

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO. 881/2021
AND
CRIMINAL WRIT PETITION NO. 900/2021
AND
CRIMINAL WRIT PETITION NO. 901/2021

CRIMINAL WRIT PETITION NO. 881/2021

Harry Inder Dhaul
Aged about 67 Years, Occ: Business,
R/o. 2, Kautilya Marg Chanakya Puri,
New Delhi - 110021. .PETITIONER

VERSUS

1. State of Maharashtra,
through Police Station Officer,
Ganeshpeth Police Station, Nagpur.
2. Siddhayu Ayurvedic Research
Foundation Private Limited,
A Company incorporated under
the provisions of Companies Act, 1956
C/704, Pramukh Plaza,
Cardinal Gracious Road,
Chakala, Andheri (East)
Mumbai - 400069
Through its Director/Authorised
Representative
3. State of Maharashtra
through Deputy Commissioner of Police,
Economic Offence Wing, Crime Branch,
Civil Lines, Nagpur - 440001 .RESPONDENT(S)

AND

CRIMINAL WRIT PETITION NO. 900/2021

Narayan Singh Pathania
Aged about 75 Years, Occ: Business,

R/o. Flat No. 4601, Gyan Shakti
CGHS Limited, Plot No. 7,
Sector-6, Dwarka,
New Delhi - 110076

. PETITIONER

VERSUS

1. State of Maharashtra,
through Police Station Officer,
Ganeshpeth Police Station, Nagpur.
2. Siddhayu Ayurvedic Research
Foundation Private Limited,
A Company incorporated under
the provisions of Companies Act, 1956
C/704, Pramukh Plaza,
Cardinal Gracious Road,
Chakala, Andheri (East)
Mumbai - 400069.
Through its Director/Authorised
Representative
3. State of Maharashtra
through Deputy Commissioner of Police,
Economic Offence Wing, Crime Branch,
Civil Lines, Nagpur - 440001. .RESPONDENT(S)

AND

CRIMINAL WRIT PETITION NO. 901/2021

Mikhail s/o Harry Dhaul
Aged about 44 Years,
Occ: Business,
R/o. 22, Rakhi Mahal,
Dinshaw Vacha Road,
Mumbai - 400020.

.PETITIONER

VERSUS

1. State of Maharashtra,
through Police Station Officer,
Ganeshpeth Police Station, Nagpur.
2. Siddhayu Ayurvedic Research
Foundation Private Limited,

A Company incorporated under
the provisions of Companies Act, 1956
C/704, Pramukh Plaza,
Cardinal Gracious Road,
Chakala, Andheri (East)
Mumbai – 400069.
Through its Director/Authorised
Representative

3. State of Maharashtra
through Deputy Commissioner of Police,
Economic Offence Wing, Crime Branch,
Civil Lines, Nagpur – 440001. .RESPONDENT(S)

Mr. S.S. Dewani, Advocate, for the petitioners in all petitions
Mr. S.S. Doifode, APP, for respondent Nos. 1 and 3 in all
petitions
Mr. Darasing J. Sindhu, Advocate, for respondent No. 2 in all
petitions

CORAM : **SUNIL B. SHUKRE AND**
M. W. CHANDWANI, J.J.

RESERVED ON : **30 NOVEMBER, 2022**
DELIVERED ON : **18 JANUARY, 2023**

JUDGMENT : (PER:- M. W. CHANDWANI, J.)

1. Heard.

2. **Rule.** Rule made returnable forthwith. Heard finally
by consent of the learned Counsel for the parties.

3. These criminal writ petitions challenge the same
order dated 23.08.2021 passed by Judicial Magistrate First
Class (for short “**the learned Magistrate**”), Court No. 1, Nagpur
directing to carry out investigation under section 156(3) of

the Criminal Procedure Code, 1973 (for short “**the Cr.P.C.**”).

