A V.P. SHRIVASTAVA

v.

INDIAN EXPLOSIVES LTD. & ORS.

(Criminal Appeal No. 1843 of 2010)

SEPTEMBER 24, 2010

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[D.K. JAIN AND H.L. DATTU, JJ.]

Penal Code, 1860 – ss. 405, 415, 420, 406 and 120-B – Cheating and dishonestly inducing delivery of property, C *criminal breach of trust and criminal conspiracy – Company in which appellants were senior functionaries entering into tripartite agreement with complainant company and another company – Complainant alleging suppression of the fact by appellants that the company was likely to be declared a sick* D *company – Criminal complaint u/ss. 420, 406 and 120B IPC and ss. 540 and 542 of the Companies Act – Issuance of summons to appellants – Petition u/s. 482 Cr.P.C. – Dismissed by High Court – On appeal, held: No prima facie case made out against appellants in respect of alleged* E *offences u/ss. 420, 406 and 120B – High Court should have quashed the complaint exercising its jurisdiction u/s. 482 Cr.P.C. – Thus, order of High Court set aside and order of magistrate taking cognizance in complaint case quashed – Code of Criminal Procedure, 1973 – s. 482 – Companies Act,* F *1956 – ss. 540 and 542.*

Respondent no. 1 Company (IEL) was engaged in the manufacture and sale of industrial explosives. They used to buy raw materials from 'FCIL'. 'FCIL' entered into a tripartite agreement with respondent no. 1 and 'BCCL'. G **In terms of the agreement, 'FCIL' supplied raw materials to respondent no. 1. The same was stopped due to breakdown of gas compressor and financial difficulties. 'FCIL' was declared a sick company by the BIFR.**

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Thereafter, the BIFR directed winding up of 'FCIL'. Respondent no. 1 filed a criminal complaint against the appellants and 'M'-senior functionaries of 'FCIL for offences punishable under Sections 420, 406 and 120B IPC. Respondent no. 1 also filed a suit for recovery of certain amount. The magistrate took cognizance of the complaint and issued summons against the appellants and 'M'. Aggrieved, the appellants and 'M' filed petition under section 482 of the Code of Criminal Procedure, 1973 for quashing the order of summoning them. The High Court dismissed the petition. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 It is plain from a bare reading of Section 415 IPC that to hold a person guilty of cheating, as defined in Section 415 IPC, it is necessary to show that at the time of making the promise he had a fraudulent or dishonest intention to retain the property or to induce the person so deceived to do something which he would not otherwise do. Such a culpable intention right at the time of entering into an agreement cannot be presumed merely from his failure to keep the promise subsequently. [Paras 21 and 24] [801-C; 80' E]

Ram Jas vs. State of U.P **(1970) 2 SCC 740;** *Hridaya Ranjan Prasad Verma and Ors. vs. State of Bihar and Anr.* **(2000) 4 SCC 168;** *S.W. Palanitkar and Ors. vs. State of Bihar and Anr.* **(2002) 1 SCC 241;** *Kuriachan Chacko and Ors. vs. State of Kerala* **(2008) 8 SCC 708;** *Medical Chemicals and Pharma (P) Ltd. vs. Biological E. Ltd. and Ors.* **(2000) 3 SCC 267;** *Hira Lal Hari Lal Bhagwati vs. CBI, New Delhi* **(2003) 5 SCC 257, referred to.**

