend that when a statutory provision cannot be complied with as per its strict language, the consequence should be that there can be no prosecution. There is no sense in prosecuting somebody when the punishment cannot be awarded as per the mandate of the statute. The present reference to a large Bench for consideration of this question was made in view of a three-Judge Bench decision of this Court in *Astt. Commr v Velliappa Textiles Ltd.* In the said judgment two learned Judges who formed the majority, took the view favouring the proposition advanced by the appellants, that is, in such a situation a corporation cannot be prosecuted.*

43. *We cannot ignore the fact that prosecution, conviction and sentencing are different stages in a criminal trial. The stage for sentencing is reached only after a verdict of guilt is pronounced after a full-fledged trial. A reference to Section 56 of the Act itself demonstrates this aspect when the last words in the opening part in sub-section(1) are:*

"...upon conviction by a court, be punishable,..."

Thus the section itself refers to two stages, i.e., the stage up to conviction and thereafter the stage of punishment. From this it follows that conviction is not dependent on sentencing. Rather it is the other way round i.e sentencing follows conviction.

45. *What follows from this is that for difficulty in sentencing we need not let the offenders escape prosecution. While laying down criminal liability the statute does not make any distinction between a natural person and corporations. The Criminal Procedure Code dealing with trial of offences contains no provision for exemption of corporations from prosecution if there is difficulty*

in sentencing them as per statue. How can we allow corporations to escape liability on this specious plea? In such a situation the Latin Maxim lex non cogit ad impossibilia is attracted which means law does not compel a man to do that which he cannot possible perform. Broom's Legal Maxims contains several illustrative cases in support of the maxim. This maxim has been referred with approval by this court in State of Rajasthan v. Shamsheer Singh.

46. *In the background the above legal position let us consider Section 56 of FERA. First we must find as to who can be the offender. The key words are "if any person" the meaning of the word Person is to be gathered. This word has not been defined in FERA. The definition of the word Section 3 (42) in the General Clauses Act. Both the definitions are similar and show that the word person includes any company or association or body of persons whether incorporated or not. It follows that the word person here will include corporation, company or association or body of persons whether incorporated or not. This makes it clear that a company or a corporation can be subjected to penal liability under Section 56 of FERA. In fact, during the course of hearing none of the counsel appearing for the appellant argued or suggested that Section 56 does not apply to corporations. Their entire argument to save the corporations from liability under Section 56 is based on the difficulty of levying mandatory punishment of imprisonment on corporation when the amount involved exceeds Rs One lakh. As a matter of fact, it is not disputed that when the amount involved does not exceed one lakh, a corporation or a company can be prosecuted.*

47. *The question which now arises is can the criminal liability created by the statute be made dependent on the sentencing part contained in the same statue. In my view the mandate of the provision is quite clear, that is, the corporations are liable to be prosecuted for offences under FERA as per Section 56 and allowing corporation to escape liability for prosecution on this*

specious plea based on difficulty in sentencing as per the section, will be doing violence to the state, As already notices, principles of strict interpretation of criminal statutes require that the substantive offences created by the statute which does not exclude corporations, should be enforced strictly and anyone rendering itself liable for action under the said section, be it a corporation or a natural person, should face prosecution, conviction and sentence. The charging provision contained in Section 56 lays down the ingredient of the offence in very clear and unambiguous terms. There is no scope for any doubt that corporations are subject to provision of Section 56 of FERA. The statutory mandate is loud and clear. Any interpretation which leads to results contrary to the statutory mandate will be in violation of the statute.

48. *No difficulty arises when we come to the stage of sentencing after a finding of guilt if the amount involved does not exceed Rs one lakh. This difficulty arises only in cases where the amount involved exceeds Rs one lakh. Here it may be worthwhile to mention that the original FERA of 1947 did not prescribe a mandatory punishment of imprisonment and fine and therefore, such a situation was never faced. The 1973 Act sought to make the penal provision more severe and therefore prescribed that in case of high valuation cases punishment by way of imprisonment and fine, both will be necessary. When the statutory intention was to make the graver offences punishable more severely are we justified in holding that in such a situation such absurdity. Such a view in my judgment will neither be just nor fair nor in accordance with the law. By a purely technical process of reasoning corporations should not be allowed to go scot-free. There are several statutes making corporations liable for conviction which prescribe punishment by way of imprisonment as well as fine. An interpretation as suggested on behalf we may point out that Section 48-A of the Monopolies and Restrictive Trade Practices Act, 1969 specifically makes corporations liable for prosecution to*

imprisonment and also fine. In the fact of this specific provision will corporations be allowed to escape liability on some reasoning as is being advanced here on behalf of the appellants? In my view allowing corporations to escape prosecution for offences under Section 56 FERA for the only reason that corporations cannot be punished with imprisonment even though the punishment by way of fine which is also prescribed under the section can be levied on them, will be defeating the statutory mandate regarding bringing to book offenders under FERA. For the view I am taking I find support from the view expressed by the three Judge Bench in the referring order in this case which is ANZ Grindlays Bank Ltd v. Directorate of Enforcement wherein it observed

