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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 29th March, 2016

\+ **Crl.M.C.No.3173/2005**

ASHOK CHOUDHRY ..... Petitioner

Represented by: Mr. S.K.Dubey and Mr. Udit Malik, Advocates.

Versus

STATE(GNCT OF DELHI) & ORS. ..... Respondents

Represented by: Mr.Ashish Dutta, APP for the State with SI Ajeet Kumar Jha, PS-EOW.
Mr.Dinesh Kumar Gupta, Advocate for R2.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Vide the present petition filed under Section 482 of the Cr P C, petitioner seeks direction thereby setting aside the summoning order dated 16.05.2005 passed by learned Metropolitan Magistrate issued against him and also for quashing of the proceedings arising out of the FIR No.451/2003 registered at police station Malviya Nagar, Delhi for the offences punishable under Sections 120B/406/420/467 /471 of the IPC.

2. The factual matrix leading to registration of above FIR against petitioner is that one Vijay Garg claimed to be the partner of M/s Puja & Company (hereinafter referred as respondent No.2) approached the

petitioner and other directors of company of petitioner under the name and style of M/s Tri-X Security Pvt Ltd, registered under the provisions of Indian Companies Act, 1956(hereinafter referred as 'company of petitioner') and represented to them that M/s Puja & Company has a very sound financial condition and able to market the goods exclusively. On 16.08.2002, a Regional Sub-Distributorship Agreement (hereinafter referred as the 'said agreement') was executed between the company of petitioner and company of respondent No.2 thereby appointing the latter as sole distributor of the product 'Autowatch' a security device of which, the company of petitioner was the sole exclusive authorised seller to sell the product in India, Nepal, Srilanka and Bangladesh. The said agreement was signed by petitioner on behalf of company of petitioner and Vijay Garg, partner on behalf of company of respondent No.2. The said product was manufactured by PFK Electronics Pvt Ltd, a South-African concern. In terms of clause No.2.1 the said agreement, company of respondent No.2 was under an obligation to purchase the said product worth Rs.10.00 Crore per annum. The clause No.5 relates to the terms and conditions of the purchase. As per clause No.6.1 of the said agreement it was agreed between the parties that 'price payable by the purchaser to the company of petitioner in respect of the product will be in accordance with the agreement and shall be agreed in writing between Tri-X Company and the purchaser at the time of placing of the relevant order'. Annexure A to the agreement contains the standard conditions of the agreement vide clause No.4, the purchaser and its authorised signatory i.e. Vijay Garg agreed that they had ready and understood each term of the agreement and accepted as binding.

3. The above referred clauses of the said agreement reads as under:-

*"**2.1** The PURCHASER undertakes to purchase from TRI-X and pay for the following minimum quantities (by value) of PRODUCTS during the following periods:-*

Year	*1st QTR*	*2nd QTR*	*3rd QTR*	*4^{th} QTR*	*TOTAL*
16.08.2002 -15.08.2003	*250*	*250*	*250*	*250*	*1000*
16.08.2003 - 15.08.2004	*375*	*375*	*375*	*375*	*1500*
16.08.2004 - 15.08.2005	*625*	*625*	*625*	*625*	*2500*

All above figures are in Rupees Lakhs.

***5.3** The PURCHASER shall comply with TRI-X's payment which are 100 % advance with order or strictly through Firm, irrevocable, Transferable, Divisible, confirmed Letter of Credit drawn in favour of TRI-X and negotiable and payable at sight in full on presentation of despatch documents from TRI-X's supplies with part shipment being permitted. All LC and other charges to be to Purchaser's account.*

***7.** Any delivery note (carbon copy or original) signed by the purchaser held by Tri-X shall be conclusive proof that delivery was made to the purchaser."*

4. Learned counsel appearing on behalf of petitioner submitted that it was specifically agreed between the parties that delivery note signed by the purchaser would be a conclusive proof that delivery was indeed made to the purchaser. Under clause 12 of the standard clause of agreement, the parties had agreed that no claim under the contract will arise unless the purchaser has given 30 days written notice to the company by a registered post to rectify any defect in the goods or breach of contract. Even the price for the product was expressly agreed between the parties under the terms and conditions of the agreement. Thus, the relationship between both the companies was purely contractual being governed by the terms and conditions of the said agreement only.

