Delhi High Court
A.M. Chakrabortty vs Ved Vrat And Ors. on 7 October, 1985
Equivalent citations: 1986 (2) Crimes 49, 30 (1986) DLT 165, 1985 (9) DRJ 328
Author: J Jain
Bench: J Jain
JUDGMENT J.D. Jain, J.

(1) Both the above-mentioned revision petitions are directed against order dated 2nd February 1983 of an Additional Sessions Judge discharging the respondents in a police case under Sections 193, 448, 463, 464, 465 & 471, read with Section 120-B, Indian Penal Code (for short 'PIP').

(2) The facts leading to these revision petitions in brief are that Miss Kamla Sen Gupta was the owner of property bearing No. A-5, Chitranjan Park, New Delhi. Dr. Ved Vrat-respondent No. I was her tenant in respect of the ground floor of the said property. Miss Kamla Sen Gupta died intestate on 18th December, 1977 leaving behind her brother Arun Kumar Sen Gupta, who was a lunatic and has since died, and four sisters, namely, Smt. Bina Gupta, Smt. Kalyani Sen. Smt. Lalita Ray and Smt. Bani Roy. None of the legal heirs of the deceased was living with her at the time of her death and they were all residing in Calcutta excepting Smt. Bani Roy, who was then living in North Carolina, U.S.A.

(3) On 19th February 1980, the petitioner-A.M. Chakraborty who was holding a power of attorney from all the above-mentioned heirs of the deceased, lodged a complaint at Police Station Kalkaji that in the absence of the owners of the properly in question he was looking after the same and the first floor of the house had been put under lock and key which had been handed over to him by one of the heirs. He had been visiting the property in question from time to time and although he had suspected that some unauthorised use was being made of the first floor by some persons, he used the find the same under lock and key whenever he went there. However, when he visited the premises in question on 17th February 1980 which was Sunday, he found that the lock of the first floor was missing. He was told by the occupants of the ground floor that they had taken the first floor on rent. However, when asked to disclose the name of the person from whom they had taken the first floor also to produce evidence, if any, in respect of the same, Shri Chakraborty was flatly told that it was none of his business and that the necessary information would be available at the police station. He further alleged that the unauthorised occupants of the first floor were the tenants of the ground floor against whom he had filed a suit for eviction on the ground of non-payment of rent and the same was pending in the court of an Additional Rent Controller. He asserted that Dr. Ved Vrat and his wife (Dr. (Mrs.) Prem Lata-respondent No. 2) were tenants only in respect of the ground floor and there was no question of their having taken on rent the first floor of the premises, as alleged. A case under Section 448 Indian Penal Code being Fir No. 284/80 was registered against respondents 1 & 2 on the basis of that complaint.

(4) During the course of investigation, respondents 1 & 2 told the police that they had taken the first floor of house No. A-5, Chitranjan Park, on rent from one Shri SC. Dass Gupta, who was a relation of the deceased Miss Kamla Sen Gupta and was looking after the property in question after her death on behalf of her legal heirs. They further disclosed that two cheques dated 12th August 1978, one for

Rs. 700.00 representing rent for two months and the other for Rs. 350.00 representing cost of the furniture sold to them, were delivered to S.C. Dass Gupta and they were inducted as tenants in the first floor with effect from the said date. They amplified that the two cheques mentioned above bore endorsements showing that the amount of Rs. 700.00 was on account of rent for two months while the amount of Rs. 350.00 was paid on account of cost of furniture etc. (5) On completion of investigation the police filed a charge sheet against all the three respondents under Sections 195, 448, 467, 471 read with Section 120B, Indian Penal Code on the allegations that respondents 1 & 2 hatched a conspiracy along with A.K. Gupta-respondent No. 2, who is real brother of respondent No. 2, to fabricate false evidence in order to obtain illegal possession of the first floor of the premises and thus they tendered the two cheques mentioned above, which had been drawn by respondent No. 3 on his own banker, in the bank account of S.C. Dass Gupta with a view to establish that the rent and the cost of the furniture which was lying in the premises in question had been duly paid to him i.e. S.C. Dass Gupta. The case of the prosecution precisely is that S.C Dass Gupta never let the first floor of the property in question to the respondents and he never received any of the cheques adverted to above ; rather on coming to know that Rs. 1,050.00 had been wrongly credited to his account, he immediately informed his banker i.e. State Bank of India, Greater Kailash Branch, that the aforesaid amounts of Rs. 700.00 and Rs. 350.00 did not pertain to him and the credits had been wrongly given in his account for the same. So, he requested his banker to remove the said credit entries from his account. Police also seized both the original cheques dated 12th August 1978, which had been drawn by respondent No. 3 in favor of S.C. Dass Gupta, from the State Bank of India along with relevant pay-in-slips. The same were then sent to the hand-writing expert of the Central Forensic Science Laboratory, New Delhi, for comparison with the standard writings of S.C. Dass Gupta and respondent No. 3-A.K. Gupta. The hand-writing expert found that the signatures on both the cheques as well as the writings on the reverse of the cheques were in the hand of A K.. Gupta. The said writings are to the following effect : (I)On the reverse of cheque for Rs. 7001- "Advance rent for two months for 1st Floor of A-5, Chitranjan Park, New Delhi-110019". (ii) On the reverse cheque for Rs. 3501- "Cost of furniture".