"Section 56 of the Act provides for different punishments for commission of different offences. It is true that in an offence of this nature a mandatory punishment has been provided for but offences falling under other part of the said section do not call for mandatory imprisonment. Section 56 of the Act covers both cases where an offender can be punished with imprisonment or fine and a mandatory provision of imprisonment and fine. In the event it is held that a case involving graver offence allegedly committed by a company and consequently, the persons who are in charge of the affairs of the company as also the other persons, cannot be proceeded against, only because the company cannot be sentenced to imprisonment, in our opinion, the same would not only lead to reverse discrimination but also go against the legislative intent. The intention of Parliament is to identify the offender and bring him to book.

.... upon taking recourse to the principle of purposive construction as has been held by a three-Judge Bench of this court in Balram Kumawat v Union of India an attempt should be made to make section 56 of the Act workable. It is possible to read down the provisions of Section 56 to the effect that when a company is tried for commission of an offence under the Act, a

judgment of conviction may be passed against it, but having regard to the fact that it is a juristic person, no punishment of mandatory imprisonment can be imposed."

42. The Hon'ble Supreme Court in the case of ***Bhushan Kumar & Anr v. State (NCT of Delhi) & Anr.*** reported in 2012 (5) SCC 424, is reproduced herein below:

"11. In *Chief Enforcement Officer vs. Videocon International Ltd. & Ors.*, (2008) 2 SCC 492, the expression 'cognizance' was explained by this Court as it merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code.

12. A "summons" is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.

13. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section

mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

14. *Time and again it has been stated by this Court that the summoning order under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith*

19. *This being the settled legal position, the order passed by the Magistrate could not be faulted with only on the ground that the summoning order was not a reasoned order."*

43. The Hon'ble Supreme Court in the case of **Vadolal Panchal v. Ghadgaonkar** reported in AIR 1960 SC 1113, held that, *"the Inquiry envisaged under Section 200-203 of the Cr.PC 1973 is for ascertaining whether there is evidence in support of the Complaint so as to justify the issue process and not whether there is sufficient ground for conviction."*

44. The Hon'ble Supreme Court in the case of **Anil Saran v. State of Bihar** reported in 1995 (6) SCC 142, has held that, *"at the time of issuing process under Section 204 of the Cr.PC, 1973, what the court is required to find out is whether there is prima facie case. It need not and should not determine the adequacy of the evidence or the probability of the accused being guilty."*

45. The Hon'ble Supreme Court in the case of **Hindustan Construction Co. Ltd. V. State of Bihar & Others** reported in 1999(8) SCC 436, has held as under:

"13. The Bank, in the above guarantee, no doubt, has used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following:

"...in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilization loan from the contractor under the contract."

14. This condition clearly refers to the original contract between HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "advance mobilization loan", then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilization loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the "advance mobilization loan". It is in these circumstance that the aforesaid clause would operate and the whole of the amount covered by the "mobilization advance" would become payable on demand. The bank guarantee thus could be invoked only in the circumstances referred to in clause 9 where under the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the Bank guarantee."

46. The Hon'ble Supreme Court in the case of **Vinitec Electronics Private Ltd. V. HCL Infosystems Ltd.** reported in 2008 (1) SCC 544, observed as follows:

"16. Shorn of all the embellishments the question that really arises for our consideration is as to whether bank guarantee furnished is an unconditional and irrevocable one or a conditional one? It may not be necessary to refer in detail the terms and conditions of the contract except to analyse the original clause of the bank guarantee dated 10.08.2001 and as well as the subsequent amendment of the relevant clause in the said bank guarantee on 20.08.2001.