5. Learned counsel further submitted that on 06.09.2002 in terms of the said agreement, the company of petitioner placed order for supply of product worth Rs.1.00 Crore to be delivered in two consignments of Rs.48,51,250/- and Rs.49,16,375/- respectively. Accordingly, a purchase order dated 06.09.2002 was issued by respondent No.2 on behalf of his partnership company, which is placed on record as Annexure C to the petition. Moreover, on 06.09.2002 itself an irrevocable letter of credit (hereinafter referred as L/C) was issued by the banker for the purchaser i.e. Bank of India, Rajouri Garden, Delhi for a sum of Rs.1.00 Crore with the company as beneficiary. The said L/C required the following documents:-

> *"1. Bill of exchange (first & second) drawn on Bank of India, Rajouri Garden Branch A/C. M/s. Puja & Company and stating under Bank of India, Rajouri Garden Branch Doc Credit No. & date.*
> *2. Signed invoices in triplicate indicating applicant order No. and date must not exceed the credit amount.*
> *3. Receipt of goods by the applicant (Puja & Co.) must be acknowledged on the invoice and signed by Sh.Anand Garg or Sh.Vijay Garg.)*
> *4. Material / goods must be strictly as per the order dated 06.09.2002.*
> *5. Goods will be delivered in two consignment of Rs.50 Lacs each."*

6. On 23.09.2002 the company of petitioner raised the invoice for the first consignment of product for an amount of Rs.48,51,250/- which was signed by respondent No.2 on behalf of the partnership company on the same date. Accordingly, the bill of exchange was drawn for the said amount by the company in favour of bank mentioned above to pay to the order of ABN Amro Bank, DLF Centre, Sansad Marg, New Delhi, banker of the company. On 25.09.2002, the purchase order was revised by respondent No.2 and accordingly on 26.09.2002, the L/C was amended by

the aforesaid Bank of India. On the said date itself, the goods were shipped from Durban, South Africa to India. In terms of the agreement, the company presented the documents to its banker i.e. ABN Amro Bank for collection against the irrevocable L/C and bill of exchange.

7. Learned counsel further submitted that respondent No.2 admitted in the aforenoted FIR that on 01.10.2002, the goods were delivered to the satisfaction of respondent No.2 and delivery challan was duly signed by him. The money was remitted to the company's account by Bank of India on 04.10.2002. The copy of bank statement of ABN Amro Bank duly evidencing the deposit of the amount of Rs.48,51,250/- to the account of company is annexed as annexure G. Thus, the first consignment was admittedly received by respondent No.2, being partner and payment was duly made as per the agreed procedure under the said agreement. Thereafter, following the same procedure as was in the case of first consignment, the company raised second invoice on 08.10.2002 for the second consignment of goods wroth Rs.49,16,375/-. Respondent No.2 following the agreed procedure signed the invoice dated 08.10.2002 required under the agreement and in terms of L/C. Copy of same is placed on record as Annexure H. Moreover, the respondent No.2 signed at the bottom of the invoice on that very date acknowledging receipt of the goods to enable the company to present the documents to its banker immediately after the shipment from the Durban. Accordingly, the bill of exchange was also executed for a sum of Rs.49,16,375/- in favour of Bank of India to pay to the order of ABN Amro Bank, the banker of the company for the said amount. Copy of bill of exchange for the aforesaid amount is annexed as Annexure I. Accordingly on 14.10.2002, the goods were shipped from

Durban to India. Therefore, on that very date, the company presented the documents to its banker ABN Amro along with bill of exchange for collection against the L/C as per the procedure agreed by in terms of the agreement. On 22.10.2002 the second consignment of goods were received in India and after clearance on request and confirmation on phone by respondent No.2, the goods were delivered to the representative of respondent No.2 by one Yogesh Sharma, director of the company. On 28.10.2002, the money was remitted to the company's account by Bank of India. The statement of account pertaining to the relevant period is annexed as Annexure L.

8. Learned counsel for petitioner further submitted that respondent No.2 also raised two credit notes dated 26.09.2002 to the extent of Rs.5,14,429/- and Rs.1,81,275/- respectively towards expenses incurred for promotion of sale and at his request the said company issued two cheques dated 22.10.2002 for a sum of Rs.5,14,428/- and another for Rs.1,81,275/-. Both the cheques were drawn on ABN Amro Bank and handed over to him on 22.10.2002.

9. He further submitted that company of respondent No.2 under the terms of the contract was required to purchase a minimum quantity of product amounting to Rs.10.00 Crore per annum. However, the said company failed to market the product and had approached the petitioner to return the product and for refund of the money. Thus, respondent No.2 had refused to comply with the terms of the agreement. However, in the month of April, 2003 the petitioner was called by inspector Ashok Sharma, Crime Branch and informed that a complaint has been lodged by respondent No.2 on the allegations of cheating, misappropriation of amount of Rs.66.00

Lac. The petitioner appeared before the Assistant Commissioner of Police, Crime Branch, New Delhi however, aforenoted FIR was registered despite explaining the above position of agreement and trade between the parties.