(6) However, the hand-writing expert could not give any definite opinion about the hand-writing and signatures on the pay-in-slips except to the extent that the same were not in the hand of S.C. Dass Gupta.

(7) In his police statement S.C. Dass Gupta denied have let out the first floor of the premises in question to respondents 1 & 2, as alleged. He also denied having received the aforesaid cheques from the respondents towards payment of rent and cost of furniture.

(8) The prosecution has placed on record, inter alia. the aforesaid cheques, the pay-in-slips, letter dated 21st August 1978 written by S.C. Dass Gupta to his banker and a statement of account of S.C. Dass Gupta with the Slate Bank of India showing the credit of the sums of Rs. 700.00 and Rs. 350.00 on 17th August 1978 and reversal of the credit entries pursuant to letter dated 21st August 1978 of S.C. Dass Gupta.

(9) The respondents raised three fold contentions at the pre-charge stage, (i) that the Court was not competent to take cognizance of the offences under Sections 193, 467 & 471 Indian Penal Code

except on the complaint of the concerned Court in view of the bar contained in Section 195(1)(b) of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). It. was urged that respondent No. 1 had already instituted a suit in the Civil Court against the petitioner-A.M. Chakraborty for injunction restraining him from interfering with their lawful possession of the first floor of the property in question. Since he is relying upon the payments made to S C. Dass Gupta by means of the aforesaid two cheques, their genuineness or otherwise had to be determined by the civil court who alone, therefore, was competent to file a complaint in respect of the offences falling under Sections 193. 463, 467 & 471; (ii) that the Court was debarred from taking cognizance of offence under Section 448 Indian Penal Code after the expiry of the limitation prescribed under Section 468 of the Code ; and (iii) that even on merits no case was made out against any of the accused because it was at best a case of civil trespass and neither the cheques in question nor the endorsement made on their back-sides could be said to be forged/false and fabricated documents within the meaning of Section 464 IPC.

(10) The trial Court repelled these contentions and held vide order dated 26th October 1981 that prima facie a case for offences under Sections 448, 463, 464, 465, 471 read with Section 120B Indian Penal Code and Sections 192/193 read with Section 120B Indian Penal Code was made out against the respondents. Feeling aggrieved by the said order, the respondent filed a revision petition in the Court of Session. The learned Additional Sessions Judge has vide impugned order allowed the same and discharged the respondents. Hence, present revision petitions have been filed by (i) the State, and (ii) the complainant- Chakraborty.

