

A SUSHIL SETHI AND ANOTHER

v.

THE STATE OF ARUNACHAL PRADESH AND OTHERS

CRIMINAL APPEAL NO. 125 OF 2020

B JANUARY 31, 2020

[ASHOK BHUSHAN AND M.R. SHAH, JJ.]

Code of Criminal Procedure, 1973:

- s. 482 – Petition under – By two accused (Director and Managing Director of a Company) – For quashing the criminal proceedings against them u/s. 420 r/w s. 120B IPC – High Court dismissed the petition – Appeal to Supreme Court – Held: There are no specific allegations and averments in the complaint that the accused had fraudulent and dishonest intention – No prima facie case for the offence u/s. 420 IPC has been made out – Main allegation in the complaint is against the company which has not been made a party – There is also no allegation to constitute vicarious liability against the accused – Moreover, the statute i.e. IPC does not contain any provision fixing such vicarious liability – Summons were issued to the accused 13 years after filing of the chargesheet – Therefore, the criminal proceedings are liable to be quashed – Penal Code, 1860 – s. 420 r/w s. 120B.

Allowing the appeal, the Court

- HELD : 1. The chargesheet has been filed against the appellants for the offences under Section 420 read with Section 120B IPC. However, it is required to be noted that there are no specific allegations and averments in the FIR and/or even in the chargesheet that fraudulent and dishonest intention of the accused was from the very beginning of the transaction. It is also required to be noted that contract between the Company and the Government was for supply and commissioning of the Nurang Hydel Power Project including three power generating units. The appellants purchased the turbines for the project from another manufacturer. The company used the said turbines in the power project. The contract was in the year 1993. Thereafter in the

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year 1996 the project was commissioned. In the year 1997, the Department of Power issued a certificate certifying satisfaction over the execution of the project. Even the defect liability period ended/expired in January, 1998. In the year 2000, there was some defect found with respect to three turbines. Immediately, the turbines were replaced. The power project started functioning right from the very beginning – 1996 onwards. If the intention of the company/appellants was to cheat the Government they would not have replaced the turbines which were found to be defective. In any case, there are no specific allegations and averments in the complaint that the accused had fraudulent or dishonest intention at the time of entering into the contract. Therefore, it cannot be said that even a *prima facie* case for the offence under Section 420 IPC has been made out. [Para 8.1] [599-B-G]

State of Haryana v. Bhajan Lal (1992) Supp. 1 SCC 335 : [1990] 3 Suppl. SCR 259 ; Vesa Holdings Private Limited v. State of Kerala and others (2015) 8 SCC 293 : [2015] 4 SCR 27 ; Hira Lal Hari Lal Bhagwati v. CBI, New Delhi (2003) 5 SCC 257 : [2003] 3 SCR 1118 ; V.V. Jose and another v. State of Gujarat and another (2009) 3 SCC 78 : [2008] 17 SCR 588 ; Sharad Kumar Sanghi v. Sangita Rane (2015) 12 SCC 781 : [2015] 2 SCR 145 ; InderMohan Goswami v. State of Uttarnchal (2007) 12 SCC 1 : [2007] 10 SCR 847 – relied on.

2. The main allegations can be said to be against the company. The company has not been made a party. The allegations are restricted to the Managing Director and the Director of the company respectively. There are no specific allegations against the Managing Director or even the Director. There are no allegations to constitute the vicarious liability. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. The vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. The statute indisputably must contain provision fixing such vicarious

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- A liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. In the present case, there are no such specific allegations against the appellants being Managing Director or the Director of the company respectively. Under the circumstances also, the impugned criminal proceedings are required to be quashed and set aside. [Para 8.2] [599-G-H; 600-A-D]
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Maksud Saiyed v. State of Gujarat (2008) 5 SCC 568 :
[2007] 9 SCR 1113 – relied on.