10. On 26.05.2003, since company of respondent No.2 had breached the agreement dated 16.08.2002 and failed to purchase the goods of agreed value of Rs.10.00 Crore in terms of clause 2.1 of said agreement, therefore, the company of petitioner terminated the contract under clause 9 by giving 60 days notice in writing and also demanded damages. The said notice was duly served upon partnership firm and its partners.

11. Despite the respondent No.2 filed a complaint against the petitioner before the Economic Offences Wing, Crime Branch, New Delhi on which after enquiry, the said agency decided not to register the FIR against the petitioner. Thereafter, the respondent No.2 made a complaint against ACP, EOW and thereafter, the FIR in question was registered. The police investigated the case thoroughly and thereafter came to the conclusion that the issue purely had arisen out of the partner of M/s Puja & Company is writ large as the value of the goods were transferred by the bank of respondent No.2 to the company's bank under L/C and bill of exchange having satisfied from physical delivery of the goods to M/s Puja & Company. The said case was a baseless and unsubstantiated allegations against the petitioner and one Mr.Sanjeev Bhakt for making illegal pressure and extronist tactics of respondent No.2. The said respondent has admitted the said agreement executed between the parties by not questioning the first consignment and the procedure adopted by the parties under the agreed terms of the conditions of the contract. However, falsely alleged that the second consignment of goods was never delivered to him

or M/s Puja & Company. The said respondent has also falsely stated that petitioner had taken back two cheques for which payment was stopped with an assurance to issue pay order in lieu thereof without mentioning the fact that total amount of Rs.9,00,000/- was also paid to respondent No.2 for promotional expenses which was never accounted to respondent No.2.

12. Learned counsel further submitted that the throughout the investigation petitioner cooperated and provided all documents / assistance possible on his behalf which establishes that there was no cause as alleged in the complaint. Moreover, on 12.01.2004, the company addressed one letter to the Bank of India calling upon them to clarify the factum of remitting the amount of irrevocable L/C in favour of company through their banker – ABN Amro Bank under the terms of the agreement. The petitioner while informing the said bank about the fact that respondent No.2 partner of M/s Puja & Company has dishonestly disputed the delivery of the second consignment and asked the said bank to clarify the factum of confirmation of acknowledging the delivery of the goods by M/s Puja & Company and having received the documents for invoking the L/C. Moreover, upon denial by respondent No.2 about the identity of person, who had signed the delivery note on 22.10.2002, the petitioner made enquiry which revealed that the signatures on the delivery note dated 22.10.2002 is the same signatures that of person, whose name is Jai Gopal, also authorised representative of M/s Pooja Road Lines Private Limited having same address as that of M/s Puja & Company at 34/1, Vikas Apartment, East Punjabi Bagh, New Delhi. The said Mr Jai Gopal has been authorised and has been given Power of Attorney for and on behalf of M/s Pooja Road Lines Private Limited. During the course of investigation, said

Jai Gopal has not denied his signatures. Moreover, respondent No.2 has also not disowned about his relationship with M/s Puja & Company or that said Jai Gopal.

13. Learned counsel for petitioner also submitted that after a detailed investigation the Investigating Officer concluded in his report as under:-

> *"... From the investigation conducted so far, it has been clearly established that complainant's case entire depended upon the ground that his company did not receive the second consignment of goods, therefore, the second 'good receipt' in question was bogus. But, it has now been completely proved from the handwriting expert's opinion duly corroborated by independent evidence of the Tempo driver, that the second consignment was delivered at the complainant's company premises. In view of these concrete facts and evidence, nothing survives in the case and the same deserves to be recommended for cancellation.*
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> *Accordingly, this final report u/s 173 Cr P C is prepared to close the investigation.*
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> *It is therefore, respectively prayed that this Hon'ble Court may accept the closure report and discharge the accused Yogesh Sharma. List of documents is enclosed herewith.*
>
> *Submitted please..."*

14. Despite the above, learned Trial Court in the impugned order observed as under:-

> *"8. After careful perusal of the record, the factual position which emerges is signatures of the complainant on the second invoice bearing No.006 dated 08.10.2002 was obtained on 08.10.2002 whereas till 17.10.2000 no articles were received in India from South Africa. Complainant has specifically alleged that on 08.10.2002 he was inducted by the accused Ashok Choudhary and Sanjeev Bhakt that articles have been received in India which was factually incorrect. It is also the case of*

complainant that Mr. Jai Gopal Aggarwal was never an employee of the complainant's M/s Puja & Company whereas prosecution claims that Jai Gopal Aggarwal was an employee of M/s Puja & Company. In such circumstances, it has become a matter of trial whether Mr. Jai Gopal Aggarwal was or was not an employee of M/s Puja & Company.