4. The petitioner in Criminal Writ Petition no. 900/2021 ex-managing director and the petitioners in Criminal Writ Petition no. 881/2021 and 901/2021 were ex-directors of ‘Global Energy Private Limited’ (for short “**the company**”), a company registered under the Companies Act, 1956. The company holds a trading licence issued by the Central Electricity Regulatory Commission (for short the “**CERC**”) under section 14 of the Electricity Act, 2003 (for short “**the Act of 2003**”). Respondent no. 2 is a generating company within the meaning of the section 2(28) of the Act of 2003 and operates a wind energy generating facility. On 20.09.2010, the company entered into an agreement with respondent no. 2 for sale and purchase of wind energy for a period of ten years. Due to non payments of due by the Company and disputes between the company and respondent no. 2, the agreement dated 20.09.2010 came to be terminated by respondent no. 2. Respondent no. 2 stopped supply of electricity to the Company since October 2013. The arbitration clause of the agreement was invoked by the Company. Meanwhile, respondent no. 2 moved to Maharashtra Electricity Regulatory Commission (for short “**MERC**”) by filing Petition no. CC/83/2017 and sought recovery of Rs.1,37,82,778.36/- as principal amount and

Rs.3,78,98,332/- as interest. The prayer of the company that there was an arbitration agreement was not appreciated by the MERC. The company preferred appeal before Appellate Tribunal for Electricity (for short "**APTEL**").

5. On 31.01.2017, respondent no. 2 filed a complaint against the company before the Economic Offence Wing (for short "**EOW**"), Pune. EOW, Pune conducted inquiry and found that the matter is of civil nature. However, on 19.11.2017, respondent no. 2 again lodged complaint with EOW, Nagpur. EOW, Nagpur closed the complaint by observing the transaction to be of civil nature. Meanwhile, proceedings under the Insolvency and Bankruptcy Code, 2016 against the company have been initiated and are pending before National Company Law Tribunal (**NCLT**). Respondent no. 2 filed an application under section 156(3) of the Cr.P.C. before the learned Judicial Magistrate First Class, Nagpur. By impugned order, the learned Magistrate directed the respondent no. 1 to conduct the investigation in the matter and if need arises, the investigation may be given to respondent no.3. Pursuant to the direction, respondent no. 1 registered crime no. 392/2021 for the offences punishable under sections 406, 409, 420 r/w. 120-B of the Indian Penal Code, 1860 (for short "**the IPC**") against the company and the petitioners and the matter was

sent to respondent no.3 for investigation.

6. Feeling aggrieved with the registration of the First Information Report (**FIR**), the petitioners have approached to this Court for quashing the FIR and quashing and setting aside the order of the learned Magistrate dated 23.08.2021.

7. Respondent no. 2 filed its reply and opposed the petitions contending that detailed investigation is just and necessary as there are serious charges raised against the petitioners/company. The mandatory provisions of the Act of 2003 including regulations are clearly applicable and govern the relationship between the company and the respondent no. 2. Various cases are pending against the company and there are serious charges against the company. The company/petitioners failed to make payment even on making of demands at various times. The petitioners not only cheated the respondent no2, but also misappropriated the amount, thereby, committed the offences punishable under sections 406, 409, 420 r/w. 120-B of the IPC, hence, prayed for dismissal of the petitions.

8. The respondent no. 3 also filed reply contending that after direction of the learned Magistrate for investigation the investigating officer issued letters to the petitioners/company

dated 30.10.2021, 17.11.2021 and 04.12.2021 for ascertaining the role of the petitioners/company. The petitioners are not co-operating the investigation and prima facie material shows the involvement of the petitioners in the crime. Therefore, the petitions are liable to be dismissed and be dismissed.

9. Before proceeding to deal with the real controversy, let us first deal with the objection of the learned counsel for the petitioners. According to him that the application/complaint is filed by respondent no. 2 under section 156(3) of Cr.P.C. before the learned Magistrate without complying the mandatory requirement and the directions given in the cases of *Priyanka Srivastava & Anr vs State Of Uttar Pradesh & Ors [(2015) 6 SCC 287]*, *Sayed Anwar Ahmed And Anr. vs The State Of Maharashtra And Anr [2017 SCC OnLine Bom 3972]*. According to learned advocate for the petitioners, there is non-compliance with mandatory requirement of filing affidavit in support of the application/ complaint u/s 156(3) of Cr.P.C., therefore, the order of the learned Magistrate for investigation under section 156 (3) of the Cr.P.C does not stand and is required to be quashed on this ground alone.

