

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

Criminal Petition Nos.16240 of 2014 and 36 of 2015

Criminal Petition Nos.16240 of 2014:

Between:

Dr. Raman Srikanth.

....

Petitioner/A.3

And

State of Telangana,
Rep. by Public Prosecutor
Through KPHB Colony P.S,
and another.

....

Respondents

Criminal Petition No.36 of 2015:

Between:

Thiess Minecs India Pvt. Ltd.
Rep. by its Authorised signatory
Mr. Subhashish Datta.

....

Petitioner/A.1

And

State, through KPHB Colony PS,
Rep. by Public Prosecutor
and another.

....

Respondents

DATE OF JUDGMENT PRONOUNCED: 24.07.2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No

3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes /
No

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**
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! Counsel for Petitioner : Sri P. Vikram
^ Counsel for Respondent No.1 : Public Prosecutor for
Telangana
^ Counsel for Respondent No.2 : Sri N. Ashwin Kumar

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! Counsel for Petitioner : Sri M. Ravindranath
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^ Counsel for Respondent No.1 : Public Prosecutor for

Telangana

^ Counsel for Respondent No.2 : Sri N. Ashwin Kumar

< Gist:

> Head Note:

? Cases referred:

- 1) (2006) 6 SCC 736
- 2) (2007) 14 SCC 776
- 3) 2014) 10 SCC 663
- 4) (2008) 5 SCC 668
- 5) (2013) 10 SCC 705
- 6) 2008(2) ALT 541
- 7) 2015 Cr.L.J. 2396
- 8) AIR 1990 SC 1605 = (1990) 2 SCC 437
- 9) (2013) 2 SCC 801
- 10) (2001) 8 SCC 645
- 11) (1999) 8 SCC 686
- 12) (2014) 6 SCC 677
- 13) (2010) 8 SCC 206
- 14) 1992 Supp (1) SCC 335 = AIR 1992 SC 604

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

CRIMINAL PETITION Nos.16240 of 2014 & 36 of 2015

Common Order:

_____ Criminal Petition Nos.36 of 2015 and 16240 of 2014 are filed by Accused Nos.1 and 3 respectively under Section 482 Cr.P.C. to quash the proceedings in Cr.No.274 of 2014 of KPHB Colony PS, Cyberabad District.

2) _____ The facts which led to file the instant petitions are briefly thus:

a) _____ The private complaint filed by the complainant was forwarded by learned XIX Metropolitan Magistrate, Cyberabad, Miyapur to KPHB PS, on the basis of which the police registered Cr.No.274 of 2014 under Section 420 r/w 34 IPC against A1 to

A3.

b) The complainant—Company engaged in construction, contract coal mining and other infrastructural development activities. Whereas A1—Company is a joint venture between Thiess Maurisus PTY Limited and Minecs Finvest Private Limited which undertakes mining and related activities in India. A2 and A3 are the Directors of A1—Company.

c) In the year 2006, National Thermal Power Corporation (NTPC) invited bids for taking out mining operations at Pakri Barwadih Coal Block Project (PB Project) owned by it. A1 participated in the tender process and was short- listed at the qualification stage. In February, 2008 NTPC invited A1 to submit its price bid by 03.07.2008.

d) As per complainant, M/s.PTY Limited is a Company incorporated in Australia and a majority shareholder in A1—Company and it had no experience in mining operation in India. So, A1 was looking for a local partner to assist it in bidding process and also to undertake removal of OB/IB in the event A1 —Company bagging the PB contract from NTPC. After satisfying with the competency and capabilities of the complainant in the mining field, A1 entered into a Memorandum of Understanding (MOU) with complainant on 02.07.2008 with a clear and express agreement that a formal sub-contract would be given shape if the NTPC project was awarded to A1—Company. The complainant was induced to enter into MOU dated 02.07.2008 on the express

promise that A1 would formalise sub-contract in favour of complainant to carryout 67% of the total waste removal work for an estimated period of 22 years. Basing on the said promise and inducement, complainant even before execution of MOU, has disclosed valuable information on specific issues like coal mining in India, location of coal, mining, pricing, bidding and bid submission of process, issues faced in coal mining and security aspects etc. to enable A1—Company to effectively participate in bidding process.