(11) The learned counsel for both the petitioners have assailed the impugned older contending vehemently, inter alia, that the same is not only confused and rambling but also betrays total non-application of judicial mind by the learned Additional Sessions Judge. To elucidate his point Shri Sethi has invited my attention to the finding of the learned Additional Sessions Judge that "for the purposes of offences under Sections 193, 463, 464, 465 and 471 Indian Penal Code the sanction was essential to be accorded prior to launching the trial under Section 195 of the Code". The use of the word 'sanction' by the learned Additional Sessions Judge, it is submitted, is inferential of the fact that he did not care even to peruse Section 195 not to speak of his analysing it and applying it to the facts of the instant case after due deliberation. I am constrained to say that this contention of the learned counsel for the petitioners cannot be brushed aside lightly having regard to the language of Section 195 which reads as : "195.Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence :- (1) No Court shall take cognizance :- (b) (i) of any offence punishable under any of the following sections of the Indian Penal Code, namely, Sections 193 to 196 (both inclusive), 199, 200, 205 10211 (both inclusive) and 228, when such offence is alleged to hare been committed in, or in relation to, any proceeding in any Court, or (ii) of any offence described in Section 463, or punishable under Section 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in Sub-clause (i) or Sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(12) On a bare reading of this section it is obvious that it provides an exception to the general rule that any person having knowledge of the commission of an offence may set the law in motion by a Staunching complaint even though be is not a person interested in or affected by the offence, turn it forbids cognizance being taken of the offences referred to therein except where there is a complaint in writing by the Court or by the public servant concerned. Thus, in view of the mandatory provisions of this Section the Court has no jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing by the concerned Court itself. So, the question of any previous sanction for prosecution by the Court concerned does not arise. It may be noticed here that the words 'with the previous sanction", which occurred in the Code prior to the amendment of 1923, before the words "on a complaint in writing" in Clauses (a), (b) & (c) of Sub-section (1) were omitted. The position prior to the amendment of 1923 was that prosecution in respect of offences mentioned in the Section could be launched either upon the complaint of or upon sanction granted to a private person by the Court or the public servant concerned. However, with the deletion of the words "with the previous sanction" in 1923 there is no such requirement of law and the concerned Court, as envisaged in Clause (b) of Section 195(1), has exclusive jurisdiction to file a complaint after satisfying itself prima facie about the nature and correctness of the offences said to have been committed and covered by Sub-clauses (i), (ii) & (iii) of Clause (b). It would thus appear that the learned Additional Sessions Judge was all along labouring under the impression that like Sections 196 & 197 of the Code previous sanction of the concerned Court (as distinguished from the competent authority) Was necessary before Staunching prosecution in respect of offences enumerated in various sub-clauses of Clause (b). Surely he would have been well advised to pursue the Section himself in order to comprehend its content and scope properly.

(13) It is now to be seen whether on the allegations embodied in the police report and the material, on which reliance is sought to be placed by the prosecution, any of the offences cognizance of which is forbidden by Section 195(1)(b) is made out or not. Section 193 Indian Penal Code, inter alia, prescribes the punishment for intentionally giving false evidence in any stage of a judicial proceeding or fabricating false evidence for the purpose of being used in a judicial proceeding. Section 192 Indian Penal Code defined the offence of fabricating false "evidence. It will cover a case (a) where an accused causes any circumstances to exist, or (b) makes any false entry in a book or record, or (c) makes a document containing a false statement with the intention that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant etc. Further the accused must intend that such act may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding. On a perusal of the facts disclosed by the police report and the material on the record, there can be no manner of doubt that prima facie all the essential postulates of Section 192 are satisfied in the instant case. It bears reputation that according to S.C. Dass Gupta, who was admittedly looking after the property in question after the death of Miss Kamla Sen Gupta being a close relation of hers, he never let out the first floor of the same to any of the respondents He denies having received the two cheques, on which reliance is placed by the respondents, to countenance of their plea that the first floor was let out by S.C. Dass Gupta to respondent No. 1 and that even the price of the furniture lying there was paid to him i.e. SC. Dass Gupta. It may be pertinent to notice in this context that only a few days prior to the issuance of the cheques in question respondent No. 1 had lodged complaints, one dated

6th August 1978 and the other dated 7th August 1978 to Ihe concerned police authorities staling that he and his wife were tenants in respect of the ground floor of the property in question and that he was being harassed by one Mr. S.C. Dass Gupta who was threatening to dispossess from the demised premises. Further the fact that S.C Dass Gupta remonstrative to his banker immediately on noticing the credit entries with regard to Rs. 700.00 and Rs. 3501- in his account vide letter dated 21st August 1978 would corroborate the prosecution version that he had not let out the premises in question to the respondents or anyone of them. Needless to say that the defense version regarding the premises in question to the respondents or anyone of them. Needless to say that the defense version regarding the premises in question having been let out to them by S.C. Dass Gupta is a matter of detailed probe and can be gone into only at the stage of trial. As observed by the Supreme Court in State of Bihar v. Ramesh Singh, , "at the beginning and the initial stage of the trial, the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight attached to the probable defense of the accused." The Supreme Court further said : "Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot lake the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is & strong suspicion which leads the Court to think that there is ground for presuming that the accused hat committed an offence then it is not open to the Court to say that there is no sofficient. ground for proceeding against the accused."