10. The law with regard to section 156(3) of the Cr.P.C. is no longer *res integra*. It is also settled that before invoking the

provisions of section 156(3) of the Cr.P.C. the complainant has to make various compliances such as approaching the authorities under sections 154 and 154(3) of the Cr.P.C.. Apart from it, the contention made in the application/complaint under section 156(3) of the Cr.P.C. shall be supported by an affidavit.

11. In the case of **Priyanka Srivastava** (supra) in paragraphs 29, 30 and 31, the Hon'ble Supreme Court has held as under:-

“29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations take this route to harass their fellows’ citizens, efforts are to be made to scuttle and curb the same.

30. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of

applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in

lodging of the FIR."

12. In case of ***Sayed Anwar Ahmed*** (supra) relying on judgment in the case of ***Priyanka Srivastava***, the Bombay High Court, in paragraph 27 of the judgment has given certain directions which are as under :-

" 27. To summarise,

(a) While dealing with a Complaint seeking an action under Sub-Section (3) of Section 156 of Cr. P. C., the learned Magistrate cannot act mechanically. He is required to apply his mind to the contents of the Complaint and the documents produced along with the Complaint;

(b) An Order passed on the said Complaint must record reasons in brief which should indicate application of mind by the Magistrate. However, it not necessary to record detailed reasons;

(c) The power under Sub-Section (3) of Section 156 is discretionary. Only because on plain reading of the Complaint, a case of commission of cognizable offence is made out, an Order of investigation should not be mechanically passed. In a given case, the learned Magistrate can go in to the issue of the Veracity of the allegations made in the Complaint. The learned Magistrate must also consider the other relevant aspects such as the inordinate delay on the part of the Complainant. The nature of the transaction and pendency of civil proceedings on the subject are also relevant considerations;

(d) When a Complaint seeking an action under Sub-Section (3) of Section 156 is brought before the learned Metropolitan

Magistrate or the learned Judicial Magistrate, it must be accompanied by an affidavit in support as contemplated by the decision of the Apex Court in *Priyanka Srivastava*. The affidavit must substantially comply with the requirements set out in Chapter VII of the Criminal Manual and especially paragraphs 5 and 8 which are quoted above; and

(e) Necessary averments recording compliance with Sub-Sections (1) and (3) of Section 154 of the CrPC should be incorporated with material particulars. Moreover, the documents in support of the said averments must be filed on record.

13. Let us see whether in the present case, the application/complaint lodged by respondent no. 2 satisfies the compliance referred in cases of *Priyanka Srivastava* and *Sayed Anwar Ahmed* (supra).

14. A perusal of the application under section 153(3) of the Cr.P.C. shows that at the foot of the application solemn affirmation is done by the authorized person of respondent no.2. The solemn affirmation appearing at the foot of the application is reproduced here as under:

SOLEMN AFFIRMATION

I Shripad Prakashrao Moharil, Age - 45 years, resident of Nagpur, do hereby take oath and state on solemn affirmation that the content of above paragraphs no. 1 to 14 have been drafted by my counsel - Adv.

Prakash N. Rawlani as per my instructions. That it has been explained to me in my vernacular language, they are true and correct to best of my knowledge and belief.

Hence verified and signed here at Nagpur on this 2nd Day of August 2021.

15. Though, the application is supported by an affidavit in the form of solemn affirmation referred above, but, it does not substantially comply with the requirements set out in paragraph nos. 5 and 8 of chapter VII of the Criminal Manual as directed in the case of *Sayed Anwar Ahmed* (supra). The paragraph 5 and 8 of Chapter VII of the Criminal Manual are reproduced below:

“5. (1) Every affidavit should clearly specify what portion of the statement is made on the declarant’s knowledge and what portion of the statement is made on his information or belief.

(2) When a particular portion is not within the declarant's own knowledge but it is stated from information obtained from others, the declarant must use the expression “I am informed” and if it is made on belief should add “I verily believe it to be true.” He must also state the source or ground of the information or belief, and give the name and address of, and sufficiently describe for the purpose of identification, the person or persons from whom he had received such information.

(3) When the statement rests on facts disclosed in documents or copies of documents procured from any court or other person, the declarant shall state the

source from which they were procured and his information, or belief, as to the truth of the facts disclosed in such documents.

6.

7.