19. In the unamended bank guarantee the Bank affirmed

that they are guarantors and responsible on behalf of the supplier upto a total of rs 16,81,238.50/- (rupees sixteen lakhs eighty one thousand two hundred thirty eight and paise fifty only) and had undertaken to pay any sum or sums within that limit upon receipt of written demand from the purchaser within the validity of bank guarantee provided it is established that the supplier be in default for the performance of their warranty obligations under the contract. This makes it abundantly clear that what was furnished was a conditional bank guarantee and the bankers were liable to pay the amounts only upon establishing the fact that the supplier was in default for the performance of their warranty obligations under the contract. But by the subsequent letter dated 20.08.2001, the relevant clause in bank guarantee was amended where under the Bank stood as guarantor and responsible on behalf of the supplier upto a total of Rs 16,81,238.50/- (rupees sixteen lakhs eighty one thousand two hundred thirty eight and paise fifty only) and had undertaken to pay any sum or sums within that limit "upon receipt of written demand from the Company within the validity of this bank guarantee". This amended clause makes it abundantly clear that the Bank had undertaken to pay amounts upto a total of Rs 16,81,238.50/-. The condition that the amounts shall be paid only upon establishing the supplier to be in default for the performance of their warranty obligation under the contrast has been specifically deleted. In our considered opinion, the bank guarantee as amended replacing Para 4 of the original bank guarantee makes the bank guarantee furnished as unconditional one. The bankers are bound to honour and pay the amounts at once upon receipt of written demand from the respondent."

47. The Hon'ble Supreme Court in the case of **K. Jagdish v. Udaya Kumar G.S.** reported in 2020 (14) SCC 552, observed as under:

" 10. *In Rajesh Bajaj v. State (NCT Delhi) this Court observed:*

"10. 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 or 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. One of the illustrations set out under Section 415 of the Penal Code, 1860 is worthy of notice now:

'(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.'

11. The crux of the postulates is the intention of the person who induces the victim of his representation is 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 the payment on receipt of invoices, and that the complainant realized later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.

12. The High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a colander 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."

11. *The aforesaid view was reiterated in Kamaladevi Agarwal v. State of W.B. as under:*

"9. Criminal prosecution cannot be thwarted at the initial stage merely because civil proceedings are also pending. After referring to judgments in State of Haryana v. Bhajan Lal and Rajesh Bajaj v. State (NCT of Delhi) this Court in Trisuns Chemical Industry v. Rajesh Agarwal held:

'7. Time and again this Court has been pointing out that quashing of FIR or a complaint in exercise of the inherent powers of the High Court should be limited to very extreme exceptions.

8. In the last referred case this Court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations:

"10. 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 cheatings would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions”.

12. After referring to various decisions it was finally concluded as under:

17. In view of the preponderance of authorities to the contrary, we are satisfied that the High Court was not justified in quashing the proceedings initiated by the appellant against the respondents. We are also not impressed by the argument that as the civil suit was pending in the case either in law or on the basis of propriety. Criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different court even though higher in status and authority, cannot be made a basis for quashing of the proceedings.”

48. The Hon’ble Supreme Court in the case of **Chirag M. Pathak & Ors v. Dollyben Kantital Patel & Ors** reported in 2018 (1) SCC 330, relied on is reproduced herein below:

“ 17. We find that the High Court had labored hard when it devoted 46 pages in examining the factual issues involved in six cases, appreciated the allegations of FIRs like an appellate court to some extent and then reached to a conclusion that all the six FIRs were based on identical facts and the allegations contained therein overlapped and, therefore, the first FIR alone will survive for investigation whereas remaining five FIRs would not survive and merge in the first FIR.

18. We do not agree with the manner, reasoning and the conclusion arrived at by the High Court in the impugned judgment.

22. In our view, such issues and many more, namely, the nature and manner of conspiracy, whether it was confined to each society or there was one or larger conspiracy, how and in what manner it was accomplished, who were parties to it, who were those persons who secured financial benefits, what was the modus operandi for misappropriation of the funds of each society and how the funds were siphoned off from each society, etc., need detailed investigation with respect to each cooperative society. Once the investigation is complete in relation to each society, the same would form part of the separate charge-sheet for being proved with the aid of evidence in a competent court against each society and persons involved in the same. It is for the court to examine the factual issues arising in every case by appreciating the evidence once adduced in support thereof and

pass appropriate orders in accordance with law.