e) A1 made use of the information relating to preparation and finalisation of price bid proposals to NTPC and also in arriving at the base price for waste and coal removal. A1 got hold of ways and means of dealing with hostile local communities through the complainant. That apart, A1 could also assess possible risks that would arise due to delays in land acquisition by NTPC. Thus, A1 was benefited in all respects by the information and assistance provided by complainant. Ever since entering into MOU, the complainant deployed resources at huge cost to assist A1 in the process of finance bidding and other associated process and from June, 2008 onwards the complainant had built a large team of people for execution of waste removal work, hired senior and retired executives from reputed coal mining companies in India and also engaged the services of team of mining engineers, geologists, drilling engineers, electrical and mechanical engineers, industrial engineers, HR personnel, finance and accountants etc. For this it incurred a huge cost of about 250

millions. However, A1 never had any intention right from the beginning to award sub-contract after grant of head contract from NTPC as it can get better price than MOU price.

3) A1 submitted its price bid proposal to NTPC on 03.07.2008 i.e. one day after entering into MOU with the complainant. The NTPC awarded the head contract to A1—Company by way of Letter of Award (LOA) which was possible on account of exclusive efforts and services of complainant. It is from then the devious intention of A1 became obvious. Till then the complainant was made to believe by A1 that there were no further substantial terms of the MOU which required either a fresh look or re-negotiation but however, after getting LOA in its favour, A1 started sending e-mails through A3 as if viability of entire project from A1's point of view required a new look. In view of deceitful intention of A1, A2 surreptitiously receded into the back ground and A3 on the instructions of A1 and A2 came to forefront and started giving a decent burial to MOU and proposed sub-contract arrangement. Due to fraudulent activities of accused, the complainant suffered a wrongful loss about Rs.185,09,98,893/-. The accused ultimately stopped to send e-mails to the complainant for awarding sub-contract.

The complainant filed a claim before the Arbitral Tribunal at Singapore and by the time of filing compliant the proceedings before the Tribunal were pending.

Hence the complaint.

4) The contentions of accused are thus:

(i) A bare perusal of complaint will not disclose commission of any criminal offence much less cheating, criminal breach of trust etc. and so, continuation of the investigation is sheer abuse of process of law and hence FIR is to be quashed.

(ii) Even assuming the FIR allegations are true, they at best disclose a civil dispute arising out of MOU and therefore, if the complainant felt aggrieved, it has to resort to civil laws for vindication of its rights. In fact, the complainant resorted to Arbitration Tribunal and Tribunal passed an award on 20.11.2014 holding that MOU dated 02.07.2008 was not a valid and binding contract between the parties. The Tribunal was of the view that MOU was merely an expression of party's intention to enter into a contract with the other in future but does not intend to bind the other party to enter into contract. The Tribunal further felt that execution of further contract is not a mere formality but further negotiations for formal contract were necessary. Thus, the Tribunal held that MOU is not capable of specific performance.

(iii) MOU which was entered into by the parties on 02.07.2008 was extended from time to time and ultimately it was expired and lapsed due to efflux of time on 31.01.2011. So, by the time of filing the complaint

before the learned Magistrate no MOU was in subsistence and hence the complainant has no legal right to contend that formal sub-contract was not executed in its favour in terms of said extinct MOU. However, suppressing these facts the complainant filed the complaint with ulterior motive.

(iv) Learned Magistrate's mechanical and summary way of referring the complaint to police under Section 156(3) Cr.P.C. with a direction to investigate the matter without passing a speaking and reasoned order that *prima facie* a cognizable offence was made out from the complaint allegations and he was satisfied to that effect, is against guidelines given by the Apex Court in a number of decisions.

(v) Sofaras petitioner—A3 in Crl.P.No.16240 of 2014 is concerned, admittedly earlier he filed Crl.P.No.6192 of 2014 seeking to quash the present FIR. After enquiry, learned Judge dismissed the petition and observed that it would be appropriate to permit the police to proceed with the investigation and decide the question threadbare. However, by that time the Arbitral Tribunal which was adjudicating the dispute between the parties, has not passed its final award and claim petition was pending before it by then. In Crl.P.No.6192 of 2014 an observation was made by the learned Judge that mere pendency of Arbitral proceedings cannot restrain the

complainant from proceeding against the accused by invoking due process of law. Accordingly, Crl.P.No.6192 of 2014 was dismissed on 07.11.2014. Subsequently, Arbitral Tribunal has passed its final award on 20.11.2014 whereunder it has dismissed the claim of the present complainant after making a threadbare analysis into the contentions raised by the complainant. In view of a crucial subsequent development i.e. passing of Arbitral award, the second petition of A3 for quashment of FIR 274 of 2014 is maintainable.