1.2. In the instant case, a bare reading of the complaint would show that there was not even a whisper

A let alone a specific averment that the appellants had dishonestly 'induced' 'IEL' to enter into the said agreement/arrangement. On the contrary, the complaint clearly revealed that 'IEL' was fully conscious of the precarious financial health of 'FCIL' at the time they had B decided to enter into contract with 'FCIL' and 'BCCL' to ensure a regular supply of their basic raw material from 'FCIL' so that their production of explosives did not suffer. It is manifest from the complaint that the basis of the complaint was that by deliberately suppressing the C fact that 'FCIL' had already been referred to the BIFR after the erosion of its net worth and was likely to be declared a 'sick company', the appellants induced 'IEL' to pay Rs.4,20,41,622/- to 'BCCL' and in return did not supply ammonium nitrate to them. A mere mention of the words D 'defraud' and 'cheat' in the complaint, in the setting that these were used, is not sufficient to infer that the appellants had dishonest intention right at the beginning when, demonstrably, after due deliberations a tripartite agreement was signed, which, under the given E circumstances at that juncture, was considered to be in the interest of all the three parties to the agreement. [Para 25 and 26] [802-F-G; 803-A-B; 806-E-G]

1.3 At best, the instant case was of breach of contract on the part of 'FCIL', for which the company is already F defending a civil suit filed by 'IEL'. The averment strikes at the root of the allegation that at the time of entering into the agreement, the appellants had fraudulent intention to somehow induce 'IEL' to enter into the said agreement and part with a huge sum of money. On their own G showing 'IEL' was fully aware of the financial health of 'FCIL' at the time the contract was entered into, as also the reason why 'FCIL' was unable to continue the production of ammonium nitrate. In order to constitute an offence of 'cheating', the intention to deceive should be

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in existence at the time when the alleged inducement was made. In the instant case, such an intention cannot be inferred from the allegations in the complaint and averments in the plaint. Therefore, even if the allegations made in the complaint are taken to be correct on their face value, they may amount to breach of terms of contract by 'FCIL' but do not constitute an offence of 'cheating', punishable under Section 420 IPC. [Paras 27 and 28] [807-C; F-H; 808-A]

Anil Mahajan vs. Bhor Industries Ltd. and Anr. **(2005) 10 SCC 228, referred to.**

2.1. In relation to the offence under Section 405 IPC, the first ingredient that needs to be established is entrustment. However, it must be borne in mind that Section 405 IPC does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. [Paras 32 and 33] [809-G-H; 810-C-E]

Jaswantrai Manilal Akhan vs. State of Bombay **AIR 1956 SC 575;** *Indian Oil Corpn. vs. NEPC India Ltd. and Ors.* **(2006) 6 SCC 736, relied on.**

Onkar Nath Mishra and Ors. vs. State (NCT of Delhi) and Anr. **(2008) 2 SCC 561;** *Common Cause, A Registered Society vs. Union of India and Ors.* **(1999) 6 SCC 667 – referred to.**

2.2. In the instant case, there is nothing in the complaint which would suggest remotely that the 'IEL' had entrusted any property to the appellants or that the appellants had dominion over any of the properties of the

A **'IEL', which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405 IPC, punishable under Section 406 IPC. [Para 34] [810-E-F]**

3.1. Having come to the conclusion that no *prima facie* case had been made out against the appellants in respect of the alleged offences under Sections 420 and 406 IPC, the question of alleged conspiracy between the appellants does not arise. Nevertheless, in order to bring home the charge of conspiracy within the ambit of Section 120B IPC, it is necessary to establish that there was an agreement between the appellants for doing an unlawful act. The complaint lacks any such substance. [Para 35] [810-G; 811-A]

3.2. No *prima facie* case was made out against the appellants in respect of alleged offences under Sections 420, 406 and 120B IPC and, it was a fit case where the High Court should have exercised its jurisdiction under Section 482 of the Code quashing the complaint against the appellants. Thus, the impugned order is set aside and the order of the magistrate taking cognizance in the complaint case is quashed. [Paras 36 and 37] [811-B-D]

All Cargo Movers (India) Private Limited and Ors. vs. Dhanesh Badarmal Jain and Anr. **(2007) 14 SCC 776;** *R.P. Kapur vs. State of Punjab* **AIR 1960 SC 866;** *Dinesh Dutt Joshi vs. State of Rajasthan and Anr.* **(2001) 8 SCC 570;** *G. Sagar Suri and Anr. vs. State of U.P. and Ors.* **(2000) 2 SCC 636, referred to.**