9. The second question which again becomes a matter of trial is whether Jai Gopal Aggarwal received the goods on 22.10.2002 as claimed the accused.

10. So far as statement of truck driver is concerned against it is a matter of trial and genuineness of the statement/claim made by the parties cannot be prejudged without taking evidence from both sides. The truck driver has not been able to produce any documentary proof in favour of his claim that he delivered the articles to the office of the complainant nor the accused persons could prove any other transportation invoice which could show that the articles were delivered at the office of the complainant through some transport company bearing particulars of truck number, date and time.

11. The whole case of the prosecution is based upon the receipt dated 22.10.2002 which have been claimed to be forged by the complainant since the complainant says that Jai Gopal Aggarwal was never employee of M/s Puja & Company, whereas accused persons claims that Jai Gopal Aggarwal was an employee of M/s Puja & Company, who received the goods. In such circumstances, matter is to be put to trial for taking evidence from both the sides as to claim of which of the parties is genuine. In case it is found that complainant lodged false complaint, appropriate action against him shall be taken. In case, it is found that accused persons were involved in the present offence, the law shall take its course against them.

12. In may be mentioned here that the stock register which have been tendered by the accused persons to the Investigating Officer is also not above suspicion since it appears to have been written by the same person under same ink and appears to have been prepared in one go. An original challan dated 04.10.2002 purportedly written *on behalf of M/s Puja & Company to Mr.Adarsh Sharma of Tri-X Security Private Limited is also on record. In the said challan it is mentioned that certain articles were returned to M/s Tri-X Security Private Limited on behalf of M/s Puja & Company. It appears to have been signed by some authorised signatory on behalf of M/s Puja & Company at point 051, but despite specimen signatures of the officials of the company handwriting expert could not give any opinion to the same. The complainant claims that this challan is also forged.*

13. One official letter dated 15.10.2002 is also on record written by M/s Puja & Company to M/s Tri-X Security Private Limited stating that although the signatures of the complainant were obtained on invoice number 006 but articles were never delivered. Similarly, there is one more letter dated 30.10.2002 written by M/s Puja & Company to M/s Tri-X Security Private Limited in which it is specifically mentioned that as per invoice number 006 dated 08.10.2002 goods have not been delivered. Accused company never replied to this letter also which creates serious doubt about the accused company vide one letter dated 06.09.2002 complainant specifically told M/s Tri-X Security Private Limited that receipt of goods should be signed by any of the partners that is complainant Vijay Garg or another partner Anand Garg. Despite this fact receipt dated 22.10.2002 in question is signed by one alleged employee of complainant which against creates serious doubt about accused persons. It may be mentioned here that prosecution claims that Jai Gopal Aggarwal is an employee of M/s Puja & Company and reliance is placed upon one copy of special power of attorney purportedly executed by complainant Vijay Garg in favour of Jai Gopal Aggarwal. This again is a matter of trial since it has been denied by the complainant that Jai Gopal Aggarwal was an employee of M/s Puja & Company.

14. The complainant has specifically alleged that he was dishonestly induced on 08.10.2002 by the accused persons A1 Ashok Choudhary and A2 Sanjeev Bhakt and he was made to believe that articles have been received in

India and would be delivered to him on that very day and thereby his signatures were obtained. Despite that and despite receiving payment, second consignment was not delivered. In such circumstances, there are sufficient material to proceed against accused Ashok Choudhary, accused Sanjeev Bhakt and also against accused Yogesh Sharma. There are specific allegations by name against accused Ashok Choudhary and accused Sanjeev Bhakt that both of them were directors of M/s Tri-X Security Private Limited induced the complainant on 08.10.2002 and on other days. So far as accused Yogesh Sharma is concerned, receipt dated 22.10.2002 is question bears his handwriting which is claimed to be forged by the complainant. Therefore, his involvement in the present conspiracy also cannot be ruled out at this stage."

15. In view of above facts, learned counsel for petitioner submitted that the dispute has arisen out of a business transaction and is of civil in nature. Therefore, the investigating agency has rightly filed the closure report which was not accepted by the learned Trial Court. In such a situation, this Court has power under Section 482 of the Cr P C to quash the FIR and the proceedings arising out therefrom. On this issue, the petitioner has relied upon the decision ***M/s Pepsi Foods Ltd & Anr v. Special Judicial Magistrate & Ors : AIR 1998 SC 128*** wherein the Supreme Court has observed as under:-

"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. No doubt the Magistrate can discharge the accused at any stage of trial if he considers the charge to be groundless, but that does not mean that accused cannot approach the High Court under S. 482 of the Code or Art.227 of the Constitution to have the proceedings quashed against his when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial".