- C 3. This is a fit case to exercise the powers under Section 482 Cr.P.C. and to quash the criminal proceedings against the appellants for the offence under Section 420 read with Section 120B of the IPC. To continue the criminal proceedings against the appellants would be undue harassment to them. No *prima facie* case for the offence under Section 420 of the IPC is made out. The impugned FIR and the chargesheet filed against the appellants for the offence under Section 420 IPC are hereby quashed. [Paras 9 and 10] [600-E-H]
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- E 4. However, it is specifically observed and made clear that the impugned criminal proceedings are quashed and set aside only against the appellants and not against any other accused against whom the charge sheet had been filed and the proceedings shall continue against the other accused, in accordance with law. [Para 10] [600-H; 601-A]
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Indian Oil Corporation v. NEPC India Limited and others (2006) 6 SCC 736 : [2006] 3 Suppl. SCR 704 ;
Joseph Salvaraja A v. State of Gujarat (2011) 7 SCC 59 : [2011] 8 SCR 815 – referred to.

Case Law Reference

G	[1990] 3 Suppl. SCR 259 [2003] 3 SCR 1118 [2006] 3 Suppl. SCR 704 [2008] 17 SCR 588	relied on relied on relied on relied on	Para 3.18 Para 3.18 Para 3.18 Para 3.18
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[2015] 4 SCR 27	relied on	Para 3.18	A
[2015] 2 SCR 145	relied on	Para 3.18	
[2011] 8 SCR 815	referred to	Para 7.6	
[2007] 10 SCR 847	referred to	Para 7.7	
[2007] 9 SCR 1113	relied on	Para 8.2	B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 125 of 2020.

From the Judgment and Order dated 07.09.2018 of the Gauhati High Court in Criminal Petition No. 36 (AP) of 2017. C

Harin P. Raval, Sr. Adv., Anando Mukherjee, Advs. for the Appellants.

Sanjay Jain, ASG, Abhimanyu Tewari, Ms. Eliza Bar, Advs. for the Respondents.

The Judgment of the Court was delivered by D

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 07.09.2018 passed by the High Court of Gauhati at Itanagar in Criminal Petition No. 36(AP) of 2017, by which the High Court has dismissed the said criminal petition preferred by the appellants herein to quash and set aside the criminal proceedings being G.R. Case No. 05/200/294, the original accused nos. 1 & 2 have preferred the present appeal. E

2. That appellant no.1 is the Managing Director of M/s. SPML Infra Limited, previously known as M/s Subhas Project Marketing Limited, and appellant no.2 is the Director of the said firm M/s SPML Infra Limited. M/s SPML Infra Limited is a public limited company incorporated under the Companies Act, 1956. A contract was entered into between M/s SPML Infra Limited and the Government of Arunachal Pradesh on 18.03.1993 for construction, supply and commissioning of the Nurang Hydel Power Project including three power generating units for a consideration of Rs.24.96 crores approximately. As per clause 2(c) of the contract, the defect liability period for the works was to be for a period of 18 months. Project was commissioned in the month of July, 1996. That the defect liability period for the works of M/s SPML F

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- A Infra Limited expired in the month of January, 1998. That thereafter the project became operational and started generating electricity and according to the appellants till 20.09.1998 the project had generated 90 lakhs KW units. According to the appellants even the said project is also in operation today. There were some disputes with respect to the payment of maintenance by the respondents. The appellants issued notice to the respondents to take over the project before 31.03.2000 on account of non-payment of maintenance, vide notice dated 09.03.2000.
 - 2.1 That thereafter the respondents – original complainant lodged the complaint against the appellants and others being Jang PS Case No. 05/2000 for the offence under Section 420 of the IPC alleging inter alia that the appellants provided inferior quality materials in contravention with the provisions of the contract which stipulated specific percentages of nickel and chromium to be used. It was alleged in the complaint that the appellants were required to supply the equipments as per the terms of the contract. As per the complaint, in course of physical inspection of the plant, the DOP found that three runners turbines, viz, turbine nos. 1, 2 and 3 were cracked and damaged. Therefore, the damaged components were sent for testing and the National Test House, Calcutta submitted its report and it was found that the chemical composition of the broken runner was found containing 5.28% Nickel and 7.5% Chromium, which composition was contrary to the specification as per the agreement. Therefore, it was alleged that M/s SPML, Calcutta had supplied sub-standard turbines containing composition of materials not in accordance with the specification of MOU, resulted in frequent damage of runner turbine buckets. On the strength of written complaint, an FIR was lodged/registered. It appears that during the course of the investigation, the Investigating Officer found/discovered the illegalities/irregularities in awarding the contract at a higher price. Even during the course of investigation, the Investigating Officer found some officials responsible for the omission and neglect of duties and it was found that the officials named in the charge sheet were involved/connived with the firm M/s SPML Infra Limited with a view to cheat the Government of Arunachal Pradesh. After conclusion of the investigation, the Investigating Officer filed the final report/chargesheet 28.05.2004 against the appellants and others for the offences under Section 120-B and 420 of the IPC.
 - 2.2 According to the appellants, they were not aware about the filing of the FIR and the chargesheet against them till the year 2017 and H