8. (1) The Officer authorised in this behalf, shall, before administering the oath ask the declarant if he has read the affidavit and understood the contents thereof, and if the latter states that he has not read it, or appears not to understand fully, the contents thereof, or appears to be blind, illiterate or ignorant of the language in which it is written, the Officer administering the oath shall read and explain or cause some other competent person to read and explain in his presence the affidavit to the declarant in the language which both the declarant and the Officer administering the oath understood.

(2) When an affidavit is read, translated or explained as herein provided the Officer administering the oath shall certify in writing at the foot of the affidavit that it has been so read, translated or explained in his presence and that the declarant understood the same at the time of making the affidavit and made his signature or finger impression in the presence of the Officer.”

16. In the present case, only at the foot of the complaint, paragraph in the form of solemn affirmation has been made without mentioning what portion of the statement in the application/complaint is made on the personal knowledge of the declarant and what portion of the statement in the application/complaint is made by him on the basis of

information and belief. The reasons, for the compliance of these requirements strictly is very obvious as held in ***Priyanka Srivastava*** (supra) i.e. to see that the complaint who invokes the jurisdiction under section 156(3) of the Cr.P.C. and put the criminal law in motion, shall be held responsible for any mischief in making out a false case. There should be no scope for the declarant to escape on the technical ground from responsibility attached to the statement made by him in the affidavit. Unless those compliances, referred in paragraph nos. 5 and 8 of chapter VII of the Criminal Manual are complied with, it will be difficult to hold the person making a declaration on oath, responsible for the statement made on an oath.

17. An affidavit filed without complying with the requirement of Chapter VII of Criminal Manual published by this court, cannot be said to be an affidavit filed in compliance with the direction issued by the apex court in **Priyanka Shrivasta** and **Sayad Anwar Ahmad**. Thus, we hold that in present case, there is non-compliance of mandatory requirement i.e. filing of the proper affidavit.

18. Now, let us turn to main controversy raised in this petition i. e. whether the allegations made by respondent no. 2 in application/complaint made before the learned Magistrate under section 156(3) of the Cr.P.C., when taken at their face

value do make out any prima facie case to constitute any offence and whether civil dispute between the parties is being given the colour of criminal offence as a short cut to civil remedy or not.

19. Learned advocate for the petitioners submitted that the civil dispute has been given a colour of criminal offence and criminal proceeding has been initiated to harass the petitioners. According to him, the dispute between respondent no.2 and the company arose out of agreement of sale and purchase. The issue is of non-payment of due amount by the company, which is civil in nature and it will not attract criminal law. The allegations made in the complaint/application made before the learned Magistrate for requesting for investigation, do not make out any prima facie case to constitute any offence against the petitioners. The allegations made in the complaint are already got tested, initially from the EOW, Pune and then from EOW, Nagpur. Both of them opined that the dispute between the company and respondent no. 2 is of a civil in nature. Therefore, it cannot be termed as cheating, much less criminal breach of trust. The learned magistrate has not applied his mind before issuing direction. According to the counsel for the petitioners, for above reasons, the order of learned magistrate as well as FIR needs to be quashed and set

aside.

20. The learned counsel for respondent no. 2 vehemently submits that though there was an agreement between respondent no. 2 and the company, but, the company had induced to respondent no. 2 to enter into an agreement. The company had neither intention nor commitment to perform its obligation, but only had the intention not to pay the amount outstanding towards the sale of energy to respondent no. 2. It is submitted that after recovering the amount from retail purchasers, the company did not perform its statutory obligations to repay the amount of respondent no 2, therefore, they have committed offences punishable under sections 406, 409, 420 r/w 120B of the IPC. According to him, High of Karnataka at Bangaluru, in another similar case dismissed the petition of the very same applicants/petitioners for quashing the FIR registered against the company on the same allegations. According to him, no case is made out for interference in the order of the learned Magistrate. Hence, seeks dismissal of the petitions.

21. The learned APP appearing for respondent no. 1 and 3 supported the order of the learned Magistrate and according to him, the learned Magistrate rightly ordered for the

investigation under section 156(3) of the Cr.P.C., therefore, the petitions are liable to be dismissed.

22. It is settled law that mere breach of contract is not in itself is a criminal offence and only gives rise to civil liability of damages. However, the distinction between mere breach of contract and cheating is fine. While breach of contract cannot give rise to criminal prosecution for cheating, fraudulent or dishonest intention is basis of the offence of cheating and criminal breach of trust. This has to be determined in the facts and circumstances of each case.