23. *The High Court, in exercise of its power under Section 482 of the Code, cannot undertake a detailed examination of the facts contained in the FIRs by acting as an appellate court and draw its own conclusion. It is more so when investigation in other societies is not yet complete.*

24. *In our considered opinion, it is only when on reading the FIR, a sheer absurdity in the allegations is noticed and when no prima facie cognizable case is made out on its mere reading due to absurdity in the allegations or when facts is disclosed prima facie cognizable case and also disclose remarkable identity between the two FIRs as if the first FIR is filed second time with no change in allegations then the court may, in appropriate case, consider it proper to quash the second FIR. Such is not the case here.*

26. *We may, at this stage, apposite to mention a three-Judge Bench decision of this Court in State of W.B. vs. Swapan Kumar Guha wherein this Court examined somewhat a similar question in the context of the powers of this Court.*

27. *The learned Chief Justice, Y.V. Chandrachud and A.N. Sen, J., speaking for the Bench in their concurring opinion held as under:*

"66. Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. ...If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence."

"21. ...the condition precedent to the commencement of investigation under Section 157 of the Code is that the FIR must disclose, prima facie, that a cognizable offence has been committed. It is wrong to suppose that a police have an unfettered discretion to commence investigation under Section 157 of the Code. Their right of inquiry is conditioned by the existence of reason to suspect the commission of a cognizable offence prima facie, discloses the commission of such offence. If that condition is satisfied, the investigation must go on... The court has then no power to stop the investigation, for to do so would be to trench upon the unlawful power of the police to investigate into cognizable offences."

49. The Hon'ble Supreme Court in the case of ***State of Uttar Pradesh & Anr. V. Akhil Sharda & Ors*** reported in 2022 (9) Scale 888., has held as under:

" 7. Having gone through the impugned judgment and order passed by this High Court by which the High Court has set aside the criminal proceedings in exercise of powers under Section 482, Cr.P.C., it appears that the High Court has virtually conducted a mini trial, which as such is not permissible at this stage and while deciding the application under Section 482 Cr.P.C. As observed and held by this Court in a catena of decisions no mini trial can be conducted by the High Court in exercise of powers under Section 482 Cr.P.C. jurisdiction and at the stage of deciding the application under Section 482 Cr.P.C., the High Court cannot get into appreciation of evidence of the particular case being considered.

7.1. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and the manner in which the High Court has allowed the petition under Section 482 Cr.P.C., we are of the opinion that the impugned judgment and order passed by this High Court quashing the criminal proceedings is unsustainable. The High Court has exceeded in its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 Cr.P.C.

7.4. Even otherwise, it is required to be noted that the allegation of missing of two trucks was the beginning of investigation and when during the investigation it was alleged that earlier also a number of trucks were missing transporting contraband goods, the FIR should not have been restricted to missing of the two trucks only and return of on the goods thereafter. The High Court has not at all appreciated and/or considered the allegation of the larger conspiracy and that both the FIRs/criminal cases are interconnected and part of the main conspiracy which is very serious if found to be true. We however refrain from making any further observations as at this stage of proceedings as we are at the stage of deciding the application under Section 482 Cr.P.C. only and as the trial of both the cases have yet to take place. Therefore, we refrain from making any further observations, which may affect the case of the either of the parties. Suffice it to say and mention that in the facts and circumstances of the case the High Court has committed a grave/serious error in quashing and setting aside the criminal proceedings arising out of Criminal Case No.5694 of 2019 and Case Crime No.260 of 2018 PS lodged under Section 406, registered at PS – Husainganj, District – Lucknow."

50. On careful appreciation of the above cases, I find that there could have hardly any quarrel to the above propositions of laws as enunciated by the Hon'ble Supreme Court.

51. Having perused the relevant facts and submissions

made by the learned counsel for the parties and also after consideration of the judgments of the Hon'ble Supreme Court, as noted above, in my considered view, the following points require determination in this present petition:

(i) whether the necessary ingredients of offences punishable under Section 405, 406, 409, 415, 420 of IPC read with Section 34/120B of IPC are prima facie made out,

(ii) whether encashment of 4 Conditional Bank Guarantees amounts to mere breach of contract or constitutes an offence of criminal breach of trust or cheating, and

(iii) whether the dispute is one of purely civil nature and therefore liable to be set aside.

52. In order to find out the veracity of submissions made by the parties, it is imperative to examine whether the necessary ingredients of offences which the petitioners had been charged with are prima facie made out. Relevant Sections are reproduced herein below:

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

[Explanation [1]. – A person being an employer [of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit

to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

[Explanation 2. – A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

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

409. Criminal breach of trust by public servant, or by banker, merchant or agent. – Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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".

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

34. Acts done by several persons in furtherance of

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

This section recognises principle of vicarious liability in criminal jurisprudence and it is a rule of evidence and does not create a substantive offence.