16. Learned counsel has further submitted that even if there was a cheating on the part of the petitioner where the transactions were based on an agreement, the Supreme Court in case of ***Ajay Mitra v State of MP & Ors : (2003)3 SCC 11*** held as under:-

> *"16. A guilty intention is an essential ingredient of the offence of cheating. In other words 'mens rea' on the part of the accused must be established before he can be convicted of an offence of cheating. (See Jeswantrai Manilal Akhaney v. The State of Bombay : AIR 1956 SC 575. In Mahadeo Prasad v. State of West Bengal AIR 1954 SC 724, it was held as follows:*
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> > *"Where the charge against the accused is under S.420 in that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But if on the other hand he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods then a case of cheating would be established."*
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> *17. In* ***Hari Prasad Chamaria v. Bishun Kumar Surekha & Ors. AIR 1974 SC 301*** *it was held that unless the complaint showed that the accused had dishonest or fraudulent intention at the time the complainant parted with the money it would not amount to an offence under*

Section 420 IPC and it may only amount to breach of contract. ***In G.V. Rao v. L.H.V. Prasad & Ors. 2000 (3) SCC 693****, it was reiterated that guilty intention is an essential ingredient of the offence of cheating and, therefore, to secure conviction 'mens rea' on the part of the accused must be established. It has been further held that in order to constitute the offence of cheating the intention to deceive should be in existence at the time when the inducement was offered."*

17. Learned counsel further submitted that some persons have tendency of converting civil litigation into criminal litigation. The said tendency is not acceptable under law. Such type of tendency has to be discouraged and parties should approach the Civil Courts for establishing and claiming their claims.

18. He further submitted that the respondent No.2 has filed CS (OS) No.1174/2006 for recovery of Rs.66,00,000/- against petitioner and other directors as well as company. And counter claim vide CS (OS) No.84/2006 has been filed against respondent No.2 and his partnership company and company as well claiming damages of Rs.70,00,000/- with pendente lite and future interest. Both the cases are pending disposal.

19. Learned counsel also submitted that investigating agency in the closure report stated as under:-

"... Investigation conducted from Bank of India, Rajouri Garden revealed that both LCs were got encashed by the director of M/s Tri-X Security Pvt Ltd. Scrutiny of the statement of account No.10120, belonging to the complainant company reflected the debits of Rs.48,51,25/- and Rs.49,16,375/- on 28.09.2002 and 22.10.2002 respectively in account No.752185 of M/s Tri-X Security Pvt Ltd on 04.10.2002 and 28.10.2002.

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Further investigation from Oriental Insurance Company Ltd revealed that the company issued an insurance cover to both the consignment of car immobilizer against Fire and Burglary. The cover was provided on the declaration of insured as per proposal form and these covers were granted in good faith as per principal of insurance as such there was no need for physical inspection and verification of the stock at the time of insurance and no claim had been lodged with the insurance company by M/sPuja & Co. so far. ...”

20. While concluding his arguments, learned counsel for petitioner has submitted that there were two transactions between the parties. There was no issue on the first transaction. However, dispute arose qua the latter regarding the delivery of the goods which were based on the said agreement, thus, the issue is civil in nature. Thus, the respondent No.2 cannot be allowed to use as a tool by converting the said issue into criminal action. Accordingly, the FIR in question, impugned order and the proceedings arising therefrom are liable to be quashed.

21. On the other hand, learned counsel for respondent No.2 / complainant has submitted that merely if the civil remedy is available to any party, it does not preclude the aggrieved party to continue with the criminal proceedings for the reason that jurisdiction of both the Courts are independent. Every wrong doer is liable to be dealt with in accordance with law of the land. The petitioner, in conspiracy with other persons, have committed the cognizable offences while inducing and misrepresenting him with dishonest intention and caused wrongful loss by gaining wrongfully. The petitioner has set up his case on the basis of certain documents which cannot be taken into consideration at this stage.

22. He further submitted that clause 2 of the Anneuxre C letter dated

06.09.2002 addressed to the petitioner states as under:-

> *"2. Payment would be made to you after delivery of goods received and signed by any of the partners i.e. Sh Anand Garg or Sh Vijay Gar on behalf of M/s Puja & Company".*

23. The petitioner and other associates have misrepresented before respondent No.2 on 08.10.2002 by saying that the goods had been dispatched by their supplier. The petitioner has committed an offence by issuing the invoice without having the goods in their power and control, thus, it is sufficient for continuation of the proceedings against the petitioner. The respondent No.2 had never made any request or confirmation on phone regarding the delivery of the goods to his representative. During the course of investigation, Adrash Sharma, employee of petitioner denied the hand writing and signatures upon annexure K and also denied signatures on second consignment note dated 22.10.2002 and same note is signed by the persons who were authorised, as recorded in purchase order dated 06.09.2002 as annexure C.