(14) Applying this criterion, therefore, there can be no room for doubt that prima facie the respondents are guilty of fabricating false evidence with the requisite guilty intention contemplated in Section 192. Indeed, in order to reap the fruit of fabricating false evidence, respondent No. 1 instituted a civil suit on 26th February 1980 i.e. soon after the petitioner had lodged a complaint against the respondents with the police authorities on 19th February 1980, for an injunction restraining the petitioner from dispossessing them from the first floor of the property in question and he was successful in obtaining an ad-interim injunction from the concerned Court.

(15) The crucial question, however, which falls for determination is Whether cognizance of the offence under Section 193 Indian Penal Code would be barred by Section 195(1)(b)(i) or not. The submission of the learned counsel for the- petitioner is that the alleged offence would fall within the ambit of second paragraph of Section 193 which relates to intentionally giving or fabricating false evidence in any other case i.e. not for the purpose of any judicial proceeding. However, I am not persuaded to accept this contention because the dominant purpose of the respondents in fabricating false evidence apparently was to use the same for supporting their possession in a court of law. Needless to say that the intention can only be gathered from the attendant circumstances of each case. The civil court having taken seisin of the matter prior to the filing of the charge sheet by the police under Section 173 of the Code, there can be no room for doubt that the case would fall within the purview of Sub-clause (i) of clause (b) of Section 195(1). Atone time there was a conflict of judicial opinion in regard to the meaning and ambit of the words "in or in relation to" which occur in clause (b) of Section 195(1) and one line of decisions expressed the view that the words 'in relation to' are wide enough to cover a proceeding in contemplation though it may not be taken at the date of the commission of the offence but Was subsequently instituted incourt. This view is no longer good law in view of the pronouncement of the Supreme Court in M.L Sethi v. R.P. Kapur & another, . That case related to the commission of an offence under Section 211 Indian Penal Code The appellant had

first lodged a report with the police charging the respondent-R.P. Kapur with certain cognizable offences on 10th December. 1958. While the police were investigating into the report, the respondent filed a complaint in the Court of a Magistrate on 11th April 1959 alleging that the appellant had committed an offence under Section 211 Indian Penal Code by falsely charging him with having committed an offence. The Magistrate took cognizance of the respondent's complaint under Section 190 of the Code. At that stage, there were no proceedings in any Court nor any order by any Magistrate for arrest, remand or bail of the respondent in connection with the appellant's report to the police. Later, however, the police arrested the respondent on 18th June 1959 and filed a charge-sheet against him but the case ended in an order of discharge. So, the contention raised was that the Magistrate could not take cognizance of the complaint filed by the respondent in view of the bar contained in Section 195(1)(b) of the Code. The Magistrate rejected the contention and the order was confirmed by the Sessions Court, the High Court and eventually the Supreme Court. Said the Supreme Court : '"WHENexamining the question whether there is any proceeding in any court, three situations can be envisaged , (a) There may be no proceeding in any court at all ; (b) a proceeding in a court may actually be pending when cognizance is taken of the offence under Section 211 Indian Penal Code ., and (c) though there may be no proceeding pending in a court, there may have been a proceeding which had already concluded and the offences under Section 211 may be alleged to have been committed in, or in relation to, that proceeding. In cases (b) and (c), the bar to taking cognizance under Section 195(1)(b) Criminal Procedure Code . would come into operation in case (a), when there is no proceeding pending in any court at all at the time when the applicability of Section 195(1)(b), Cr. P.C. has to be determined, nor has there been any earlier proceeding which may have been concluded, the Sub-section would not apply, and in such a case, the Magistrate would be competent to take cognizance of the offence under Section 211 Indian Penal Code ., if his jurisdiction is invoked in the manner laid down in Section 190 of Criminal Procedure Code."