120-B. Punishment of criminal conspiracy- (1)

Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

To establish the charge to conspiracy under the Section it is to establish that there was an agreement between the parties for doing of unlawful act.

53. In the present case, the complaint against the petitioners is one which involves commission of offences of criminal breach of trust and cheating. While a criminal breach of trust as postulated under Section 405 of IPC, entails misappropriation or conversion of another's property for one's own use, with dishonest intention, cheating too, and on the other hand an offence defined under section 415 Cr.PC, involves the ingredients of having dishonest or fraudulent intention which is aimed at inducing the other party to deliver

any property to a specific person. Both the sections clearly prescribes "dishonest intention" as a pre condition for even prima facie establishing the commission of said offence. Thus, in order to assess the submissions made by the learned counsel for the parties, the question whether the actions of the petitioners were committed in furtherance of a dishonest or fraudulent scheme is one which requires scrutiny.

54. In the present case, the contested contention between the parties is that the petitioners have encashed 4 numbers of Bank Guarantees. The R2 claims that the petitioners have encashed the 4 Bank Guarantees illegally on 20.03.2017 before the termination of the contract agreement with a malafide intention and to misappropriate and cheat the R 2 which they cannot evade criminal liability on a mere premise that it is a civil dispute. The R2 further contents that the 4 Bank Guarantees are Conditional Bank Guarantees.

55. The petitioners on the other hands contends that the contract agreement was terminated legally on 20.03.2017 after several notices to the respondent and since the 4 Bank Guarantees are unconditional and irrevocable, the petitioners have legally encashed the said bank guarantees as per the terms and conditions of the bank guarantee. The moment situation for invocation of bank guarantees arises, the matter is in between the bank and the petitioners and the R2 has nothing to do with it. The agreement of bank guarantee between the petitioners and the bank is independent of the contract agreement between the petitioners and the R2,

therefore, no criminal liability can be fastened on the petitioners and could at best be a dispute of civil nature.

56. It is noted that the respondent approached this Hon'ble Court before the Aizawl Bench by filing a writ petition being WP(C)/40/2017 on 29.03.2017 assailing the termination order dated 20.03.2017. This Hon'ble Court dismissed the writ petition vide judgment and order dated 09.11.2018 and held that it is well settled principle of law that the interpretation of clause in contract agreement and implementation of such clause cannot be made a subject matter of writ petition and the remedy of the aggrieved person lies in approaching a competent Civil court or some other appropriate forum. At Para 34 of the judgment and order dated 19.11.2018, this Court noticed that admittedly, since the petitioner (herein R2) could not complete the construction of the BoPs, the contract was terminated vide the impugned Termination Letter dated 20.03.2017. Following the termination, the Bank Guarantees were encashed by the respondent No. 2 (Petitioner No. 1 herein) on the same day and the amount credited to the account of the respondent No. 2 by the Bank on 22.03.2017. It is also noted that while challenging the termination letter dated 20.03.2017, the learned counsel for the respondents at para 17 of the said judgment and order submitted that the four bank guarantees were illegally encashed by the respondent No. 2 (petitioners herein) even before the contract agreement was terminated. On the other hand, the learned counsel for the petitioner submits that the letter of Termination was issued on

20.03.2017 and the letter for encashment was written after the Termination Letter was issued on the same day.

The four Bank Guarantees was encashed on 22.03.2017 at the same time the learned Sr. counsel for the petitioners contents that the averments made in the complaint are cut and paste from the above writ petitioner of R2, in other words, averments are exactly same in the complaint petition except mentioning of the above referred Sections, i.e., 405,406,409,415,420 of IPC which is only to cloak the criminal colour of the case which at best is of civil nature.

57. It is also noted that the present complaint has been filed in the month of April, 2017 after the filing of the said writ petition. Therefore, it could be seen that the respondent has filed the present complaint on not being able to obtain the favourable order of this Hon'ble Court in the said writ petition. This Court is of the view that when the matter was pending adjudication before the Hon'ble High Court, the same issue regarding the termination and encashment of bank guarantee, no complaint could have been filed but at the same time, this Court, even not for a moment, is of the view that there could not have been a criminal complaint when the matter is pending before the Hon'ble High Court but only of the view that it could not have been filed in view of the fact that the same issues of termination of the contract and the encashment of 4 Bank Guarantees by the petitioners were under scrutiny of the this High Court.