24. Learned counsel for respondent No.2 further submitted that M/s Pooja Road Lines Private Limited is working as contractor in Uttar Pradesh and at that relevant time, sister of petitioner was the minister in the Cabinet of UP Government and during that course of discharge of certain day to day functioning, the officials of PWD had obtained the signatures of official upon blank papers which were misused by petitioner to save the skin from the offences committed. Moreover, the second consignment dated 22.10.2002 cannot be considered as a challan as the said challan ought to have been printed challan form. Therefore, the goods have not been received by respondent No.2 on 22.10.2002. The self

cheque No.4015 for Rs.4,50,000/- has not been issued or handed over to Mr.Manish, the representative of M/s Puja & Company, nor the said cheque was ever encashed by the said company. The petitioner company breached the terms of the agreement and respondent No.2 never refused to comply with the terms of said agreement or ever breached the terms and conditions thereof. Respondent No.2 never made any false statement that the goods were not received or cheques were returned on the pretext to issue pay orders or Rs.9,00,000/- paid for promotional expenses. Certain goods were recovered at the instance of Yogesh Sharma, those had been allegedly delivered to respondent No.2 on 22.10.2002 besides incriminating material. The second shipment was signed by respondent No.2 on 23.09.2002 and signed another document on 08.10.2002. As per the petitioner, the petitioner shipped the goods on 16.10.2002. The petitioner was duty bound to comply with the terms and conditions as incorporated in clause 5.3 of the agreement.

25. As per letter dated 06.09.2002, as noted above, the petitioner was to deliver the goods to any of the partners i.e. Anand Garg or Vijay Garg on behalf of M/s Puja & Company. The goods were allegedly received by Jai Gopal, who was not authorised by the said company. Moreover, as per the claim of petitioner, said Jai Gopal received the goods on 27.10.2002 was on a plain paper, however that cannot be an admissible paper in the eyes of law. Annexure Q at page No.102 is alleged to have been signed by said Jai Gopal is also not on the company's letter head and that also cannot be accepted as genuine one.

26. As per the claim of petitioner, 50 pieces of goods were received on 04.10.2002 whereas 54 pieces of second consignment were recovered from

the office of the petitioner. Thus, the letter head of said company is also forged one. Moreover, whether Jai Gopal received the goods on 22.10.2002 as claimed by the petitioner is a matter of trial. So far as the statement of claim is concerned, it is a matter of trial and genuineness of such claims made by the parties cannot be adjudged at this stage without leading evidence from both the sides. Learned Trial Court has rightly not accepted the closure report on the ground that case of the prosecution was based on the receipt dated 22.10.2002, which has been claimed to be forged by the complainant. Stand of complainant is that Jai Gopal was never in the employment of said company; whereas the petitioner and co-accused are trying to establish otherwise. In such a situation, matter requires trial for establishing that which of the parties is genuine. Respondent No.2 never made any special power of attorney in favour of Jai Gopal, which has been relied upon by the petitioner and the investigating agency, thus, the each and every fact raised by the petitioner has to be tested during trial.

27. Learned counsel for respondent No.2 further submitted that the judgments relied upon by the petitioner are on different facts and circumstances, thus, are not relevant at all in the present case. He further submitted that the petitioner earlier had prayed for quashing of the FIR before this Court vide W.P.(Crl.)No.43/2004 which was dismissed as withdrawn on 27.10.2005. Thus, the instant petition is second attempt by petitioner for the same relief. The malafide intention of the company can be ascertained with the fact that company of petitioner issued an advertisement for dealership without terminating the earlier dealership agreement with the respondent No.2.

28. Learned counsel for respondent No.2 while emphatically relying upon the observation of learned Trial Court in para No.8 in the impugned order (*supra*) submitted that this Court need not interfere with the finding of learned Trial Court.

29. I have heard submissions of learned counsel for parties.

30. The core issue for consideration in this case revolves upon the procedure to be adopted by learned Metropolitan Magistrate in case after the investigation police or agency filed any cancellation report. On receipt of such report from the police, if the Magistrate finds that case has not been properly investigated, the Magistrate has power to direct the Investigating Officer to investigate the matter further and accordingly re-filed the report. Also, even without any such direction, the Magistrate can issue summons to the culprits based on the material brought or collected during investigation. But when the documents which have already been admitted and expert opinion thereon is there, then, there was no occasion before learned Trial Court saying that such documents require trial. The trial can be of disputed facts, but in the present case, as per the terms and conditions of the agreement, the petitioner supplied the goods and received by Jai Gopal, representative of the respondent No.2. The said representative admitted that he was working as representative of respondent No.2. Jai Gopal has not denied the signatures and documents, moreover, confirmed by the hand writing expert. In addition, both the parties have filed civil suits which are pending adjudication. The documents can be proved or disproved by both parties in their respective civil claims by leading evidence.