on being aware of the FIR and the chargesheet against them, the appellants preferred a petition before the High Court for quashing the aforesaid criminal proceedings under Section 482 Cr.P.C. It was contended on behalf of the appellants that the matter pertains to the contract and therefore purely a civil and contractual dispute has been given the colour of criminality and that too with a mala fide intention as they served a notice upon the respondents to pay the maintenance amount due and payable. It was also submitted on behalf of the appellants that they are the Managing Director/Director of M/s SPML Infra Limited – a company and that the company has not been arrayed as an accused. It was submitted that there are no allegations that the appellants were in-charge of the affairs of the company and therefore vicariously liable. Number of other submissions were also made on merits in support of their submission that the offence under Section 420 IPC has not been made out at all. It was also submitted that as soon as the company/appellants were informed with respect to the defect, despite the defect liability period was over, they changed the turbines in the year 2000. It was also submitted that all through out the project has run and even still running.

2.3 That by the impugned judgment and order, the High Court has refused to quash the criminal proceedings. While rejecting the quashing petition, the High Court has observed that there are allegations not only against the appellants, but also against the connected company executives and engineers of the Government of Arunachal Pradesh and there are allegations of criminal conspiracy amongst themselves in the supply of sub-standard runner turbines and receiving the sub-standard runner turbines which were not in conformity with the specified standard and the others co-accused persons have not come up with a similar petition under Section 482 Cr.P.C. and therefore at this stage it is not possible to segregate the case qua the appellants only.

2.4 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court in refusing to quash the criminal proceedings against the appellants in exercise of powers under Section 482 Cr.P.C., the original accused nos. 1 & 2 – Managing Director/Director of M/s. SPML Infra Limited have preferred the present appeal.

3. Shri Harin P. Raval, learned Senior Advocate appearing on behalf of the appellants has vehemently submitted that in the facts and circumstances of the case the High Court has committed a grave error

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- A in not exercising the power under Section 482 Cr.P.C and not quashing the criminal proceedings.
 - 3.1 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to appreciate and consider the fact that by the impugned criminal
- B proceedings the complainant has tried to convert purely a civil dispute into a criminal case.
 - 3.2 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to consider and appreciate that the allegations as contained in the FIR even
- C if taken on face value and assumed to be correct in entirety, do not disclose a prima facie commission of an offence, much less a cognizable offence.
 - 3.3 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that a bare perusal of the FIR
- D would demonstrate that the allegations seem to be supply of inferior quality of raw materials as seen under test report of National Test House, Calcutta which purportedly does not match with the test certificate given by the company. It is submitted that there is nothing in the entire body of FIR to suggest even remotely the element of existence of fraudulent and dishonest intention from the initiation of the transaction between the
- E parties.
 - 3.4 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has not properly appreciated and considered the fact that the defect liability period expired much before the filing of the complaint/FIR.
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 - 3.5 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that even thereafter also the company continued the maintenance work and the project is running. It is submitted that in fact the project was commissioned in the year 1996 and the project had generated 90 lakhs KW units till 20.09.1998 even as
- G per the certificate issued by the Department of Power.
 - 3.6 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to appreciate the fact that the impugned FIR and the complaint subsequently filed has been filed with a mala fide intention and after the company
- H demanded to pay the amount for regular maintenance work.

3.7 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court ought to have appreciated that the FIR was lodged on 26.06.2000 only after the appellants issued notice dated 9.3.2000 by which the complainant was called upon to take over the project before 31.03.2000 on account of non-payment of the maintenance charges.