Pettitioner/A3's role is concerned, he was not associated with A1's Company in any manner when the MOU was negotiated and entered into by complainant and A1. The MOU was signed on 02.07.2008 and LOA was issued in favour of A1 on 30.11.2010 on which dates A3 was not associated with A1's Company and he was appointed as non-Executive Director only on 03.12.2010 and hence it cannot be contended for a moment that he had made dishonest inducement to the complainant either prior to or on the date of MOU i.e. 02.07.2008. Hence, A3 cannot be attributed to have involved in the alleged offence.

Thus, the petitioners/accused prayed to quash the FIR.

5) Heard arguments of Sri C.V.Mohan Reddy, learned senior counsel appearing for Mr.M.Ravindranath Reddy, learned counsel for A1; Sri D.Prakash Reddy, learned senior counsel appearing for Mr. P.Vikram, learned counsel for A3;

learned Public Prosecutor for Telangana for R1 and Sri D.V.Seetaram Murthy, learned senior counsel appearing for Mr.N.Ashwini Kumar for R2/complainant.

6a) Sri C.V.Mohan Reddy, learned senior counsel on behalf of A1 firstly argued that if the breach of a civil contract apart from giving rise to civil remedy, also gives sprout to criminal offence, aggrieved person may take recourse under criminal law also parallel to civil proceedings and there is no demur in it. On this aspect he also submitted a decision reported in **Indian Oil Corporation v. NEPC India Ltd.**^[1]. However in this case, he argued, complaint allegations which are based on MOU dated 02.07.2008, even if held true, disclose only a breach of civil contract for which the remedy for the complainant lies before a civil court but they do not disclose the commission of any criminal offence much less an offence under Section 420 IPC.

b) Secondly, he argued that the peculiarity in this case is that the MOU, which the complainant heavily relied upon to level criminal charge against the accused, itself was held to be invalid and unenforceable by Arbitral Tribunal. Hence, basing on the said unenforceable MOU, the complainant cannot lodge complaint alleging the commission of cheating by the accused. In this context, learned senior counsel argued that while appreciating the complaint allegations to cull out whether they disclose *prima facie* commission of criminal offence, this court can and has to necessarily look into the connected documents

like series of e-mails and arbitration award. To buttress his argument that courts can look into the connected record he relied upon the decision of the Apex Court reported in ***All Cargo Movers (India) Private Limited v. Dhanesh Badarmal Jain***^[2].

c) Thirdly, he argued that as per the terms of MOU the award passed by the Arbitral Tribunal is final and binding on both the parties and still if the complainant feels aggrieved, it can challenge the award before an appropriate forum but it cannot convert the civil proceedings into criminal proceedings to harass and intimidate the petitioners. He relied upon the decision of the Apex Court reported in ***Binod Kumar v. State of Bihar***^[3] to canvass that civil liability cannot be converted to criminal liability in abuse of process of court.

d) Finally, referring the Magistrate's order, he argued that learned Magistrate forwarded the complaint under Section 156(3) Cr.P.C. in a most mechanical and summary way without making any speaking order mentioning that *prima facie* cognizable offence was made out which necessitate the police investigation. He argued, such a mere serving of a postman job of forwarding the complaint to police will not reflect the application of mind by the Magistrate to the complaint allegations and hence FIR has to be quashed for this reason also. In this regard, he relied upon the following decisions.

1. ***Maksud Saiyed v. State of Gujarat***^[4]

2. ***Anil Kumar v. M.K.Aiyappa***^[5]

3. D.K.Pattanaik v. SHO, Nallabelly PS^[6]

4. Priyanka Srivastava v. State of U.P.^[7]

7) Learned senior counsel, Sri D.Prakash Reddy in his address for A3, while adopting the arguments of A1, additionally submitted that the dismissal of earlier quash petition in Crl.P.No.6192 of 2014 by this Court will not pose hurdle for the present application in view of the fact that by then the arbitration award was not passed and now the award was passed holding that MOU was not enforceable which observation crumbles the very foundation of criminal complaint. He thus submitted that due to this vital change in circumstances second quash petition is maintainable. On this aspect he relied upon the decision reported in ***Mosst. Simrikhia v. Smt. Dolley Mukherjee @ Smt. Chabbi Mukherjee***^[8]. He further argued that as mentioned in his petition, A3 was not in the scene during the relevant period and as such he cannot be attributed to have committed any offence.