31. The company of respondent No.2 under the terms of the contract was required to purchase a minimum quantity of the product amounting to Rs.10.00 Crore per annum. However, the said company failed to market the product and had approached the petitioner to return the product and for refund of the money to which company of petitioner did not agree. This was the turning point which has given birth to the disputes in question.

32. Since the company of respondent No.2 had breached the agreement dated 16.08.2002 and not purchased the goods of agreed value, therefore, on 26.05.2003, the company of petitioner terminated the contract under clause 9 of the agreement by giving 60 days written notice and also demanded damages. The said notice was duly served upon partnership firm as well as all its partners.

33. It is not in dispute that respondent No.2 being the partner of the company filed the complaint alleging that petitioner being the director of the company besides Sanjeev Bhakt represented him on 16.08.2002 that they were authorised dealer of 'Autowatch' – an instrument being used for security of the vehicle and manufactured by M/s PKF Electricals of South Africa. They claim themselves to be the sole agent in India, Srilanka and Nepal. Accordingly, the said agreement was entered into between the parties. Initially parties entered into deal by two transactions, of which first consignment was delivered to respondent No.2 on 26.09.2002, although his signatures on the invoice No.005 were obtained on 23.09.2002 that is prior to the receipt of the goods in India from abroad. There is no dispute regarding the first delivery of consignment, despite in the first consignment, there were allegedly short delivery of goods for which two credit notes dated 26.09.2002 to the tune of Rs.5,14,429/- and

Rs. 1,81,275/- were delivered to the respondent No.2 with respect to that very first consignment.

34. The difference and dispute between the parties arises with respect to second consignment. Respondent No.2 claims that the second consignment was never delivered till the institution of complaint despite the payment having been received by the petitioner. The respondent No.2/complainant admitted that his signatures were taken on invoice without receiving any goods and the second consignment was not received on 08.10.2002. He also claimed that two cheques were issued by the petitioner including other accused persons for a sum of Rs.5,14,290/- and Rs. 1,81,275/- which were dishonoured and cheques were taken back by petitioner promising to issue pay orders, but even said pay order were not issued. The matter was investigated by the police and filed the cancellation report on the ground that respondent No.2 has not denied his signatures on the invoice dated 08.10.2002 bearing No.006. The second consignment reached in India only on 17.10.2002 that much after 08.10.2002 and the second consignment was cleared by the custom authorities on 22.10.2002.

35. It was claimed to be a business practice to obtain the signatures of the respondent No.2 before the delivery of the goods. As such, the delivery of first consignment is not denied by either side in which the signatures were obtained on 29.09.2002 on the invoice bearing No.005 whereas admittedly the consignment was cleared and delivered to respondent No.2 on 26.09.2002. In the same fashion, signatures of respondent No.2 on invoice No.006 dated 08.10.2002 were obtained by petitioner and the goods were delivered to the representative of respondent No.2 Jai Gopal on 26.09.2002.

36. During investigation, Jai Gopal was also confronted by the investigating agency with the second delivery receipt dated 22.10.2002, who did not deny the signatures, but stated that he had executed so many receipts in day to day business, so the receipt in question dated 22.10.2002 might have been signed by him. The whole case was based upon the receipt dated 22.10.2002 which is signed by Jai Gopal, as confirmed by the hand writing expert. Moreover, respondent No.2 raised two credit notes dated 28.09.2002 to the extent of Rs.5,14,429/- and Rs. 1,81,275 respectively towards expenses incurred for promotion of sale. Accordingly, the company of the petitioner issued two cheques for aforesaid amount drawn on ABN Amro Bank, however said respondent No.2 stated that petitioner had taken back two cheques for which payment was stopped with an assurance to issue pay order in lieu thereof without mentioning the fact that total amount of Rs. 9,00,000.- was also paid to respondent No.2 for promotional expenses which was never accounted to respondent No.2. In addition, it is pertinent to mention here that on 12.01.2004, the company of the petitioner addressed one letter to the Bank of India calling upon them to clarify the factum of remitting the amount of irrevocable L/C in favour of company through their banker i.e. ABN Amro Bank under the terms and conditions of the agreement.

37. Thus, learned Trial Court has ignored the documentary evidence and the fact that second consignment/goods were delivered to Jai Gopal, who was the representative of M/s Pooja Road Lines Private Limited a sister concern of M/s Puja & Company. The said Jai Gopal has acknowledged his signatures on the delivery challan and hand writing expert has also confirmed it.