Case Law Reference:

(2007) 14 SCC 776	**Referred to.**	**Para 12**
AIR 1960 SC 866	**Referred to.**	**Para 16**
(2001) 8 SCC 570	**Referred to.**	**Para 17**

(2000) 2 SCC 636	**Referred to.**	**Para 18**
(1970) 2 SCC 740	**Referred to.**	**Para 22**
(2000) 4 SCC 168	**Referred to.**	**Para 22**
(2002) 1 SCC 241	**Referred to.**	**Para 22**
(2008) 8 SCC 708	**Referred to.**	**Para 22**
(2000) 3 SCC 269	**Referred to.**	**Para 23**
(2003) 5 SCC 257	**Referred to.**	**Para 24**
(2005) 10 SCC 228	**Referred to.**	**Para 26**
(2008) 2 SCC 561	**Referred to.**	**Para 31**
(1999) 6 SCC 667	**Referred to.**	**Para 32**
AIR 1956 SC 575	**Relied on.**	**Para 33**
(2006) 6 SCC 736	**Relied on.**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Civil Appeal No. 1843 of 2010.

From the Judgment & Order dated 28.2.2007 of the High Court of West Bengal at Calcutta in CRR No. 2898 of 2004.

WITH

Crl. A. No. 1844 of 2010.

Jaideep Gupta, Shweta Bharti, Ahanthem Henry, Saurabh Raj Sinha, Ghanshyam Joshi, Dipak Kumar Jena, Sanjoy Ghosh, Avijit Bhattacharjee for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted.

2. These appeals, by special leave, arise out of the

judgment and order dated 28th February 2007, delivered by the High Court of Calcutta in CRR No.2898 of 2004 in a common petition filed by the two appellants herein and one Mr. A.K. Mukherjee, who is now deceased, under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code"). By the impugned judgment, the High Court has declined to quash a private complaint filed by respondent No.1 company against the appellants and Mr. A.K. Mukherjee for offences under Sections 420, 406 and 120B of the Indian Penal Code, 1860 (for short "the IPC').

3. Shorn of unnecessary details, the facts, material for the purpose of disposal of these appeals may be stated thus:

Both the appellants in these appeals were senior employees of the Fertilizer Corporation of India Limited (hereinafter referred to as "FCIL"), a government company within the meaning of Section 617 of the Companies Act, 1956.

4. On 20th April 1992, the FCIL's Board of Directors passed a resolution to the effect that the company had become a sick company within the meaning of the Sick Industrial (Special Provision) Companies Act, 1985 (hereinafter referred to as "SICA") and hence a reference should be filed with the Board of Industrial and Financial Reconstruction (hereinafter referred to as "BIFR"). On 6th November 1992, FCIL was declared a "sick company" under Section 3(1)(o) of the SICA by the BIFR.

5. The complainant — Indian Explosives Limited (hereinafter referred to as "IEL"), respondent No.1 in these appeals, is engaged in the manufacture and sale of industrial explosives. Ammonium nitrate is a major raw material for the manufacture of explosives, and the same was procured by IEL from FCIL. Some time in the year 2001, FCIL entered into a tripartite agreement with M/s Bharat Coking Coal Limited (hereinafter referred to as "BCCL") and IEL. As per the arrangement under the agreement, it was agreed that FCIL

would supply ammonium nitrate to IEL and against this supply, IEL would supply explosives of an equivalent value to BCCL, which in turn would supply coal of equivalent value to FCIL. It is an undisputed fact that pursuant to the said arrangement ammonium nitrate was supplied by FCIL to IEL for some time. However, due to the breakdown of a synchronized gas compressor and other financial difficulties, FCIL stopped supplies of ammonium nitrate to IEL.