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3.8 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to appreciate and consider the fact that the disputes between the parties were pending before the arbitrators. It is submitted that in fact the company was required to initiate the arbitration proceedings on account of being denied the legitimate due payments.

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3.9 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that looking to the averments and the allegations in the complaint/FIR, it cannot be said that ingredients for committing the offence under Section 420 IPC has been made out. It is submitted that there are no allegations in the FIR that the appellants acted in dishonest and fraudulent intention from the very inception of the contract with the respondent – State.

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3.10 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the allegations as contained in the FIR at best pointed towards the dispute, namely, relating to breach of the conditions of the contract and therefore at best could have given rise to civil liability.

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3.11 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to appreciate that no complaint has been filed against the company – M/s SPML Infra Limited and only the appellants being the Managing Director/ Director of M/s SPML Infra Limited are joined as accused. It is submitted that as held by this Court in catena of decisions in the absence of the main company being joined as accused the criminal proceedings against the Directors of the company alone shall not be maintainable.

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3.12 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that even otherwise there are no averments and allegations in the complaint that the appellants were in charge of the administration of the company and therefore they were vicariously liable for the act of the company.

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- A 3.13 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to appreciate that apart from the fact that defect liability period had expired in the year 1998 and even thereafter the certificates were issued by the Chief Engineer certifying satisfaction over the execution of the project and its commissioning in July, 1996, the defects subsequently detected were cured even after the defect period was over and even the company changed the turbines. It is submitted that therefore if the intention of the company and/or the appellants was to cheat, in that case, they would not have changed/replaced the runner buckets.
- B 3.14 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has not properly appreciated and considered the role of the appellants and their company in the entire contract. It is submitted that the entire contract was not to manufacture the turbines and the runner buckets by the appellants and the company, but to only procure the same from the manufacturer and supply the same to the respondents. It is submitted that the company relied upon the certificate issued by the manufacturer and simply used the said turbines in the project. It is submitted that therefore also the appellants cannot be saddled with the criminal liability for any manufacturing defect when the same was not even in the domain of the appellants and their company.
- C 3.15 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that even otherwise when the final report has been filed by the investigating officer, the chargesheet has gone much beyond the allegations and averments in the FIR.
- D 3.16 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that though there were no allegations in the complaint/FIR, the police authorities went into the commercial efficacy of the project through which M/s SPML Infra Limited was selected. It is submitted that merely because there was a margin difference between the purported manufacturing cost of the turbines and the rates quoted by the company, the appellants cannot be held guilty of a criminal offence of cheating. It is submitted that as such the company was the lowest bidder and was awarded the contract after due deliberations by the tendering committee.
- E 3.17 It is further submitted by Shri Raval, learned Senior Advocate appearing on behalf of the appellants that the High Court has failed to

exercise the powers under Section 482 Cr.P.C. and thus has not exercised A
the jurisdiction vested in it.

3.18 Making the above submissions and relying upon the decisions B
of this Court in the cases of *State of Haryana v. Bhajan Lal 1992*
Supp. (I) SCC 335; Hira Lal Hari Lal Bhagwati v. CBI, New Delhi
(2003) 5 SCC 257; Indian Oil Corporation v. NEPC India Limited
and others (2006) 6 SCC 736; V.V. Jose and another v. State of
Gujarat and another (2009) 3 SCC 78; Vesa Holdings Private
Limited v. State of Kerala and others (2015) 8 SCC 293; and Sharad
Kumar Sanghi v. Sangita Rane (2015) 12 SCC 781, it is prayed to
allow the present appeal and quash and set aside the impugned criminal
proceedings so far as the appellants are concerned. C

4. The present appeal is vehemently opposed by the learned counsel D
appearing on behalf of the respondents – State of Arunachal Pradesh.

4.1 It is vehemently submitted by the learned counsel appearing D
on behalf of the respondent – State and the counsel on behalf of the
original complainant that having found a *prima facie* case for the offence
under Section 420 IPC for delivering/supplying sub-standard materials
and charging exorbitant rates for such materials with a criminal intent to
dupe the Government with huge public money, the High Court has rightly
refused to quash the criminal proceedings. E

4.2 It is further submitted by the learned counsel appearing on F
behalf of the respondents that the appellants are charged for the offences
under Section 420 read with 120B IPC. It is submitted that as per the
inspection carried out by the Department and even as revealed during
the investigation the appellants supplied the sub-standard runner turbines
which are used by the accused though they were not in conformity with
the specified standards. It is submitted that therefore a *prima facie* case
of criminal conspiracy between the accused to cheat the government
has been made out.

