NEUTRAL CITATION
2017:GUJHC:15340

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 4758 of 2015
With
SPECIAL CRIMINAL APPLICATION NO. 4759 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

CIRCULATE THE JUDGMENT AMONG THE SUB-ORDINATE JUDICIARY

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MEHUL CHINUBHAI CHOKSI....Applicant(s)

Versus

STATE OF GUJARAT & 1....Respondent(s)

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Appearance:
MR MIHIR H JOSHI, SENIOR ADVOCATE WITH MR SALIL M THAKORE, ADVOCATE for the Applicant(s) No. 1
MR ND NANVATY, SENIOR ADVOCATE WITH MR VISHAL K ANANDJIWALA, ADVOCATE for the Respondent(s) No. 2
MR MITESH AMIN PUBLIC PROSECUTOR WITH MS SHRUTI PATHAK WITH MS NISHA THAKORE, APPs for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

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Date : 05 /05 /2017

CAV COMMON JUDGMENT

1 Since the issues raised in both the writ applications are the same and the challenge is also to the selfsame first information report, those were heard analogously and are being disposed of by this common judgment and order.

2 For the sake of convenience, the Special Criminal Application No.4758 of 2015 is treated as the lead matter.

3 By this writ application under Article 226 of the Constitution of India, the writ applicant-original accused has prayed for the following reliefs;

> *"(A) That the Hon'ble Court be pleased to issue a writ, order or direction quashing FIR No.2 of 2015 registered with Gandhinagar Police Station, Gandhinagar Zone on 23.1.2015 and all proceedings consequent to the same;*
>
> *(B) That pending the hearing and final disposal of this petition, the Hon'ble Court be pleased to stay further proceedings of FIR No.2 of 2015 registered with Gandhinagar Police Station, Gandhinagar Zone on 23.1.2015 and all proceedings consequent to the same;*
>
> *(C) For such other and further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

4 The case of the first informant may be summarized as under;

4.1 The first informant is engaged in the business of jewellery. The writ applicant is also engaged in the business of jewellery. The writ applicant herein is the Chairman and the Managing Director of a company by name Geetanjali Jewellery Retail Limited (for short GJRL).

The writ applicant also owns one another company by the name Geetanjali Gems Ltd. (for short, "the GGL").

4.2 In the year 2010, one Mr. Kaushik Hariya, serving as a Business Development Manager with the GJRL and GGL, visited the residence of the first informant and persuaded him to take the franchisee of the company. Mr. Kaushik Hariya is said to have explained the modalities relating to the channel partner / franchisee. He also invited the first informant to have a meeting with the writ applicant herein being the chairman and the managing director of the GJRL and GGL. The first informant, accordingly, visited Mumbai and had a meeting with the writ applicant and other office bearers of the GJRL and GGL. The first informant was told that the company had an annual turnover of Rs.1100 crore. It would be worth becoming a channel partner/franchisee in the State of Gujarat. The first informant was also provided with the figures of sales and profits to create confidence. The first informant gave a thought to the proposal and decided to enter into an agreement with the company of the writ applicant. The understanding arrived at was that whatever amount the first informant would send, the Company would buy the gold bars equivalent to the same in the name of Divyanirman Jewellers, i.e., the business concern of the first informant and the gold bars would remain in the possession of the accused in a fiduciary capacity as a deposit. It was also agreed between the parties that the accused would give 12% interest or margin, whichever is higher, as a minimum guarantee on the gold bars. The first informant was also told that all the expenses concerning the store would be borne by the company and the company alone would be responsible for the profit and loss and the role of the first informant would be merely one of an investor. At the end of the business relations, the gold bars, deposited, would be returned to the first informant without any delay or dispute.

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4.3 It is alleged by the first informant that he transferred an amount of Rs. 22 crore by the RTGS to GJRL for the purchase of the gold bars. The transfer was effected from the account of his wife. It is alleged that between 2010 and 2013, the first informant transferred, in all, Rs.21.28 crore by RTGS/cheque to the GJRL. In the year 2013-14, the first informant sent gold bars of the value of Rs.1,76,81,500/- to the GJRL. In all, the first informant deposited through the GJRL, the gold bars worth Rs.23,04,81,500/- and the value of the same, as on the date of the registration of the first information report, was Rs.30 crore.

4.4 It is the case of the first informant that he deposited 30.111 kg in 2011-12, 18.4 kg in 2011-12 and 57.34 kg in 2013.14 and, accordingly, in a span of three years, 105.853 kg gold bar/ money was transferred to the accused as a deposit.