23. The offence of cheating is punishable under section 420 of IPC. It will be apt to reproduce Section 420 of IPC which reads as under :-

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

24. To appreciate the argument advanced by the learned counsel for the respective parties in this regard, it is

necessary to consider the relevant averments made in the application/complaint filed by respondent no. 2, which we find in paragraph nos. 2 to 7 of the application/complaint and those are reproduced here as under :-

*“2) That on 20.09.2010 Applicant entered into an agreement for sale of entire wind energy generated through the above said project through accused to consumers in the state of Maharashtra. A copy of this Agreement is annexed and marked herewith as **Annexure-A**. Accused is an electricity trading Company presently holding a valid license to trade electricity issued by the Central Electricity Regulatory Commission.*

*3) That the reason for the present complaint is that Accused induced Applicant to enter into an agreement for which it never had either the intention or the commitment to perform its obligations fully as envisaged under the agreement. Till date an undisputed amount of Rs.8,03,62,566/- (**Eight Crore, Three Lakh, Sixty Two Thousand, Five Hundred and Sixty Six Thousand Rupees Only**) being the proceeds remaining outstanding for the sale of energy effected through accused stands payable by accused since the year 2012-13 which even after constant requests and reminders has not been paid to Applicant. Needless to state that accused has also assured Applicant in the past that such amounts shall be paid which assurances were also nothing but an empty promises. **Annexure-B**.*

4) The fact of admission of liability and assurance w.r.t to payment of the same given by accused has also been rightly recorded by the Hon'ble Maharashtra Electricity Regulatory Commission in its

Order dated 10.04.2018. A copy of the Order dated 10/04/2018 is annexed and marked herewith as **Annexure-C (Para 20 & 21)**

5) It is also an admitted position that even after recovering all the money by selling power supplied by Applicant to various consumers in Maharashtra since, 2012, Accused has "Misappropriated" the same and has not paid Applicant their legitimate dues. By such willful and deliberate act, accused are liable to be prosecuted under Section 405, 406, 415, 418, 420, 425 read with Section 120 B and 34 of the Indian Penal Code, 1860. It is reiterated that accused never had the intention to perform its obligations under the said agreement.

6) Applicant is conscious of the fact that the present dispute arises out of a contract for which a civil remedy is available to parties. In fact Applicant has already submitted them before the Hon'ble Maharashtra Electricity Regulatory Commission for claiming their contractual losses. However, it is an established principle that "If prima-Facie ingredients of criminality are established then such disputes have to be entertained notwithstanding that there are also civil disputes" meaning thereby that a commercial transaction may also have a criminal ingredients and if such criminality is prima-facie established then both civil and criminal prosecution can go simultaneously. Hence civil remedy does not bar a criminal action if prima-facie a case of criminality is established. A sample copy of the judgment passed by the Hon'ble Supreme Court on the above proposition is annexed and marked herewith as **Annexure-D**.

7) The modus-operandi through which a lot of people/companies have been cheated

and duped of hundreds of Crores of rupees needs to be understood which can best be summarized as under:

Inducing People to get into commercial agreements.

Take their property/energy generated by them, use it, sell it and make profits.

Pay them initially.

Stop paying them after sometime.

Create a lot of outstanding.

Create false and baseless counter-claims.

Cheating various entities in Maharashtra on the same design and pattern.”

25. It will also be useful to see the relevant clauses of the agreement executed between respondent no.2 and the company, which are reproduced below:

“ARTICLE 1

SALE PURCHASE OF WIND ENERGY

1.1 Sale and Purchase

a. The Generator hereby agrees to exclusively sell and deliver and the Purchaser hereby agrees to purchase and accept the Wind Energy of the Facility at the Delivery Point In accordance with and subject to the terms and condition of this Agreement. It is estimated that 25MUs of Wind Energy will be available in a year for sale and purchase under this Agreement (the “Estimated Wind Energy”) from 1st April 2011 onwards since commissioning of the proposed 12.85 MW is in phases out of which only 4.5 MW shall be available from 30th

September 2010 onwards.

b. The Parties have mutually agreed upon a Power Purchase Price of Rs. 4.05/Unit (The “Base Price”) for the sale of the Wind Energy at the Delivery Point. It is mutually agreed that for each subsequent year, the Power Purchase Price shall be kept constant at the agreed base price for the entire duration of 10 years and the extended period of additional 3 years thereafter.