4.3 It is further submitted by the learned counsel appearing on G
behalf of the respondents that there being enough material/evidences
against the appellants and therefore this is a fit case wherein the appellants
are liable to be prosecuted for the commission of an offence under Section
420, 120B IPC.

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- A 4.4 It is further submitted by the learned counsel appearing on behalf of the respondents that the arbitration proceedings initiated by the appellants/company has nothing to do with the criminal dispute. It is submitted that therefore it cannot be said that the civil dispute is tried to be converted into a criminal dispute.
- B 4.5 It is further submitted by the learned counsel appearing on behalf of the respondents that even otherwise as held by this Court in catena of decisions just because a proceeding has a civil nature does not mean that no criminality exists in the same.
- C 4.6 It is further submitted by the learned counsel appearing on behalf of the respondents that during the course of investigation it has been found that one Kartik Steel Limited, Chennai tested the components supplied by M/s SPML Infra Limited and the report suggests that the materials were sub-standard. It is submitted that therefore it is a clear cut case that the appellants had prior knowledge of the low quality of the materials which they supplied to the department.
- D 4.7 It is further submitted by the learned counsel appearing on behalf of the respondents that during the course of investigation, it is found that the appellants have not only cheated the DOP by supplying sub-standard materials but they also charged exorbitant rates for the three runner buckets turbines in spite of their knowledge that the said runner buckets were not up to the satisfaction. It is submitted that during the investigation it has come on record that the turbines were manufactured by M/s Beacon Neyrpic, Chennai and the rates quoted by the appellants and the manufacturing company were compared. It is submitted that it has been found that cost as per the manufacturing company was Rs.1,61,04,000/-, however, M/s SPML Infra Limited charged Rs.5,18,50,049/. Thus, there was a difference in the rate to the tune of Rs.3,57,46,049/. It is submitted that therefore there was a fraudulent and dishonest intention from the initiation of the transaction between the parties.
- G 4.8 It is further submitted by the learned counsel appearing on behalf of the respondents that thus the supply of sub-standard material at three times higher rates and the prior knowledge of the sub-standard quality of the material shows that the appellants had criminal intent to supply sub-standard quality material at a higher price to the DOP/ Government of Arunachal Pradesh. It is submitted that therefore the
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appellants are rightly chargesheeted for the offence under Section 420 A
read with 120B IPC.

4.9 It is further submitted by the learned counsel appearing on behalf of the respondents that appellant no.1 is the Managing Director and appellant no.2 is the Director of the company – M/s SPML Infra Limited and therefore being Managing Director/Director of the company, naturally they were in charge of the administration and management of the company and therefore are vicariously liable. It is submitted that the aforesaid has been elaborately considered by the High Court in the impugned judgment and order. It is submitted that even otherwise as rightly observed by the High Court at this stage it is not possible to segregate only the appellants case. B

4.10 It is further submitted by the learned counsel appearing on behalf of the respondents that whatever submissions are made on behalf of the appellants are their defences which are required to be considered at the time of the trial. It is submitted that after thorough investigation, the investigating agency has filed the chargesheet against the appellants and other accused for the offences under Section 420 read with 120B IPC and more particularly with respect to criminal conspiracy, the High Court has rightly refused to quash the criminal proceedings in exercise of powers under Section 482 Cr.P.C., which powers are required to be exercised sparingly and in exceptional cases, as observed by this Court E in catena of decisions. D

4.11 Making the above submissions and relying upon the decision of this Court in the case of Sau. Kamal Shivaji Pokarnekar v. The State of Maharashtra and others, reported in 2019 SCC Online SC 182 (Criminal Appeal No.255 of 2019 decided on 12.02.2019), it is prayed to dismiss F the present appeal.