(16) Indisputably an offence under Section 211 Indian Penal Code falls within the purview of Section 195(1)(b). Thus, the crucial date for the purpose of Section 195(1)(b) of the Code would be the date when the Court takes 'cognizance of the offence. It would apply if a judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. In the instant case, the judicial proceeding, viz., the suit instituted by respondent No. I for injunction, was already pending when the police report under Section 173 of the Code was submitted on 14th February 1981. Hence, by no stretch of reasoning it can be said that no nexus between the fabrication of false evidence including conspiracy to create false evidence and the judicial proceeding in which the factum of pendency is sought to be established, exist. So, Sub-clause (i)&(iii) of clause (b) of Section 195(1) would be squarely attracted to the facts of the instant case and the prohibition contained therein to the cognizance of the offence on the basis of police report would operate so far as offence under Section 193 Ipc is concerned.

(17) As regards offences under Sections 463, 464, 463 & 471 Indian Penal Code, the submission made by the learned counsel for the petitioner is that none of the alleged forged documents, viz. two cheques and the pay-in-slips, having been produced or given in evidence in a proceeding in any court, clause (b) (ii) of Section 195(1) would not apply inasmuch as to attract the applicability of the said clause it is necessary that the document should be actually put into or tendered in evidence in a Court. Reliance in this context is placed on Patel Laljibhai Somabhai v. The State of Gujarat, ,

Raghunath v. Stale of U.P., , Legal Remembrance of Govt. of West Bengal v. Haridas Mundra, and State of Karnataka v. Hemreddy & Another, . The gist of ail these authorities is that where the forged document was not produced in Court or given in evidence Section 195(1)(b)(ii) corresponding to old Section 195(1)(c) would not be attracted as the Legislature could not haw intended to extend the prohibition contained in the said Section to the offences mentioned therein when committed by a party to a proceeding in that court prior to his becoming such party. Since the cheques and the pay-in-slips in question were seized by the police during the course of investigation in this case from the concerned bank and the original documents have not been put into or tendered in evidence in any court so far the prohibition embodied in Sub-clause (ii) clause (b) of Section 195(1) will not stand in the way of the petitioner so far as these offences are concerned. It may, however, be noticed that the words "by a party to any proceeding" appearing in the old provision viz. Sub-section (1) (c) of the old Section 195, have been omitted in the present provision viz. Sub-clause (ii) of Section 195(1)(b). The effect of the omission evidently is to enlarge the scope of Section 195(1)(b)(ii). Consequently not only the persons who are party to the proceedings in which the alleged forged documents were filed or given in evidence but all other persons who are alleged to have committed the offence in relation to such documents viz. those produced and given in evidence in any proceeding in a court, would also gain immunity from being prosecuted at the instance of a private complaint. This change has obviously been brought about to save the accused persons from various or baseless prosecutions inspired by feelings of vindictiveness on the part of the private complainants to harass their opponents. In this view of the matter, I am fortified by the decision of a Division Bench of Allahabad High Court in Ram Pal Singh v. State of UP. & others, 1982 Cri. L.J. 424. Said the learned Judge: "The effect of omission in the re-enacted provision of the words "by a party to any proceeding in any Court", occurring in Section 195(1)(c) of the Old Code, clearly is that. the bar created by Section 195, against taking cognizance of an offence described in Section 463 or under Sections 471, 475 or Section 476 Indian Penal Code committed in respect of a document produced or given in evidence in a proceeding in any Court, which till then was confined only to complaints directed against parties to the proceeding (offence having been committed in capacity of such party) now became applicable in respect of complaints directed against some other persons as well. Accordingly not only persons who are parties to the proceedings in respect of which offences of the nature mentioned in Section 195(1)(b)(ii) had been committed filed or produced, but all other persons who are alleged to have committed such offence in relation to documents produced or given in evidence in any proceeding in a Court, also became, irrespective of the fact whether or not they were parties to the proceeding and whether or not they committed the offence in their capacity as such party immune from being prosecuted at the instance of a private complainant."

(18) The submission of the learned counsel for the respondents, however, is that the allegations made in the police report and other material on record do not at all disclose any offence of forgery falling under Section 463, 464 & 465 Indian Penal Code and as such the further question whether prohibition contained in Sub-clause (ii) of Section 195(1)(b) would come into play or not does notarise. On a consideration of the matter, I find considerable merit in this contention.