8 a) Per contra, severely opposing the quash petitions, learned senior counsel D.V.Sitharam Murthy appearing for complainant, firstly argued that the High Court under its inherent power shall not stifle the investigation, particularly when the complaint averments disclose the commission of criminal offence besides an actionable civil wrong. Expatiating, he argued, certain criminal offences like cheating, criminal breach of trust, forgery etc. imbibe in them civil wrongs also. When facts disclose both civil and criminal remedies, the choice rests on the aggrieved to choose either both, one or none and Courts for that matter cannot, nay,

shall not smother his efforts to vindicate his rights. He relied on the following decisions to buttress the point that merely because the facts in the complaint reveal an element of civil dispute Courts shall not snub the criminal prosecution.

1. ***Arun Bhandari v. State of U.P.***^[9]

2. ***M.Krishnan v. Vijay Singh***^[10]

b) He argued, the complaint allegations vivify that pursuant to MOU and upon the inducement of accused, the complainant—Company made vast preparatory arrangements by expending time, resources, man-power and money to furnish valuable and crucial information to help A1 acclimatize itself with the local conditions and to make a safe bid to secure LOA but after that, A1 eased out the complainant on one hand and caused wrongful loss of money and resources on the other and this betrayal on the part of accused is nothing but cheating and therefore, the complaint allegations amply picturize commission of criminal offence, the truth or otherwise of which needs exhumed only after a threadbare investigation by police agency.

c) Secondly, he argued that when the facts sprout to civil and criminal remedies, pendency or decision in one is not a hurdle for continuation of the other proceedings. The civil and criminal proceedings run on different principles of law. Thus, the pendency or finalisation of arbitration proceedings is not an obstacle in this case to continue investigation because the award of the Arbitral Tribunal has no binding force in criminal proceedings. On this point he relied upon the following decisions.

1. *Trisuns Chemical Industry v. Rajesh Agarwal*^[11]
2. *Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee*^[12]

d) Nextly, defending the action of the learned Magistrate in referring the complaint under Section 156(3) Cr.P.C. without passing an elaborate speaking order, learned senior counsel argued that the Magistrate has power under Section 156(3) Cr.P.C. to refer the complaint to the police for investigation in pre-cognizable stage and for that purpose he need not pass any elaborate speaking order. Suffice if he is satisfied that *prima facie* a cognizable offence was committed which requires investigation by the police. On this aspect he relied upon the judgment of the Apex Court reported in ***Srinivas Gundluri v. SEPCO Electric Power Construction Corporation***^[13]

He further submitted that even assuming that Magistrate is bound to pass such a speaking order and he failed to do so, by that count alone FIR cannot be quashed if the contents in the FIR disclose all the necessary ingredients of criminal offence.

f) Finally, learned senior counsel argued that earlier quash petition—Crl.P.No.6192 of 2014 filed by A3 was dismissed by this Court holding that specific overtacts were attributed against A3 and to find out the truth in them, investigation has to be conducted. It was also observed, mere pendency of arbitral proceedings will not constrain the complainant in proceeding against accused. He thus argued, in view of such categorical observation of this Court, the second petition for quashment of

proceedings is not maintainable. He reiterated that Arbitral Award will have no impact on the criminal proceedings. To buttress his argument he relied upon **Mosst. Simrikhia**'s case (8 supra). He thus prayed to dismiss the petitions.

9) In the light of above rival submissions, the point for determination is:

“Whether petitioners deserve quashment of proceedings in FIR No.274 of 2014”

10) **POINT:** Law is no more *res integra* on the point if the complaint allegations reveal both criminal offence and actionable civil wrong, aggrieved party can initiate both or either of the actions.

a) In **Indian Oil Corporation**'s case (1 supra) cited by petitioners, one of the questions engaged with the Apex Court was:

“Whether existence or availment of civil remedy in respect of disputes arising from breach of contract, bars remedy under criminal law?”