4.5 The accused persons issued a receipt dated 18th March, 2013 and an agreement dated 25th July, 2013 was also entered into duly signed by the parties. It is the case of the first informant that this is how the accused won over his trust and confidence, unmindful of the fact that the intention was otherwise. Soon, thereafter, disputes cropped up between the first informant and the accused. It is the case of the first informant that the accused failed to act in accordance with the terms of the agreement. The accused was informed about the same by the first informant. It is alleged that as the first informant got suspicious about the functioning of the company, he asked a chartered accountant firm to undertake a search of the affairs of the company. The report of the chartered accountant revealed that there was some tampering with the books of account. When the first informant confronted the accused with the same, the accused is alleged to have got angry and threatened the first informant with dire consequences.

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4.6 It is the case of the first informant that, in fact, the company had not purchased the gold bars in accordance with the terms of the agreement out of the amount transferred through the RTGS. The company failed to show the holding of such gold bars in the balance-sheet. It is the case of the first informant that the gold bars could be said to have been entrusted to the accused subject to certain terms and conditions, but the property, ultimately, came to be misappropriated. According to the first informant, the company has failed to return the gold bars weighing 105.853 kg worth Rs.30 crore and also failed to pay the minimum guarantee of Rs.19.42 crore. In such circumstances, according to the first informant, the accused committed an offence of criminal breach of trust by misappropriating the property worth Rs.49.42 crore.

4.7 Accordingly, the first information report came to be registered with the Gandhinagar Police Station, Gandhinagar Zone, for the offence punishable under sections 406, 420, 465, 467, 468, 471, 506, 120-B read with section 114 of the Indian Penal Code.

4.8 The applicants have come up with the two writ applications praying for quashing of the first information report substantially on the ground that the allegations levelled by the first informant fail to disclose commission of any offence.

5. On 11th August, 2016, a Co-ordinate Bench of this Court, while issuing notice and granting the ad-interim relief, passed the following order;

> *" petitioner. The petitioner had asked for the accounts to be settled between the parties. However, respondent No.2 did not think it fit to return the stock of the petitioner or make the full payment of the*

amount he owed the petitioner on account of selling the said stock. That respondent No.2 also passed off his own jewellery under the logo of the petitioners company. There are disputes pending between the parties and a Civil Suit has been instituted by the petitioner on 13.08.2014. The petitioner also made a complaint to the Senior Inspector of Police, Bandra (E), Mumbai against respondent No.2, which has now culminated into an FIR dated 14.11.2014. Pursuant to the complaint, a Panchnama was drawn up, which shows that respondent No.2 has been passing off his own jewellery under the logo of the petitioners Company.

3.1 It is further submitted that as a counterblast to the Civil Suit instituted by the petitioner and the FIR registered against him, respondent No.2 initially tried to lodge an FIR against the petitioner at Bhavnagar. However, as no FIR was registered by the Police authorities at Bhavnagar, respondent No.2 got the FIR registered at Gandhinagar Police Station on 23.01.2015. It is submitted that the impugned FIR is nothing but a counterblast to the Civil Suit and the complaint filed by the petitioner against respondent No.2.

3.2 That the dispute is purely civil in nature and pertains to the alleged breach of an Agreement and contract between the parties. It is being given a criminal colour by respondent No.2, in order to pressurize the petitioner. The FIR does not disclose any prima-facie case against the petitioner and the offences alleged against him are not made out, upon a bare perusal of the FIR.

3.3 It is contended that there is no misappropriation on the part of the petitioner, as it is respondent No.2, who owes the petitioner a large amount of money for the stock of the petitioner sold by him.

3.4 That the offence under Section 420 of the Indian Penal Code is also not made out against the petitioner, as the issue revolves around the alleged breach of Agreement. The petitioner is disputing the very Agreements that are being pressed into service by respondent No.2. Similarly, the other offences under Sections 465, 467 and 468 of the Indian Penal Code are not made out, as no element of forgery has been alleged against the petitioner.

3.5 It is further submitted that the entire incident has taken place at Bhavnagar and Bombay but the FIR has been lodged at Gandhinagar, which also raises certain questions.

4. Considering the material on record and the submissions advanced

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by the learned Senior Advocate for the petitioners, in the view of this Court, a prima-facie case has been made out for the grant of interim relief.

Hence, issue Notice, returnable on 15.09.2015.

Ad-interim relief in terms of Paragraph-16(B) is granted, till then.

Mr.L.B. Dabhi, learned Additional Public Prosecutor, waives service of notice for respondent No.1- State of Gujarat.