5. We have heard the learned counsel for the respective parties at length. We have also gone through and considered the averments and allegations in the FIR as well as the charge sheet filed by the investigating agency. G

5.1 At the outset, it is required to be noted that the chargesheet has been filed against the appellants for the offences under Section 420 read with Section 120B of the IPC. By the impugned judgment and order, the High Court has refused to quash the FIR and the chargesheet H

- A against the appellants in exercise of powers under Section 482 Cr.P.C.. Therefore, the short question which is posed for the consideration of this Court is, whether a case has been made out to quash the FIR and the chargesheet against the appellants for the offences under Section 420 read with Section 120B of the IPC, in exercise of powers under Section 482 Cr.P.C?
- B 6. Considering the averments and the allegations in the FIR and even the chargesheet the main allegations are that the company, namely, M/s SPML Infra Limited supplied sub-standard materials – runner bucket turbines and the supplied runner bucket turbines were not as per the technical specifications. It is also required to be noted that there is no FIR/complaint/chargesheet against the company – M/s SPML Infra Limited and the appellants are arrayed as an accused as Managing Director and Director of M/s SPML Infra Limited respectively. From a bare reading of the FIR and even the chargesheet, there are no allegations that there was a fraudulent and dishonest intention to cheat the government from the very beginning of the transaction. Even there are no specific allegations and averments in the FIR/chargesheet that the appellants were in-charge of administration and management of the company and thereby vicariously liable. In light of the aforesaid, the prayer of the appellants to quash the criminal proceedings against the appellants for the offence under Section 420 IPC is required to be considered.
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- F 7. While considering the prayer of the appellants to quash the impugned criminal proceedings against the appellants for the offence under Section 420 IPC, few decisions of this Court on exercise of powers under Section 482 Cr.P.C. are required to be referred to.
- G 7.1 In the case of Bhajan Lal (*supra*), in paragraph 102, this Court has categorised the cases by way of illustration wherein the powers under Article 226 or the inherent powers under Section 482 Cr.P.C. could be exercised either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. In paragraph 102, it is observed and held as under:
- H “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 channelised and inflexible guidelines or rigid formulae and to give an 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

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- A reach a just conclusion that there is sufficient ground for proceeding against the accused.
- B (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.
- C (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.”
- D The aforesaid decision of this Court has been followed subsequently by this Court in catena of decisions.
- E 7.2 In the case of Vesa Holdings Private Limited (*supra*), it is observed and held by this Court that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. It is further observed and held that for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. It is further observed and held
- F that even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 IPC can be said to have been made out. It is further observed and held that the real test is whether the allegations in the
- G complaint disclose the criminal offence of cheating or not.

H 7.3 In the case of Hira Lal Hari Lal Bhagwati (*supra*), in paragraph 40, this Court has observed and held as under:

“40. It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that

the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office-bearers *right at the time of making application for exemption*. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Penal Code, 1860 does not arise. We have read the charge-sheet as a whole. There is no allegation in the first information report or the charge-sheet indicating expressly or impliedly any intentional deception or fraudulent/dishonest intention on the part of the appellants right from the time of making the promise or misrepresentation. Nothing has been said on what those misrepresentations were and how the Ministry of Health was duped and what were the roles played by the appellants in the alleged offence. The appellants, in our view, could not be attributed any mens rea of evasion of customs duty or cheating the Government of India as the Cancer Society is a non-profit organisation and, therefore, the allegations against the appellants levelled by the prosecution are unsustainable. The *Kar Vivad Samadhan Scheme* certificate along with *Duncan* [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045] and *Sushila Rani* [(2002) 2 SCC 697 : (2002) 2 Apex Decisions] judgments clearly absolve the appellants herein from all charges and allegations under any other law once the duty so demanded has been paid and the alleged offence has been compounded. It is also settled law that once a civil case has been compromised and the alleged offence has been compounded, to continue the criminal proceedings thereafter would be an abuse of the judicial process.”

It is further observed and held by this Court in the aforesaid decision that to bring home the charge of conspiracy within the ambit of

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- A Section 120B of the IPC, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. It is further observed and held that it is difficult to establish conspiracy by direct evidence.