Provided that in the event of any change in Metering Point or Delivery Point, the Parties reserve the right to re-negotiate the Power Purchase Price as well as the Delivery Point.

c. The Power Purchase Price indicated above is Inclusive of all taxes and duties, If any, In case, due to type of buyer, as a result of which any Electricity Duty and/or Tax on sale becomes applicable, the same will be to the account of the purchase/GEPL.

However, it is clarified that, In case of any increase in the existing tax/duty rates or imposition of new taxes/duties, arising out of change of law then the Parties shall re-negotiate the Power Purchase Price in good faith.

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ARTICLE 8

PAYMENT SECURITY MECHANISM

8.1 The Purchaser shall open Revolving Irrevocable Letter of credits in favour of the Generator, on a monthly basis equivalent to 100% of the estimated monthly billing (30 days) based upon operation of the Facility at 20% estimated PLF @ Rs.4.05/Unit as security towards payment with the

Generator before commencement of the proposed transaction.

8.2 In the event of default in payment by the Purchaser of any undisputed sum for power supplied and billed by the Generator as provided in clause 7.2(a) above, the Generator shall give a notice to the Purchaser, stating that if default in payment is not remedied within 15 days from the receipt of said notice, the Generator shall proceed to encash the Payment Security.

8.3 The Parties agree that only in the event of the Purchaser not making the payment within 15 days from the receipt of notice mentioned in Clause 8.2, shall the Generator be entitled to encash the Payment Security.

8.4 The Parties agree that in the event the Generator is compelled to encash the aforesaid Payment Security as stated in Clause 8.3 above, then Purchaser agrees to open fresh Letter of Credits in favour of the Generator as stated in Clause 8.1 above to replenish/reinstate the aforesaid Securities within 7 days of such encashment. In case the Purchaser delays in reinstating the above security in favour of the Generator within 7 days as stated above, then the Purchaser agrees to pay penal interest at the rate of 2% on the total value of the above Securities for the entire duration of such delayed period until such time the agreed Securities are reinstated as provided in clause 8.1 of this agreement.”

26. The allegations in the complaint and clauses of the agreement clearly spell out that relation between the Company and respondent no. 2 were of purchaser and seller, respectively. By the agreement dated 20.09.2010, the

Company agreed to purchase entire wind generated electricity of respondent no. 2. The energy was sold to the Company and the bills were generated by respondent no. 2 towards sale of the wind energy to the company. From time to time, the company made the payment towards said purchase between 2010 to 2012 to the tune of Rs.30,43,91,936/-. The complaint as well as statement to police show that there was balance of Rs.1,37,82,077/- outstanding due to the Company towards sale of energy, which could not be paid by the Company and the remaining amount in the claim is towards penalty and interest on the outstanding dues. Thus, it is manifest that the main grievance of respondent no. 2 in the application/complaint u/s. 156(3) is non payment of the outstanding due by the Company.

27. An attempt has been made by respondent no. 2 by incorporating in the complaint that the company induced respondent no. 2 to enter into an agreement for which it never had intention to perform its obligation fully. Taking help of these averments, the learned counsel for respondent no. 2 vehemently submits that the company since inception had intention to cheat respondent no. 2 and with that intention agreement came to be executed by the company with respondent no. 2, therefore, it is clear case of cheating against

them.

28. It can be seen from the complaint/application filed by the respondent that initially the amount towards purchase of energy was paid by the company to the tune of more than Rs. 30 crores and only outstanding due was Rs. 1,37,82,077/- which the company could not pay. Thus, a big chunk of amount towards transaction is already paid and only a small portion is outstanding against the company. The fact that the company has so far discharged its liability under the contract substantially by paying to respondent No. 2 an amount which is more than Rs. 30 crores and the disputed amount is of only Rs. 1,37,82,077/-, itself falsifies the allegation of respondent No. 2 made on oath that the company had no intention, since inception to honour its commitment towards making payment, as per the contract. Dishonest intention has to be there since inception of contract, which is missing here.