38. It is not denied that Jai Gopal is not known to respondent No.2. It is also not denied that M/s Pooja Road Lines Private Limited is not a family concern of respondent No.2 wherein the respondent No.2 and his wife have an interest in the said company. These facts establish that to initiate the criminal proceedings against petitioner, the respondent No.2 had initially denied the signatures of Jai Gopal saying that he was not familiar with said signatures.

39. Learned Metropolitan Magistrate has failed to appreciate that the petitioner has never claimed that Jai Gopal was the employee of M/s Puja & Company, but stated that the goods were delivered on 22.10.2002 to said person as representative sent by and on behalf of respondent No.2. Learned Metropolitan Magistrate also failed to consider the said PoA executed by respondent No.2 in favour of Jai Gopal which has not been denied or disputed on behalf of M/s Pooja Road Lines Private Limited as the same address is mentioned for both the companies i.e. 34/1/, Vikas Apartments, East Punjabi Bagh, New Delhi. The challan dated 04.10.2002 was signed by the same person who signed the earlier challan dated 04.10.2002 on the documents of M/s Pooja Road Lines Private Limited and M/s Pratap Oil Company of having same address as noted above. From the above facts, it is established that respondent No.2 has been running various firms from the very same address and using services of same person in these concerns as per his convenience showing him as authorised signatory on behalf of M/s Puja & Company, M/s Pratap Oil Company, and M/s Pooja Road Lines Private Limited.

40. As referred above, the law is settled that guilty intention is an essential ingredient of the offence of cheating and, therefore, to secure the

conviction '*mens rea*' on the part of accused must be established. In order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered. In the case in hand, there was no dispute at the time of first consignment, however, dispute crept in at the time of second consignment.

41. In case of ***Inder Mohan Goswami v State of Uttaranchal : AIR 2008 SC 251*** wherein the Supreme Court has held as under:-

> *"41. On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducting must be intentional but need not be fraudulent or dishonest. 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 a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one can not presume that he all along had a culpable intention to break the promise from the beginning."*

42. Also in case of ***Sharon Michael & Ors v. State of Tamil Nadu & Anr : (2009) 3 SCC 375*** wherein the Supreme Court held as under:-

> *"16. The first information report 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 against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing*

to show that the appellants herein who hold different positions in the appellant company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are the employees of the Company."

43. As per the established legal position noted above, the summoning of 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. The allegations in the FIR pertains to the purely civil transactions arising out of the said agreement dated 16.08.2002 and there was no occasion of any inducement.

44. It is also imperative to lodge criminal cases for the offences of cheating that it is the intention from the very inception to cheat the victim. In the instant case, reading of the averments made in the FIR and all the allegations are taken to be true, the ingredients of intentional deception on the part of the petitioner right at the beginning of the negotiations for the transactions has neither been expressly stated nor suggested in the complaint. It cannot be ruled out that the FIR has been lodged to wreck personal vengeance against the petitioner for the reason he refused to take back the goods from respondent No.2. The date of occurrence as per the averments is between August 2002 to October 2002 and the FIR in

question was registered on 17.06.2003 after a lapse of almost 8 months. Moreover, the allegations against petitioner are of cheating, embezzlement and wrongful loss and wrongful gain. The FIR is totally silent about any allegations of breach of trust or forgery so as to invoke the offences punishable under Sections 406/467 and 471 of the IPC as done by learned Trial Court against petitioner.

45. The Supreme Court in the case of ***State of Haryana & Ors v Ch.Bhajan Lal & Ors : AIR (1992) SC 604*** while deliberating on the powers of the High Court under Section 482 of the Cr P C, carved out certain category for quashing of the proceedings and held as under:-

> *"105. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> *(a) 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.*
>
> *(b) 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.
(c) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
(d) Where, the allegations in the F.I.R. 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.
(e) 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.
(f) 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.
(g) 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."

46. There is no escape from the conclusion that the facts of instant case are squarely falls within the categories (e) and (g) of above decision.

47. It not out of place to mention that learned Trial Court summoned all three accused persons including the petitioner herein. This Court vide order dated 20.07.2005 stayed the operation of impugned order dated 16.05.2005 and the Trial Court Record is tagged with the petition. Hence, learned Trial Court has not proceeded in the matter against the two other

persons. Moreover, both sides are agitating their respective claims and rights through civil suits.

48. In view of above discussion and legal position, I hereby set-aside order dated 16.05.2005 and quash the emanating proceedings thereto qua petitioner.

49. Consequently, the petition is allowed with no order as to cost. Trial Court Record be remitted henceforth.

Crl.M.A.No.7072/2005(Stay)

In view of above order, this application stands disposed of.

SURESH KAIT
(JUDGE)

MARCH 29, 2016
M/jg