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

- 7.5 In the case of Sharad Kumar Sanghi (supra), this Court had an occasion to consider the initiation of criminal proceedings against the Managing Director or any officer of a company where company had not been arrayed as a party to the complaint. In the aforesaid decision, it is observed and held by this Court that in the absence of specific allegation against the Managing Director of vicarious liability, in the absence of company being arrayed as a party, no proceedings can be initiated against such Managing Director or any officer of a company. It is further observed and held that when a complainant intends to rope in a Managing Director or any officer of a company, it is essential to make requisite allegation to constitute the vicarious liability.

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

- 7.7 In the case of Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1, it is observed and held by this Court that the Court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. It is further observed and held by this Court that it is neither possible nor desirable to law down an inflexible rule that would govern the exercise of inherent jurisdiction. It is further observed and held that inherent jurisdiction of the High Courts under Section 482

Cr.P.C. though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself.

8. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that this is a fit case to exercise powers under Section 482 Cr.P.C. and to quash the impugned criminal proceedings.

8.1. As observed hereinabove, the chargesheet has been filed against the appellants for the offences under Section 420 read with Section 120B of the IPC. However, it is required to be noted that there are no specific allegations and averments in the FIR and/or even in the chargesheet that fraudulent and dishonest intention of the accused was from the very beginning of the transaction. It is also required to be noted that contract between M/s SPML Infra Limited and the Government was for supply and commissioning of the Nurang Hydel Power Project including three power generating units. The appellants purchased the turbines for the project from another manufacturer. The company used the said turbines in the power project. The contract was in the year 1993. Thereafter in the year 1996 the project was commissioned. In the year 1997, the Department of Power issued a certificate certifying satisfaction over the execution of the project. Even the defect liability period ended/expired in January, 1998. In the year 2000, there was some defect found with respect to three turbines. Immediately, the turbines were replaced. The power project started functioning right from the very beginning – 1996 onwards. If the intention of the company/appellants was to cheat the Government of Arunachal Pradesh, they would not have replaced the turbines which were found to be defective. In any case, there are no specific allegations and averments in the complaint that the accused had fraudulent or dishonest intention at the time of entering into the contract. Therefore, applying the law laid down by this Court in the aforesaid decisions, it cannot be said that even a *prima facie* case for the offence under Section 420 IPC has been made out.

8.2. It is also required to be noted that the main allegations can be said to be against the company. The company has not been made a party. The allegations are restricted to the Managing Director and the

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- A Director of the company respectively. There are no specific allegations against the Managing Director or even the Director. There are no allegations to constitute the vicarious liability. In the case of Maksud Saiyed v. State of Gujarat (2008) 5 SCC 668, it is observed and held by this Court that the penal code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. It is further observed and held that the vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further observed that statute indisputably must contain provision fixing such vicarious liabilities. It is further observed that even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. In the present case, there are no such specific allegations against the appellants being Managing Director or the Director of the company respectively. Under the circumstances also, the impugned criminal proceedings are required to be quashed and set aside.
- D 8.3 At this stage, it is required to be noted that though the FIR was filed in the year 2000 and the chargesheet was submitted/filed as far back as on 28.5.2004, the appellants were served with the summons only in the year 2017, i.e., after a period of approximately 13 years from the date of filing the chargesheet. Under the circumstances, the High Court has committed a grave error in not quashing and setting aside the impugned criminal proceedings and has erred in not exercising the jurisdiction vested in it under Section 482 Cr.P.C.
- F 9. In view of the above and for the reasons stated above, we are of the firm opinion that this is a fit case to exercise the powers under Section 482 Cr.P.C. and to quash the criminal proceedings against the appellants for the offence under Section 420 read with Section 120B of the IPC. To continue the criminal proceedings against the appellants would be undue harassment to them. As observed hereinabove, no *prima facie* case for the offence under Section 420 of the IPC is made out.
- G 10. The instant appeal is accordingly allowed. The impugned judgment and order passed by the High Court is set aside. The impugned FIR and the chargesheet filed against the appellants for the offence under Section 420 IPC are hereby quashed. However, it is specifically

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observed and made clear that the impugned criminal proceedings are quashed and set aside only against the appellants and not against any other accused against whom the charge sheet had been filed and the proceedings shall continue against the other accused, in accordance with law.

Kalpana K. Tripathy

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Appeal allowed.