6. On 2nd November 2001, BIFR formed its final opinion recommending winding up of FCIL and forwarded the same to the High Court of Delhi. Some time in December 2001, FCIL aggrieved by the opinion of the BIFR, preferred a statutory appeal under Section 25 of SICA before the Appellate Authority for Industrial and Financial Reconstruction (hereinafter referred to as "AAIFR"). However, on 16th April 2002, the AAIFR dismissed the said appeal and confirmed the order of the BIFR for the winding up of FCIL. In June 2002, FCIL and its employees preferred a Writ Petition (CWP No.3298 of 2002) before the High Court of Delhi challenging the said order of the AAIFR. The writ petition was disposed of by the High Court by its order dated 26th November 2002, whereby it remitted the matter back to BIFR for fresh consideration on the revival of the closed units of FCIL. BIFR, upon receiving the reference, directed the winding up of FCIL, except the JMO unit and on 2nd April 2004 sent its opinion to the High Court for confirmation.

7. During the pendency of the writ petition before the High Court, the Government of India, on 30th July 2002, issued a memorandum for closing of all the units of FCIL except the Sindhri and JMO units. On 10th September 2002, the Government of India issued yet another memorandum directing closure of the Sindhri unit as well. It was further directed that FCIL shall implement Voluntary Suppression Scheme in all its units, and all the employees shall be discharged of their employment. The appellants herein availed of the Voluntary Suppression Scheme and were discharged from the service of FCIL.

A 8. On 22nd May 2003, IEL instituted a criminal complaint (Case No. 2560/2003) in the court of Chief Metropolitan Magistrate, Kolkata under Sections 406, 420 and 120B of the IPC read with Sections 540 and 542 of the Companies Act, 1956 against both the appellants and Mr. A.K. Mukherjee.

B 9. Simultaneously, on 25th May 2003, IEL also filed a Title Suit No. 34 of 2003 before the 4th Civil Judge, Alipore for recovery of the outstanding amount of Rs.4,20,41,622/- along with future and pendelite interest against FCIL. IEL, on 23rd January 2004, obtained and was granted permission by the C BIFR to continue with the said civil suit subject to the condition that they will not execute the decree in the suit without the permission of the BIFR.

10. On 30th October 2003, the Chief Metropolitan D Magistrate referred the complaint to Metropolitan Magistrate, 8th Court, Kolkata, who issued summons against the appellants and Mr. A.K. Mukherjee. Aggrieved by the order of the Magistrate taking cognizance of the complaint, appellants together with Mr. A.K. Mukherjee preferred the afore-stated E petition under Section 482 of the Code for quashing of the order summoning them to stand trial, before the Calcutta High Court.

11. As stated above, the High Court, vide its impugned judgment has dismissed the said petition. The High Court has inter alia, observed that if the fact that FCIL, of which the F accused were senior functionaries, had become sick and the question of its winding up was under consideration by the BIFR was made known to the complainant company, it would not have agreed to the proposal of the accused persons. According to the High Court, in order to arrive at a conclusion whether or not G on the available materials the accusation against the appellants would be sustained or not, a detailed enquiry by appreciation of the evidence would be required and such an exercise, being entirely a matter of trial, cannot be undertaken in proceedings under Section 482 of the Code.

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Hence the present appeals.

12. Mr. Jaideep Gupta, learned senior counsel appearing for the appellants strenuously urged that the complaint deserves to be quashed as it ex-facie lacks the basic ingredients of Sections 420 or 406 IPC. It was argued that in the complaint it is not even averred that the accused had a fraudulent or dishonest intention to induce the complainant to enter into the tripartite agreement. Similarly, there is no allegation that the appellants herein had dishonestly misappropriated or converted to their use any property of IEL, which had been entrusted to them. Further, from a bare perusal of the complaint, it is evident that the complainant was aware of the financial health of FCIL and, therefore, it cannot be said that the appellants had suppressed the fact that FCIL was likely to be declared as a sick company. To buttress the plea, learned senior counsel referred to the plaint in the suit. Relying on the decision in *All Cargo Movers (India) Private Limited & Ors. Vs. Dhanesh Badarmal Jain & Anr.*[1], it was submitted that the averments and the documents in the civil suit could be taken into consideration to find out as to whether the allegations in the complaint were correct. Additionally, learned senior counsel argued that the disputes between FCIL and IEL were essentially civil in nature, and the complaint only against the erstwhile employees of FCIL was mala fide and an abuse of the process of court and, therefore, deserves to be quashed.