(19) Sections 463 & 464 define the offence of forgery and as such the two Sections have to be read and construed together For deciding whether a person has committed the offence. Under the former the actus reuse which is indicated in bare outline is "making a False document" and the means read

may be any of the intentions enumerated therein. Seel ion 464 states when a person may be said to make a false document. A document can be laid to be falsely made if the signatures, seal or the date is false. In other words, the signature (in the case of forgery of signature) must be affixed by a person other than the person whose signature it purports to be. Hence, it must be shown that it was the accused who had affixed the false signatures or thumb impressions etc. before lie can be convicted of an offence of forgery. It has, therefore, been repeatedly held in several judicial decision that every instrument containing false statement, though fraudulently made cannot be said to be a forged document. As said by Kelly, C.B. in The Queen v. William Ritson and Samuel Ritson, 1869 Law Reports (Crown Cases) 200: "The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but, adopting the correction of my Brother Blackburn, that every instrument which fraudulently purports to be that which it is not is a forgery. whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed."

(20) Reference in this context be also made with advantage to State v. Parasram, , State Government. Madhya Pradesh v. Hifzvl Rahman & others, Air 1952 Nagpur 12, Motisinh Gambhirsinh v. The Slate, and Labhshanker Maganlal Shuk1a v. State of Gujrat, Air 1979 Sc 1012. The gist of all these authorities is that if a document has been made, signed, sealed or executed by or by the authority of a person by whom or by whose authority it purports to have been made, signed etc. then mere inclusion of certain false recitals or particulars does not amount to forgery and that would amount to making of false statement or even fabricating false evidence. I am in respectful agreement with the view expressed in all these decisions. It is abundantly clear in the instant case that the forged cheques in question were issued by respondent No. 3 and he signed the same in his own name. So, he cannot be said to have committed any forgery within the meanings of Sections 463, 464 & 465 Indian Penal Code The contention of the learned counsel for the petitioner that in view of Explanation I to Section 464, a man's signature of his own name may amount to forgery is not at all tenable in the facts and circumstances of the instant case. Even Illustration (e) to Section 464 does not in any manner advance the cause of the petitioner inasmuch as the maker of the forged document is known and is a genuine person. So, the mere fact that the cheques contain false recitals/statements will not make them a false document. Needless to say that there is a clear distinction between an offence of forgery and that of fabrication of false evidence. The gist of offence of forgery is the making of a false document while the gist of offence of fabricating false evidence is the procuring of false circumstances or the making of a document containing a false statement so that a judicial officer may form a wrong opinion in a judicial proceeding on the face of the false evidence. Hence, the complaint and the other material on record does not disclose any offence of forgery as such.

(21) The position is, however, different with regard to offence under Section 471 Indian Penal Code which consists of fraudulent or dishonest use of any document by a person which he knows or has reason to believe to be a forged document as genuine. So, in order to punish a person under Section 471 it is not necessary that he himself should have made or created the forged document. In the instant case, the pay-in-slips were apparently forged by someone; of course, it is not known who that someone was. All the same the forged pay-in-slips were used dishonestly for depositing the two

cheques in question in the account of S.C. Dass Gupta. The circumstances on record cast a grave suspicion about the complicity of the respondents in using the forged pay-in-slips in order to achieve their avowed object i e. to make out a case of letting of the premises in question by S.C. Das Gupta by proving payment to him by means of the said cheques towards (1) rent, and (2) cost of furniture. Since the pay-in-slips have not been produced in the civil suit so far and were seized by the investigating agency from the possession of the concerned bank, the bar contained in Section 195(1)(b)(ii) would not be attracted against taking cognizance of the offence under Section 471 Indian Penal Code Reference in this context may pertinently be made to Stale of Karnataka v. Hemareddy alias Vemareddy & Another (supra) in which the High Court had acquitted Hemareddy @ Vemareddy accused of both the offences viz. (1) under Section 467 read with Section 114 Indian Penal Code and (2) Section 193 Indian Penal Code on the ground that the conviction of the accused was on the strength of a complaint filed by a private individual. However, the Supreme Court maintained the acquittal of the accused-Hemareddy @ Vemareddy under Section 193 only but allowed the appeal in part so far as conviction of the said accused under Section 467 read with Section 114 Indian Penal Code was concerned on the ground that the same constituted a distinct offence. Hence, cognizance of offence under Section 471 will not be hit by the provisions of Section 195(1)(b)(ii) & (iii)IPC.