29. That apart, there are covenants in the agreement that in case of non-payment of dues, certain measures for realisation of the dues can be taken, as e.g., invoking bank guarantee, stopping of sale of energy to the company invoking LOC and so. These clauses show that the respondent no. 2 was in a dominant position in the agreement and was having control over the transactions with the company. Then, for

breach of agreement i.e. non-payment of due, respondent no. 2 has also a right to charge penal interest to the company. The respondent no. 2 could have and should have taken recourse to these measures; instead of filing a criminal proceeding and it seems, he has already done it.

30. Evidently, the civil proceedings are pending between respondent no. 2 and the company in respect of the same transaction in MERC and APTEL. The alleged incidents of non-payment of the company is of 2012. Thus, the respondent no.2 has already proceeded under the civil law against the company for the breach of contract.

31. Notably, two attempts were made by the respondent by filing police complaints to launch criminal prosecution against the company. Firstly at Police station (EOW) at Pune. EOW, Pune opined that the matter is of civil nature and it closed the case and rightly so. Then, the respondent no.2 took chance at Police station (EOW) at Nagpur. EOW Nagpur after inquiry did not take cognizance of the matter by holding that transaction is of civil nature and closed the proceedings, again rightly so.

32. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit

knows or believes to be false. For holding a person responsible for an offence of cheating, it must be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence and that person by making false representation induced the other person to do something. There is no averment in the application/complaint that false representations were made to respondent no. 2 by the Company, whereby respondent no. 2 was induced to execute agreement. Mere allegations that the Company induced respondent no. 2 to enter into the agreement and since inception, it had intention not to perform the obligations fully as envisaged to the agreement will not make a civil dispute to a criminal offence of cheating. From the averments in the application/complaint and facts & circumstances noted earlier, no offence of cheating is made out.

33. This takes us to the allegation of the committing offence of criminal breach of trust. It is contended by learned counsel for respondent no. 2 that there are ingredients to show that the company has committed an offence of criminal breach of trust. Criminal breach of trust is defined under Section 405 of the IPC, which is reproduced here as under :-

405. Criminal breach of trust. —
Whoever, being in any manner entrusted with property, or with any dominion over

property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

32. Explanation 1.—A person, being an employer [of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

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

34. From above definition, we can cull out the essential ingredients of offence of criminal breach of trust which are as under:

1. Accused must be entrusted with the property or with any dominion over it;
2. The person so entrusted must use the property dishonestly or;
3. The accused must dishonestly use or dispose of that property or wilfully suffer any person to do so in violation of;
 - (a) any direction of law prescribing the mode in which such trust to be discharged or;
 - (b) any legal contract which he has made teaching the discharge of such trust.

35. The learned counsel for respondent no. 2 vehemently submits that the amount, which has been collected by the company from the persons to whom it had sold the electric energy has not been repaid to respondent no. 2. The company was under statutory obligation to pay the same to the respondents as per regulation of CERA. According to him non-payment of statutory dues is amount to non-compliance of statutory obligations and violation of direction of a law. By not repaying the payment to respondent no. 2, the Company has committed offence of criminal breach of trust punishable under Section 406 of IPC.

36. We have already stated above that the agreement between the respondent no.2 and the company is a purchase agreement of wind energy. Thus, the transaction between respondent no.2 and the company under the agreement is of sale – purchase. Once respondent no,2 sold the energy to the company, respondent no. 2 does not remain the owner of the said energy. The delivery of property/energy by respondent no,2 to the company is not an entrustment of the property in trust, but, it is a delivery of property in the transaction of sale. After sale, the company became owner of the energy sold to it, therefore there is no question of misappropriation or dishonestly using or disposing of the same.

37. Though, the company was under statutory obligation to pay dues of respondent no. 2, the non-payment will not amount to misappropriation of the amount by the Company. By no stretch of imagination, it would be offence of criminal breach of trust. As state above, the very nature of the transaction in the agreement is of sale and purchase and not entrustment of the property in trust, there is no question of attracting the provisions of sections 406 or 409 of the IPC. Therefore, on scrutiny of allegations made in the complaint/FIR and agreement in question, we do not find, constitution of any offence, much less, sections 406 and 409 of

IPC.