13. Per contra, Mr. Sanjoy Ghosh, learned counsel appearing on behalf of the IEL, supported the impugned judgment and argued that the appellants had only disclosed to the IEL that FCIL was going through a financial crunch and, therefore, withholding of material information regarding its moving the BIFR for being declared a sick company was clearly suppression of material facts from IEL with a mala fide intention to induce them to enter into the said agreement with them,

1. (2007) 14 SCC 776.

A knowing fully well that FCIL will not be able to honour its commitment under the arrangement. According to the learned counsel, this tantamounts to cheating as also criminal breach of trust within the meaning of Sections 415 and 405 IPC respectively. Learned counsel thus, contended that the High B Court was justified in not analyzing and returning a finding on the truthfulness or otherwise of the allegations in the complaint at such a preliminary stage of the proceedings, when only summons have been issued to the appellants to appear in the court and it is always open to the appellants to apply for C discharge before the trial court.

14. The question for consideration, therefore, is whether or not in the light of the allegations in the complaint against the appellants, the High Court was correct in law in declining to exercise its jurisdiction under Section 482 of the Code?

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15. Before evaluating the contentions advanced on behalf of the parties, it will be useful to briefly notice the scope and ambit of the inherent powers of the High Court under Section 482 of the Code. The section itself envisages three E circumstances under which the inherent jurisdiction may be exercised, namely; (i) to give effect to an order under the Code; (ii) to prevent an abuse of the process of court; and (iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which F would govern the exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but is not unlimited. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not G confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice.

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16. In one of the earlier cases, in *R.P. Kapur Vs. State of Punjab*[2] this Court had summarised some of the categories of cases where the inherent power under Section 482 of the Code could be exercised by the High Court to quash criminal proceedings against the accused. These are:

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings e.g. want of sanction;

(ii) where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

17. In *Dinesh Dutt Joshi Vs. State of Rajasthan & Anr.*[3], while dealing with the inherent powers of the High Court, this Court has observed thus: (SCC p. 573, para 6)

"6. ... The principle embodied in the section is based upon the maxim: quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases."

2. AIR 1960 SC 866.

3. (2001) 8 SCC 570.

A 18. In *G. Sagar Suri & Anr. Vs State of U.P. & Ors.*[4], this Court had opined as follows:

> "Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the
> B High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused
> C it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends
> D of justice."

19. Bearing in mind the aforestated legal position in regard to the scope and width of power of the High Court under Section 482 of the Code, we shall now advert to the facts at
E hand.

20. As noted above, the complaint against the appellant alleges commission of offences by them of cheating and dishonestly inducing delivery of property; criminal breach of trust and of criminal conspiracy punishable respectively under
F Sections 420, 406 and 120B of the IPC.

21. Section 415 IPC deals with "cheating" and reads as follows:

> G *"415. Cheating.*—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally

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H 4. (2000) 2 SCC 636.

induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section."

It is plain from a bare reading of the Section that to hold a person guilty of cheating, as defined in Section 415 of the IPC, it is necessary to show that at the time of making the promise he had fraudulent or dishonest intention to retain the property or to induce the person so deceived to do some thing which he would not otherwise do.

22. The ingredients required to constitute an offence of cheating have been succinctly laid down in *Ram Jas Vs. State of U.P.*[5], as follows:

"(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property." (*Hridaya Ranjan Prasad Verma & Ors. Vs. State of Bihar & Anr.*[6], *S.W. Palanitkar & Ors. Vs. State*

5. (1970) 2 SCC 740.