58. Upon careful examination of the facts and circumstances in the present case, this Court is not able to accept and conclude that the petitioners have deceptively or intentionally encashed the 4 bank guarantees. Whether the 4 Bank Guarantees are conditional or unconditional or irrevocable, it is a purely a disputed question of facts on which it could be determined before the appropriate civil court. However, on the perusal of the said 4 Bank Guarantees, this Court is of the view that these 4 Bank guarantees are unconditional and irrevocable.

59. As held by the Hon'ble Apex Court that although there is perhaps not even an iota of doubt that a singular factual premise can give rise to a dispute which is both, of a civil as well as criminal nature, each of which could be pursued regardless of the other. In the present case, the actual question which requires determination is to whether the relevant ingredients for a criminal case are even prima facie made out. On consideration of the facts of this case, I am of the view that clearly no cogent case regarding the criminal breach of trust or cheating is made out.

60. The dispute between the parties could at best be termed as one involving a mere breach of agreement or whether the Bank Guarantees is conditional or unconditional or the 4 bank guarantees have been encashed as per terms of the Bank Guarantee, which in my view is purely of civil nature.

61. On examination of the entire facts and

circumstances, this Court is of the view that the averments in the complaint, read on its face, does not disclose the ingredients necessary to constitute offences under Section 405,406,409,415, 420 read with Section 34, 120B of IPC.

62. The encashment of 4 Bank Guarantees by the petitioners rightly or wrongly is at best a mere breach of contract which does not constitute an offence of criminal breach of trust or cheating. The entire dispute including whether conditional or unconditional bank guarantee between the parties is purely of civil nature. Accordingly, this Court is of the view that the Criminal proceedings against the petitioner is an abuse of the process of Court.

63. In the case of ***Hridaya Ranjan Prasad Verma & Ors. vs. State of Bihar & Anr*** reported in (2000) 4 SCC 168, the Hon'ble Supreme Court has observed, "*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 to 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..*"

64. By applying the above case to the present factual matrix the key ingredients of having dishonest or fraudulent intention under Section 405, 406, 409, 420 is not made out, the present case in my opinion is one of those cases which warrants invoking of powers under Section 482 of CrPC, 1973.

65. In the case of ***M/s Indian Oil Corporation v. M/s NEPC India Ltd & Ors***, reported in (2006) 6 SCC 736, the Hon'ble Apex Court held as under:

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. ...There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. 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.

"14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law."

66. This Court is not oblivious of the dictum in the case of ***G. Sagar Suri and Anr. V. State of UP and Ors*** reported in (2002) 2 SCC 636, the Hon'ble Apex Court has observed that *"Jurisdiction under Section 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing*

process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

67. In the landmark judgment of ***State of Haryana & Ors v. Bhajan Lal and Ors***, reported in (1992) Supp (1) SCC 335, the Hon'ble Supreme Court has laid down the following categories of instances wherein inherent powers under Section 482 of CrPC can be exercised. They are:-

- "(1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;*
- (2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a magistrate within the purview of Section 155(2) of the Code;*
- (3) where the uncontroverted allegations made in the FIR or 'complaint and evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;*
- (4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;*
- (5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;*
- (6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the*

grievance of the aggrieved party;

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

68. On perusal of the above law laid down by the Hon'ble Apex Court and applying it on the present case, it can be concluded that the present case warrants intervention of this Court by exercising powers under Section 482 of CrPC, I find that there has been attempt to stretch the contours of civil dispute and essentially impart a criminal colour to it. The Hon'ble Supreme Court has number of times expressed its disapproval for applying criminal colour to civil dispute, which has been made merely to take advantage of relatively quick relief granted in contents of civil dispute which is nothing but an abuse of the process of law which must be discouraged in its entirety.

69. In view of the above discussions on the facts and circumstances of the present case and law as laid down by the Hon'ble Apex Court, I am of the considered view that the complaint case being CR. Case No. 06/2017 pending before the learned Court of CJM, Dimapur, Nagaland and order dated 09.04.2019 taking cognisance of the offences under Sections 405, 406, 409, 415 and 420 IPC read with sections 34/120B of IPC and issuing process against the petitioners is nothing but attempt to impart criminal colour to a civil dispute. Accordingly, the CR. Case No. 06/2017 and the impugned order dated 09.04.2019 against the petitioners for offences under Section 405, 406, 409, 415 and 420 read with section 34/120B is set aside and quashed.

70. The Criminal Petition No. 4/2019 is accordingly
allowed.

Returned the LCR

Sd/-
JUDGE

Comparing Assistant