(22) This brings me to the offence under Section 448 Indian Penal Code i.e. criminal house trespass by the respondents. Section 448 defines criminal trespass and Section 442 defines house trespass. The latter is obviously an aggravated form of the former. On a plain reading of Section 441 it is evident that in order to constitute criminal trespass there must be (1) an unauthorised or unlawful entry into or upon property in possession of another or remaining there after having lawfully entered into/upon it and (2) such unauthorised or unlawful entry or remaining there must be with the intent of intimidate, insult or annoy the person in possession of such property. According to the prosecution case, the premises in question were locked and the key was with the petitioner-complainant. He used to find the first floor under lock on his frequent visits and it was only on 17th February 1980 when he found for the first time. that: the lock of the first floor was missing and he was told by the occupants of .the ground floor that they had taken the first floor on rent. So, the factum of dispossession by the respondents is apparently made out. Indeed, the case of the respondents themselves is that the same had been let to respondent .No. I by the petitioner. However, an observed earlier, this is a matter to be gone into at the trial and not at this stage. As for the requisite criminal intent suffice it to .say that the goods belonging to the deceased landlady were lying in the premises, and on her death the right and title of the deceased immediately devolved on her legal heirs. So, the mere Fact that the legal heirs had not come to occupy the premises in question would not render the goods res nullius, and they would still be deemed to be in possession of her legal heirs. In this view of the matter, therefore, there can be no shadow of doubt that the respondents committed trespass with intent to commit an offence i.e. steal the goods belonging to the deceased which were lying in the house. This is evident from an attempt on their part to create evidence that they had paid price thereof to SC. Dass Gupta. Moving moveable property out of the possession of any person without that person's consent with the intention of taking the same dishonestly constitute offence of theft as defined in Section 378 Indian Penal Code In the words of the Supreme Court, "Commission of theft consists in moving a moveable property of a person out of his possession without his consent, the moving being in order to the taking of the property with a

dishonest intention." (See K.N. Mehra v. State of Rajasthan, ). In the instant case all the necessary ingredients of this offence appear to be prima facie established inasmuch as by unlawfully entering into the premises in question respondents 1 & 2 not only committed trespass but they also committed theft in respect of the goods lying there. It is not an essential postulate of an offence under Section 379/ 380 Ipc that there must be actual shifting/removal of the goods from one place to another and it is enough that the property belonging to the victim has been moved out of his possession. In other words, the essence of theft consists of the dishonest moving of the property out of the possession of the owner and this fact has been accomplished by respondents 1 & 2 by not only illegally occupying the premises in question but also of the goods lying therein and thus taking them out of the possession of the rightful owner. In the alternative, assuming argued that to constitute an offence under Section 379 Indian Penal Code actual removal of the goods from the place of its storage must be there, the act of the respondents would amount to an offence of criminal misappropriation under Section 403 Indian Penal Code All that is necessary for an offence under Section 403 is that there should be misappropriation or conversion with the intention of causing wrongful gain or wrongful loss. Evidently 'the furniture etc. belonging to the deceased would be held to have been misappropriated or converted to their own use by the respondents with the dishonest intention in case the alleged letting of the premises by S.G. Dass Gupta is not established. Indeed. Section 404 specifically deals with the offence of dishonest misappropriation of property possessed by deceased person at the time of his death and has not since come into the possession of any person legally entitled to such possession. Admittedly, the respondents were aware of the fact that the goods in question belonged to the deceased and were in her possession at the time of her death. Apparently they took possession of these articles wrongfully and converted the same to their own use dishonestly. Thus, the commission of an offence under section 403/404 Ipc appears to have been made out. In State v. Abu Ismail Merchant, , it was observed by a Division Bench of Bombay High Court: "Even if the person who obtained wrongful possession may be assumed to have obtained possession of the letter by cheating, when that person converted the same into his own use, he must be deemed to have criminally misappropriated the draft contained therein."