6. (2000) 4 SCC 168.

A *of Bihar & Anr.*[7], *Kuriachan Chacko & Ors. Vs. State of Kerala*[8])

23. Similar views were echoed in *Medchl Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. & Ors.*[9], wherein it was
B observed that:

> "In order to attract the provisions of Sections 418 and 420 the guilty intent, at the time of making the promise is a requirement and an essential ingredient thereto and subsequent failure to fulfil the promise by itself would not
C attract the provisions of Section 418 or Section 420. Mens rea is one of the essential ingredients of the offence of cheating under Section 420. As a matter of fact Illustration (g) to Section 415 makes the position clear enough to indicate that mere failure to deliver in breach of an
D agreement would not amount to cheating but is liable only to a civil action for breach of contract."

24. It is well settled that in order to constitute an offence of cheating, it must be shown that the accused had fraudulent
E or dishonest intention at the time of making the representation or promise and such a culpable intention right at the time of entering into an agreement cannot be presumed merely from his failure to keep the promise subsequently. (Also see: *Hira Lal Hari Lal Bhagwati Vs. CBI, New Delhi*[10]).

F 25. In the instant case, it has been alleged by IEL that at the time of entering into the tripartite agreement, the appellants, by having suppressed the fact that FCIL was likely to be declared a sick company and was, in fact, declared to be so by the BIFR, had dishonest intention to induce IEL to enter into
G the said agreement, which amounted to cheating. A bare

7. (2002) 1 SCC 241.
8. (2008) 8 SCC 708.
9. (2000) 3 SCC 269.
H 10. (2003) 5 SCC 257.

reading of the complaint would show that there is not even a whisper let alone a specific averment that the appellants had dishonestly "induced" IEL to enter into the said agreement/ arrangement. On the contrary, the complaint clearly reveals that IEL was fully conscious of the precarious financial health of FCIL at the time they had decided to enter into contract with FCIL and BCCL to ensure a regular supply of their basic raw material from FCIL so that their production of explosives did not suffer. At this juncture it would be apposite to extract relevant portions of the complaint:

> "6. That the complainant Company approached the accused persons at their office at 41, Chowringhee Road, Kolkatta-700 071 *to supply a large quantity of Ammonium Nitrate and at last the accused persons had agreed to such proposal. The complaint had been to the office of the accused persons on several occasions and had several discussions with this regard with some terms and conditions.*
>
> 7. That the accused persons supplied Ammonium Nitrate to the complaint Company for some time. The accused persons who were officers-in-charge of (sic) and were responsible for the supply of ammonium nitrate to the complainant's company made the following representations to the complainant and other officers of the complainant's Company:-
>
> > (a) That it would not be possible for the accused persons to maintain regular supply of Ammonium Nitrate to the complainant's company due to acute shortage of funds the Company of the accused persons was not in position to lift coal from M/S Bharat Coking Coal Ltd. hereinafter referred as "BCCL" which is one of the subsidiaries of Coal India Ltd. and unless regular supply of coal is received by the company of the accused persons from BCCL, the manufacture of Ammonium Nitrate

A would be hampered and consequently the company of the accused person would not be able to supply the same to the company of the complainant.

(b) That it was represented by the accused persons that as BCCL purchases huge industrial explosives from the complainants company, for using explosives in their coal mines for mining/procuring coal, and as BCCL supplies coal to the company of the accused person, for the purpose of its manufacturing Ammonium Nitrate, which would be supplied to the Company of the complainant, the accused persons would make arrangements with BCCL so that instead of making payment to the company of the accused persons for supply of ammonium nitrate, the Complainant's Company would make an advance payment of Rs. 4,20,41,622/- by supply of explosives to BCCL and the same would be adjusted for its supply of coal to the company of the accused person against supply of Ammonium nitrate of equivalent value by the company of the accused persons to the complainant's company.