While answering that pursuing of civil remedy will not bar criminal proceedings and on that ground the criminal proceedings cannot be quashed, Apex Court referred various decisions including the one **State of Haryana v. Bhajanlal**^[14] and codified the principles rendered in those decisions, of which the pertinent one is as follows:

“(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal

offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. **The test is whether the allegations in the complaint disclose a criminal offence or not.**” (Emphasis supplied).

b) In **Arun Bhandari’s** case (9 supra) cited by respondents also the Apex Court reiterated the same point and observed as under:

“At this stage, we may usefully note that some times a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes”

c) In **M.Krishnan’s** case (10 supra) the Apex Court again observed thus:

“6. Where factual foundations for the offence have been laid down in the complaint, the High Court should not hasten to quash criminal proceedings merely on the premise that one or two ingredients have not been stated with the details or that the facts narrated the existence of commercial of money transaction between the parties.”

So from the above it is clear, if the complaint allegations besides exposing civil dispute, also explode the criminal offence, the High Court shall not stifle the criminal prosecution. It is thus to be seen, whether the allegations in the FIR reveal purely a civil dispute or commission of any criminal offence.

11 a) Briefly stating the complaint allegations reveal — in 2006

NTPC invited bids for mining development and operations at PB block and after sieving through tender process it short-listed few companies of which A1—Company is one among and it was asked to submit its price bid by 03.07.1998. Since A1—Thiess Maurisus PTY Limited is an Australian Mining Company and alien to Indian conditions, it appointed the complainant—Company as its local partner to assist it in bidding process and also to undertake removal of OB/IB operations in coal mine in the event head contract was awarded to A1. After series of meetings and visits by A2 to the complainant project sites and satisfying with its competency, MOU was entered into between A1 and complainant on 02.07.2008 with a clear and express agreement that formal sub-contract will be given to the complainant if the NTPC awards head contract to A1. The MOU reads that RDL (complainant) shall utilise its expertise to ensure that TML (A1) will be able to optimise mining fee for MT. It was further agreed that TML would award a sub-contract to RDL or its nominee to the extent of 67% removal of OB/IB for an estimated 22 years of the contract and balance 33% would be done by TML. The said contract would be given at Rs.75.41 per CuM of OB/IB removal for an average lead of 3.0 Km (exclusive of drilling). Then, some other conditions such as the method and manner of expending the amounts jointly, duration of MOU i.e. for 12 months and the course to be followed in case another company other than TML was awarded contract were incorporated in the MOU. It is an admitted fact that MOU was extended from time to time from 02.07.2008 till 31.01.2011.

b) Then, further crucial allegations are that in view of MOU terms that the complainant shall utilise its expertise, it has disclosed valuable information on specific issues like coal mining projects in India, pricing, bidding, bid submission process, issues faced in coal mining, security issues etc. to A1 to enable it to effectively participate in the bidding process. Communication between the parties started as early as in March, 2008 i.e. much prior to A1 submitting bid proposal to NTPC by fixing base price and coal removal. A1 could get advantage of knowing the price of waste removal and it factored that base price in the price bid to be submitted to NTPC. The further advantage for A1 was that even if the price had gone up after bid, A1 would have taken a stand that complainant would bind to perform waste removal at the price agreed in the MOU. A1 in fact never had any intention to award sub-contract to the complainant after getting head contract. Believing inducement of the A1, the complainant not only furnished the crucial and vital information but also made considerable efforts and deployed resources at huge cost to assist A1. In that process, from June, 2008 the complainant built a large team of people for execution of waste removal work and hired retired executives, mining engineers, geologists, drilling engineers, electrical and mechanical engineers, industrial engineers etc. from reputed coal mining companies and deputed them by incurring huge amount of Rs.250 to 300 millions.

c) It is further alleged that the head contract was granted to A1 by NTPC under LOA dated 30.10.2010. Then onwards the

accused exhibited the true colours claiming as if certain specific terms like price, index weightings, fuel consumption rate, explosives costs rate etc. were not negotiated at the time of MOU and during the subsequent discussions no consensus could be arrived at between the parties. Since signing of the MOU, complainant was made to believe by A1—Company that no further substantial terms in MOU were required either a fresh look or negotiation but after obtaining LOA in its favour, the deceitful intention of A1 became apparent. On the lame excuses as stated supra, A3 at the behest of A1 and A2, started sending e-mails as if viability of entire project from Thiess angle was doubtful. As per complainant, all the terms including those which were raised by A3 as a part of their lame excuse were already negotiated and agreed upon. Ultimately A1 eased out the complainant and granted sub-contract to another Company (DHANSAR) on 23.02.2012.