38. Advocate for respondent no.2 relied on the judgment of the Karnataka High Court where in a similar case, the petition of the very same company for quashing of FIR registered for the offence punishable under sections 405 and 418 has been rejected by the Karnataka High Court. We have carefully gone through the judgment of the Karnataka High Court. In the said case, the agreement was of, to supply the electricity of the generating company to TSPCC company, a third party, through the company. Thus, in that case, the company was acting as an agent for and on behalf of the generating company to supply the energy to TSPCC company. The amount collected from TSPCC company was collected by the company on behalf of generating company. Whereas, in the present case, the covenants in the agreement executed between the company and respondent no. 2 clearly spell out that the transaction between the company and respondent no. 2 was nothing less than sale. Therefore, findings of single judge of Karnataka High Court against the company, on similar like case of energy will not be helpful to respondent no. 2 and will not come in the way of the company.

39. Above all, respondent no.2 has roped the ex-managing director and ex-directors in criminal prosecution

without specifying their role in commission of offences. Even, the complaint does not wishper that the relevant time who was incharge of and responsible for the affairs of the company. The petitioners are made accused in this case without any averment regarding role played by them in commission of the alleged offence.

40. In the case of *M/s. Thermax Ltd.& Ors vs K.M.Johny & Ors [(2011) 13 SCC 412]*,) while quashing the criminal proceeding, the Hon'ble Supreme Court has held in paragraphs 38 to 42, which reads as under:

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

39. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of “vicarious liability” is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the

appellant Company.

40. It is useful to demonstrate certain examples, namely, Section 141 of the Negotiable Instruments Act, 1881 which specifically provides that:

“141. Offences by companies.- (1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:”

41. Likewise, Section 32 of the Industrial Disputes Act, 1947 provides that:

“32. Offence by companies, etc.- Where a person committing an offence under this Act is a company, or other body corporate, or an association of persons (whether incorporated or not), every director, manager, secretary, agent or other officer or person concerned with the management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence.”

42. We have already noted that the offence alleged in the criminal complaint filed by respondent 1 is under Sections 405 and 420 IPC whereunder no specific liability is imposed on the officers of the company, if the alleged offence is by the company. In the absence of specific details about the same, no person other than Appellant 1 Company can be prosecuted under the alleged complaint.”

41. Thus, without the necessary averment in the

complaint regarding the role played by each of the petitioner, the complaint is not maintainable against the petitioners. That apart, there is huge delay in launching the criminal prosecution. After the gap of more than eight years the application under section 156(3) of the Cr.P.C. came to be filed.

42. The upshot of the above discussion is that the case is only of breach of a contract. The civil dispute has been given colour of criminal offence. The learned magistrate did not apply mind and mechanically passed the order under section 156(3) of Cr.P.C. directing to police for investigation. Apart from technical lacuna that the application under section 156(3) of the Cr.P.C. is not supported by the proper affidavit in terms of paragraph nos. 5 and 8 of chapter VII of the Criminal Manual as held in the case of ***Sayed Anwar Ahmed*** (supra), we also find that even the allegations made in the complaint/FIR and statements are taken at their face value, no offence, whatsoever, has been made out much less those punishable under sections 406, 409 and 420 r/w. 120B of the IPC.

43. In the case of ***State of Haryana & others vs. Bhajan Lal & others***, reported in ***1992 Supp(1) SCC 335***, the Hon'ble Supreme Court in paragraph 102 has laid down guidelines,

which are reproduced below:

“102. 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 extraordinary 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 channeliser and inflexible guidelines or rigid formulae and to give exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but

constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

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

44. As we have held that the allegations made in the application/complaint, if taken at their face value, do not constitute any offence, the cases of the present petitioners are covered by clause 1 of paragraph 102 of the judgment in the case of ***State of Haryana & others (Supra)***.

45. To conclude, the continuation of the proceedings against the petitioners will be an abuse of process of criminal

law, therefore, the order of learned Magistrate does not sustain in the eye of law. Hence, order dated 23.08.2021 passed by the learned Magistrate in M.C.A No. 2619/2021 and FIR No. 0392/2021 registered with the Ganeshpeth Police Station, Nagpur are quashed and set aside.

46. Rule is made absolute in the above terms. No costs.

47. The Writ Petitions are disposed of accordingly.

(M. W. CHANDWANI, J.)

(SUNIL B. SHUKRE, J.)