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8. That on such representations the accused persons induced the complainant and the officers of the company to pay a sum of Rs.4,20,41,622/- and equivalent to BCCL between September 2001 to November 2001 on the specific representations that the accused persons would

supply ammonium nitrate to IEL and the said sum would be adjusted towards the supply of ammonium nitrate.

... ...
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10. That enquiry revealed that the accused persons deliberately and with fraudulent intentions while making the aforesaid representations to the complainant and other officers of IEL for dishonestly inducing them to pay Rs.4,20,41,622/- and or equivalent to and the said amount an or equivalent was entrusted to BCCL in the false representation of the accused persons and the said entrustment was made to BCCL on the behalf of the accused persons. The accused persons deliberately suppressed that FCIL was already declared to be a "Sick Company" and was referred to BIFR after eroding its net worth and became a 'sick company". The accused persons also suppressed the fact that BIFR was considering winding up of FCIL by recommending to the Hon'ble High Court at Delhi.

11. That it was further learned that the accused persons with deceptive and fraudulent intentions deliberately suppressed that a huge amount was already due to various other suppliers of raw materials and other creditors, that the complainant would have not parted with such a huge amount of Rs.4,20,41,622/- and or equivalent to BCCL if they were not deceived by the false and fraudulent representation of the accused persons and induced to part with the said sum.

12. That the accused persons had therefore acted in collusion and connivance with each other in order to defraud and cheat the company of the complainant to make entrustment of the said sum of Rs.4,20,41,622/- and or equivalent to BCCL for and on the behalf of the company of the accused persons.

A 13. That the accused persons were party to a criminal conspiracy and criminal design they were in collusion to each other intentionally deceived the complainant and officers of IEL and by their false and fraudulent representation made the company of the complainant to B believe that they would supply ammonium nitrate to IEL of Rs.4,20,41,622/- and or equivalent is paid by IEL to BCCL and by such representation induced the complainant and other officers of IEL to pay a sum of Rs.4,20,41,622/- and or equivalent to BCCL knowing it fully well that the C representations made by them were false and they would not supply ammonium nitrate to IEL in respect of the said sum advanced by IEL to BCCL on their behalf and thus they have committed offences rendering themselves liable to be prosecuted under the provisions of the Section D 120B/420/406 of the Indian Penal Code and also under Section 540/542 of the Companies Act, 1956."

(Emphasis supplied by us)

26. It is manifest from the afore-extracted paragraphs of E the complaint that the basis of the complaint is that by deliberately suppressing the fact that FCIL had already been referred to the BIFR after the erosion of its net worth and was likely to be declared a "sick company", the appellants induced IEL to pay Rs.4,20,41,622/- to BCCL and in return did not F supply ammonium nitrate to them. In our view, a mere mention of the words "defraud" and "cheat" in para 12 of the complaint, in the setting that these have been used, is not sufficient to infer that the appellants had dishonest intention right at the beginning when, demonstrably, after due deliberations a tripartite G agreement was signed, which, under the given circumstances at that juncture, was considered to be in the interest of all the three parties to the agreement. In this regard, it would be useful to advert to the following observations made by this Court in *Anil Mahajan Vs. Bhor Industries Ltd. & Anr.*[11]:

H 11. (2005) 10 SCC 228.

"The substance of the complaint is to be seen. Mere use of the expression 'cheating' in the complaint is of no consequence. Except mention of the words 'deceive' and 'cheat' in the complaint filed before the Magistrate and 'cheating' in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MoU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay."

27. In our opinion, in the present case, at best, it was a case of breach of contract on the part of FCIL, for which the said company is already defending a civil suit filed by IEL. In this behalf, it is also pertinent to note that in para 5 of the plaint filed by IEL it is averred that:

"While the aforesaid arrangement was continuing and the defendant no.1 supplied various quantities of Ammonium Nitrate malt to the plaintiff in the years 2000-2001, the defendant no. 1 ran into serious difficulties in continuing its production due to breakdown of synchronized gas compressor and the other financial problems...."