d) Specific roles are concerned, A2 having entered into MOU with complainant, surreptitiously receded into the back ground after obtaining LOA and A3 entered the scene on the instructions of A1 and A2 and started sending e-mails expressing doubts over the viability of the contract on flimsy and false grounds. A2 and A3 are responsible for the operations of the A1—Company; A2 on behalf of A1 made false and dishonest representations and promised to award sub-contract and induced the complainant to expend money, deploy resources and man-power and later A3 with devious method gave a decent burial to the

MOU and proposed sub-contract. In the process, they caused wrongful loss of Rs.185,09,98,893/- to the complainant excluding the civil claims. But for their inducement and false promise, it is alleged the complainant would not have got into the job.

The gist of the complaint is as above.

12) One of the cardinal principles as enshrined in **Bhajanlal's** case (14 supra) for quashing FIR is where the allegations in the FIR even if accepted on their face value do not *prima facie* constitute any offence or make out a case against accused.

a) Testing the instant FIR on this touch stone, the complaint allegations if uncontroverted indeed signalize an offence under Section 420 IPC, as they picturize how the TML (A1) induced RDL (complainant) to utilize its expertise to optimize its mining fee on which how the complainant deployed its resources and man-power and expended money and then how the accused eased out at the penultimate stage without awarding sub-contract on some lame excuses that some important terms were not negotiated earlier upon which no agreement could be arrived at after head contract was conferred on A1. Hence the complaint allegations indeed project the commission of a cognizable offence besides a civil liability.

13) It is argued by petitioners that the deceptive intention must prevail at the inception of the contract to attract the offence of cheating but except a mere breach of contract, if one may say so, there was no deceptive intention on the part of accused since

inception.

a) It is true that deception is the live nerve of the offence of cheating. The deception involves knowingly making a false representation and thereby fraudulently or dishonestly inducing a person to deliver the property or intentionally inducing a person to do or omit to do anything which he would not do but for inducement to his disadvantage. So, this deceptive intention or guilty intention or more precisely '*mens rea*' should be present at the initial stage of the inducement to prove the offence of cheating. There is a subtle distinction between making a false promise not intending to fulfil and making promise with good intention but failing to live up to it later which is only a breach of contract. The dishonest intention or *mens rea* being a mental element it is only derivable from a given set of factors.

b) In the instant case, from the facts as even before entering into MOU the accused inducing complainant to invest its money, mind and men for the cause of A1 to make a safe bidding and later after obtaining LOA easing out it on the ground that there was no agreement on certain terms in MOU and no consensus could be reached on those terms and not even coming forward to pay off what was legitimately expended by complainant, one can *prima facie* infer the deception on the part of accused.

So, I am unable to agree with the argument of the petitioners that the complaint allegations may at best reveal a breach of civil contract but not a slightest of criminal offence leave aside cheating under Section 420 IPC.

14) Secondly, the petitioners wielded Arbitral Award to prune FIR. In this case, at the instance of complainant a three member Arbitral Tribunal passed an award on 20.11.2014. The issues it answered were:

(1) Whether MOU dated 02.07.2008 was a valid and binding contract?

- (2) If so, is it capable of specific performance?

- a) The majority of two members on issue No.1, were of the opinion that the execution of a further contract (sub-contract) pursuant to MOU is not a mere formality but further negotiations for formal contract are necessary and it is not feasible to make a finding that the MOU with e-mails, minutes of meeting, draft agreement, spread sheets constitute a valid and binding contract. On issue No.2 they held that MOU is not specifically enforceable.

- b) However, the third member—Hon'ble Justice D.P.Wadhwa (Retd.) came to a different conclusion opining that the MOU was a full-fledged contract and all relevant and important issues were already negotiated and settled and MOU could be specifically performed.