(23) The ratio of this decision will certainly apply to the facts of the instant case. So, the essential ingredients constituting an offence under Section 448 can be said to exist prima facie on the basis of the material on record and it cannot be said to be simply a case of civil trespass. In Rash Behari Chatterjee v. Fagu Shaw and others, , A obtained actual physical possession of land on 3rd February 1963 with police help, in execution of a decree for ejectment passed in his favor as against B.3. trespassed on land on the night of 16th February 1963 and on 17th February 1963, they were found making preparations for construction of bamboo structures. It was held by the Supreme Court that the intention of B to annoy A who was in possession of land was clearly made out even though the land was lying vacant after A had obtained possession. It was further observed that the actual possession must be held to be of A and the law did not require that the intention must be to annoy any person who is actually present at the time of trespass. The case of the petitioner appears to be on a stronger footing having regard to all the facts adverted to above, (24) The learned Additional Sessions Judge has, inter alia, held that the respondents having come into possession of the house in question prior to 1978 and a civil suit filed by them being still under trial it was at best a case of civil trespass. Moreover, the cognizance of the offence under Section 448 was barred by the provisions of Section 468 once the unauthorised occupation qua the premises in question was traced to 1978. To

say the least, the learned Additional Sessions Judge has overlooked the basis principles which govern the framing of a charge as pointed by the Supreme Court time and again. He seems to have totally ignored the contention of the petitioner that he had found the lock on the premises in question intact till 17th February 1980 on which date he noticed for the first time that the lock was missing. On the other hand, advertising to certain recitals in the power of attorney executed by Smt. Bani Roy in favor of the petitioner and letter dated 20th February 1978 written by Smt. Bina Gupta and Smt. Kalyani Sen, both of which allude to some persons having wrongfully and unauthorisedly taken possession of the first floor and barsati of the property in question he hastened to the conclusion that the trespass had taken place in 1978 and as such the cognizance of the complaint was barred by limitation as laid down in Section 468 of the Code. I am constrained to say that it was hardly the domain of the learned Additional Sessions Judge to sift and weigh the evidence in this manner at the stage of framing the charge. This is clear on the authority of Stale of Bihar v. Ramesh Singh (supra).

(25) That apart, as seen above, offences under Sections 404/403/471 read with Section 120B Indian Penal Code are also prima facie made out against the respondents. These offences are punishable for imprisonment for a term exceeding one year and as such Clause (c) of Section 468(2) would come into play and the period of limitation would be three years. Sub-section (3) of Section 468 which has been added by the Code of Criminal Procedure (Amendment) Act of 1978 provides for limitation in relation to offences which may be tried together. It says that in relation to offences which may be tried together the period of limitation shall be determined with reference to the offence which is punishable with the more or the most severe punishment. So, it cannot be said by any stretch of reasoning at this stage that the cognizance of the offence on the basis of police report is barred by limitation as prescribed in Section 468 of the Code. Of course, it will be open to the trial court to take into consideration the prescribed period of limitation at the conclusion of the trial vis a vis the offence under Section 448 in case it does not find the respondents or anyone of them guilty of graver offences under Sections 403, 404 & 471 read with Section 120B, Indian Penal Code It may be, however, made clear that in view of the case of the prosecution itself that the entry into the premises in question by the respondents was unlawful, their continuing therein subsequently would not constitute a continuing offence, It is quite plain on the wording of the section itself viz. that it is only remaining unlawfully in the possession of property after having lawfully entered into or upon it that offence of criminal trespass is made out under the second part of Section 441 but where the original entry is itself unlawful the possession must be presumed to have commenced with unlawful entry and as such there can be no fresh act of criminal trespass on any subsequent date unless, of course, there is reentry by the lawful owner. In such a situation the offence of criminal trespass would be complete as soon as there is unlawful entry. I have already expressed this view in Ram Narain v. The State, .

(26) The upshot of the whole discussion, therefore, is that these petitions succeed in part and I find that there is a prima facie case against the respondents for offences under Sections 380, 448, 403, 404 & 471 read with Section 120B, Indian Penal Code Consequently the impugned order is set aside and the case is remanded to the trial court for proceeding further in accordance with law. The parties are directed to appear in the court of the Chief Metropolitan Magistrate on 24th October 1985.