28. In our view, the averment strikes at the root of the allegation that at the time of entering into the agreement some time in the year 2001, the appellants had fraudulent intention to somehow induce IEL to enter into the said agreement and part with a huge sum of money. It bears repetition that on their own showing IEL was fully aware of the financial health of FCIL at the time the said contract was entered into, as also the reason why FCIL was unable to continue the production of ammonium nitrate. It needs little emphasis that in order to constitute an offence of "cheating", the intention to deceive should be in existence at the time when the alleged inducement was made. In the instant case, such an intention cannot be inferred from the aforenoted allegations in the complaint and averments in the plaint. In our opinion, therefore, even if the allegations made in the complaint are taken to be correct on

A their face value, may amount to breach of terms of contract by FCIL but do not constitute an offence of "cheating", punishable under Section 420 of the IPC.

29. We may now consider whether the allegations in the B complaint make out a case of criminal breach of trust, as defined in Section 405 of the IPC, the Section reads as follows:

"405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his C 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 D other person so to do, commits "criminal breach of trust".

Explanation 1.—A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the E 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 F 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.

G 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 H 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." A B

30. According to the Section, a criminal breach of trust involves the following ingredients:

"(a) a person should have been entrusted with property, or entrusted with dominion over property; C

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

(c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust." E

31. In *Onkar Nath Mishra & Ors. Vs. State (NCT of Delhi) & Anr.*[12], a bench of two Judges of this Court, in which one of us (D.K. Jain, J.) was a member, had observed that two distinct parts were involved in the commission of the offence of criminal F breach of trust. The first part consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is the misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created. G

32. Therefore, in relation to the offence under Section 405, IPC, the first ingredient that needs to be established is

12. (2008) 2 SCC 561. H

A "entrustment." In Common Cause, *A Registered Society Vs. Union of India & Ors.*[13], this Court held that:

> "A trust contemplated by Section 405 would arise only when there is an entrustment of property or dominion over property. There has, therefore, to be a property belonging to someone which is entrusted to the person accused of the offence under Section 405. The entrustment of property creates a trust which is only an obligation annexed to the ownership of the property and arises out of a confidence reposed and accepted by the owner."

33. However, it must be borne in mind that Section 405, IPC does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. (See: *Jaswantrai Manilal Akhaney Vs. State of Bombay*[14] and *Indian Oil Corpn. Vs. NEPC India Ltd. & Ors.*[15].)

34. In the instant case, there is nothing in the complaint which may even suggest remotely that the IEL had entrusted any property to the appellants or that the appellants had dominion over any of the properties of the IEL, which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405 of the IPC, punishable under Section 406 IPC.

35. Having come to the conclusion that no prima facie case had been made out against the appellants in respect of the alleged offences under Sections 420 and 406 IPC, the question of alleged conspiracy between the appellants does not arise.

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13. (1999) 6 SCC 667.

14. AIR 1956 SC 575.

15. (2006) 6 SCC 736.

Nevertheless, in order to bring home the charge of conspiracy within the ambit of Section 120B of the IPC, it is necessary to establish that there was an agreement between the appellants for doing an unlawful act. The complaint lacks any such substance. A

36. The upshot of the foregoing discussion is that no prima facie case is made out against the appellants in respect of alleged offences under Sections 420, 406 and 120B of the IPC and, in our opinion, it was a fit case where the High Court should have exercised its jurisdiction under Section 482 of the Code quashing the complaint against the appellants. B C

37. For the aforegoing reasons, the appeals are allowed; the impugned order is set aside and the order of the Magistrate taking cognizance in Complaint Case No.2560 of 2003 is quashed. D

N.J. Appeals allowed.