15) Relying on majority view of the award, it is argued by the petitioners that since the MOU itself was held an invalid and unenforceable contract, complainant cannot lay any civil claim or criminal complaint with it. They argued that to decide the quash petition the award can be taken into consideration and on this

aspect they relied upon the decision in ***All Cargo Movers (India) Private Limited's*** case (2 supra). In the said decision the Apex Court found that the complaint petition even if accepted on face value do not disclose any offence. Then it further held that even if the pleadings in the suit pending between the parties and notice are taken into consideration which is permissible, no allegations were made against the accused except negligence and breach of contract on the part of carriers. It shall be noted that in the above decision there was no finding as to whether or not Arbitral Award can be taken into consideration to decide the quash petition. So, the said decision has no direct bearing on the facts of this case.

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16 a) However ***Trisuns's*** case (11 supra) cited by respondents, is a relevant decision on issue. In it, disagreeing with High Court's quashing criminal proceedings on the ground of availability of arbitration proceedings, the Apex Court observed thus:

"9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana v. Bhajan Lal."

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b) Similarly in ***Swiss Timing Limited's*** case (12 supra) the

question fell for consideration of the Apex Court was:

“Whether arbitration proceedings can be continued when the criminal proceedings arising out of the same contract were pending?”

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In that context, the Apex Court held that both the proceedings can go simultaneously and further held findings recorded by the Arbitral Tribunal in its award would not be binding on criminal proceedings. In view of direct principle on issue, the findings in the Arbitral Award in the instant case cannot be taken to shut out the criminal proceedings.

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17) The next contention of the petitioners is that since the Magistrate has not made a speaking order disclosing that complaint allegations *prima facie* reveal a cognizable offence and he was satisfied to that effect to forward the complaint to police under Section 156(3) Cr.P.C., the FIR is liable to be quashed.

a) The order dated 19.03.2014 of learned XIX Metropolitan Magistrate, Kukatpally reads:

“Complainant is present. This complaint is referred to SHO, PS KPHB for investigation and report under Section 156(3) Cr.P.C.”

b) From a perusal of the above order it is true that learned Magistrate has not mentioned whether the complaint allegations *prima facie* disclose any cognizable offence and he was satisfied to that effect and the reasons for his referring the complaint to police for investigation.

c) Now, the crucial point is when a Magistrate for whatever reasons failed to pass a speaking order giving reasons for

referring the complaint to police for investigation under Section 156(3) Cr.P.C. whether the FIR is liable to be quashed even if it discloses the ingredients of a cognizable offence as in the instant case.

d) It appears there is dichotomy of opinion as to whether or not a Magistrate is required to pass a speaking order expressing his satisfaction that the complaint *prima facie* discloses a cognizable offence and there are good reasons for forwarding the same for investigation.

It is beneficial to extract Section 156(3) Cr.P.C. at this juncture.

“(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.”

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A bare perusal of Section 156(3) Cr.P.C. does not impose any condition to pass a speaking order before forwarding the complaint to police.

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18) Be that it may, the case law on this aspect is worth perusal.

a) In **Maksud Saiyed's** case (4 supra) cited by petitioners, it appears Honourable Apex Court only deprecated Magistrate's referring the complaint to police under Section 156(3) Cr.P.C. without proper application of mind and also criticized some of the untenable assumptions in his order. In this decision no specific direction was given that a Magistrate is required to pass a speaking order under Section 156(3) Cr.P.C. What is emphasized was that where jurisdiction is exercised on a

complaint petition filed in terms of Section 156(3) or Section 200 Cr.P.C. the Magistrate is required to apply his mind.

b) Similarly, in **Srinivas Gundluri's** case (13 supra) cited by Sri D.V.Sitaram Murthy, Apex Court while mentioning the requirements of the Magistrate for forwarding the complaint under Section 156(3) Cr.P.C. did not emphasise that he needs to pass a specific speaking order. It observed thus:

*“23.To make it clear and in respect of doubt raised by Mr.Singhvi to proceed under Section 156 (3) of the Code, **what is required is a bare reading of the complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation.** (Emphasis supplied) In the case on hand, the learned single Judge and Division Bench of the High Court rightly pointed out that the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding and, therefore, we are of the view that the Magistrate has not committed any illegality in directing the police for investigation. In the facts and circumstances, it cannot be said that while directing the police to register FIR, the Magistrate has committed any illegality.”*

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However, we have a different set of decisions on the same point.

19 a) In **Anil Kumar's** case (5 supra) cited by petitions, Apex Court observed thus:

“11.The scope of the above mentioned provision came up for consideration before this Court in several cases. This Court in Maksud Saiyed case (supra) examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under [Section 156\(3\)](#) and held that where a jurisdiction is exercised on a complaint filed in terms of [Section 156\(3\)](#) or [Section 200 Cr.P.C.](#), the Magistrate is required to apply

his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under [Section 156\(3\)](#) against a public servant without a valid sanction order. **The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under [Section 156\(3\)](#) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted.** (Emphasis supplied)

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b) In **D.K.Pattanaik**'s case (6 supra) also a learned Judge of this High Court expressed similar view.

"30. The endorsement of the Magistrate, by which he directed the Police to investigate the complaint, does not show that there was any application of mind whatsoever. There is nothing to suggest therein whether he felt that the allegations, prima facie, made out an offence alleged and a further investigation is required or not. For this purpose, in my considered view, the Magistrate is bound to disclose his mind by a brief indication of the reason for ordering such an investigation. Otherwise, it is not possible to know whether the Magistrate has mechanically forwarded the complaint to the Police or he had done so after application of mind."

c) In **Priyanka Srivastava**'s case (7 supra) the Apex Court resounding the need of application of judicial mind by the Magistrate before forwarding the complaint under [Section 156\(3\)](#) Cr.P.C. emphasized the need for complainant to file a sworn affidavit in support of his complaint to make him responsible.

So, the above case law shows the dichotomy on the issue. Be that it may, the crucial point for consideration as stated earlier is, if the Magistrate wittingly or unwittingly failed to pass a speaking order while forwarding the complaint under [Section](#)

156(3)Cr.P.C. whether FIR is liable to be quashed on that ground alone even if the compliant *prima facie* contains allegations of cognizable offence.

20) In my view, in such circumstances it is not justifiable to quash the proceedings merely because Magistrate failed to pass a reasoned order. Since in the instant case complaint averments reflect the commission of cognizable offence, FIR cannot be quashed.

21) The next contention is that the MOU was lapsed by 31.01.2011 and so criminal proceedings are not maintainable. I am afraid, this contention is not correct because the lapse of MOU on subsequent date will not take away the offence allegedly committed during its continuance.

22) Sofaras petitioner/A3 is concerned, though he was not in the scene by the date of MOU, his subsequent acts showing his participation in the cheating were vividly described in the complaint. So the compliant is maintainable against him. In fact, in his earlier Cr.P.No.6192 of 2014 a learned Judge of this High Court has vividly discussed about the allegations levelled against petitioner/A3 and held that quashment cannot be ordered. Therefore, the said order will certainly come in his way for the second petition filed by him which is not maintainable under law. The reason shown for filing the second petition that subsequent to the dismissal of his previous petition Arbitration Award was passed and it amounts to vital change of circumstances cannot be appreciated for the reason, as already discussed supra, the

arbitration proceedings will have no bearing on the criminal proceedings. So the second application of petitioner/A3 for quashment of proceedings is not maintainable.

So at the outset, there are no merits in the two petitions to quash the proceedings.

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23) In the result, CrI.P.Nos.16240 of 2014 and 36 of 2015 are dismissed with a direction to the police of KPHB to complete the investigation in Cr.No.274 of 2014 and file report as per law within four (4) months from the date of this order.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 24.07.2015

Note: L.R. copy to be marked Yes / No

Murthy

[\[1\]](#) (2006) 6 SCC 736

[\[2\]](#) (2007) 14 SCC 776

[\[3\]](#) 2014) 10 SCC 663

[\[4\]](#) (2008) 5 SCC 668

[\[5\]](#) (2013) 10 SCC 705

[\[6\]](#) 2008(2) ALT 541

[\[7\]](#) 2015 CrI.L.J. 2396

[\[8\]](#) AIR 1990 SC 1605 = (1990) 2 SCC 437

[\[9\]](#) (2013) 2 SCC 801

[\[10\]](#) (2001) 8 SCC 645

[\[11\]](#) (1999) 8 SCC 686

[\[12\]](#) (2014) 6 SCC 677

[\[13\]](#) (2010) 8 SCC 206

[\[14\]](#) 1992 Supp (1) SCC 335 = AIR 1992 SC 604