In addition to the normal mode of service, Direct Service for respondent No.2, through the Concerned Police Station, is also permitted. "

6 At this stage, it is necessary for me to take a note of the developments, which took place much before the registration of the first information report. It appears that in the wake of the dispute that arose between the parties, it is the accused company who filed a Special Civil Suit No.433 of 2014 in the court of the learned Civil Judge, Senior Division at Vadodara with the following prayers;

"a. That the Hon'ble Court be pleased to declare the alleged Agreements are void ab initio in view of the fraud perpetrated upon the plaintiff by the Defendants and / or in any event that the same are not binding upon the plaintiffs, in any manner whatsoever.

b. That Hon'ble Court declare that Defendant No.4 had entered into the alleged agreements (being EXHIBIT B to E hereto) without any authority from the plaintiffs and hence the same are not binding (in any manner whatsoever) on the plaintiffs;

c. That this Hon'ble Court be pleased to order and direct the Defendants to forthwith deliver to the Plaintiff's the goods / property, including but not limited to the jewellery, of the Plaintiffs" Property, which are presently in possession of the Defendants.

d. In the alternative to prayer~(c) above, the Defendants be (jointly and severally) be ordered and directed to pay the Plaintiffs a sum of Rs 27.01 crore/-, being the value of the stockpile as on date;

e. That this Hon'ble Court be pleased to Order and direct' the Defendants to state and declare on oath all the agreement(s) executed by and between Defendant No.4, purporting to act on behalf of the Plaintiffs and the Defendant Nos. 1 to 3 or any of their associates, and / or affiliates, from 2010 till date;

f. That this Hon'ble Court be pleased to direct the Defendants to deliver up the agreements referred to in prayer clause (f) above. and to cancel the same and or declare the same as void ab initio and in any event not binding on the plaintiffs, forthwith."

7 The civil suit came to be filed against the first informant herein being the defendant No.1, M/s. Divyanirman Jewellers, the partnership firm, as the defendant No.2, M/s. Divya Germs & Jewellery, a proprietary concern being the defendant No.3 and one Mr. Santosh Srivastava, an ex-employee of the accused company as the defendant No.4.

8 Some of the relevant averments made in the plaint are reproduced herein below;

"4. The Defendant No.1 is guilty of defrauding the plaintiffs. Defendant No.2 and 3 are entities that are associated with the Defendant No.1. The Defendant No.2 is a partnership firm of Defendant No.1. The Defendant No.3 is a sole Proprietor of Defendant No 1. The Defendants 1 to 3 have their address at the cause. title as mentioned above.

5. The Defendant No.4 is-co-conspirator along with Defendant Nos. 1 to 3 who has also defrauded the Plaintiff. Defendant No. 4 was previously an employee of Plaintiff No 1 and left the organisation on December 9, 2013. The Plaintiffs state and submit that. Defendants have, jointly and severally perpetrated the fraud on the plaintiffs so as to unjustly enrich themselves.

8. In or around August 2010, owing to the impeccable reputation and brand value of the "GITANJALI" brand in India, Defendant No.1 approached the Plaintiffs for the purposes of becoming it franchisee.

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Pursuant to discussions, it was decided that Defendant Nos 1 to 3. would be appointed as such franchisee on the basis of the standard terms applicable to all franchisees

9. Several draft agreements were exchanged between the parties from however. Defendant Nos 1 to 3 intentionally did not approve or sign the same due to various inconsequential and fifrivologus reasons including that they wanted to impose their own onerous terms and conditions, despite several attempts made by Plaintiff No. 1 and kept delaying the process. As a result the Parties continued to act on the basis of the original understanding till around May, 2013. Accordingly, the following were the terms of operation of the Defendant Nos. 1 to 3 as franchisee of the Plaintiff.

a. The Defendants, in consideration of being appointed as franchisee of GJRL, would provide security/invest an amount of approximately Rs.19.82 crores in the form of money/ gold with GJRL and GJRL would provide to the Defendants, gold and diamond jewellery, for sale at the franchisee outlet(s) of the Defendants;

b. Defendant Nos.1 to 3 were , on a daily basis required to provide GJRL with details and proof of the sales proceeds so as to enable GJRL to replenish the jewellery stock at the franchisee stores of GJRL;

c. Defendant Nos. 1 to 3's outlets would bear the name of "GlTANJALl" and the Defendants would exclusively sell jewellery provided by GJRL from five stores at the following locations: '

i. Vadodara;

ii. Ahmedabad;

iii. Bhavnagar;'

iv. Bhuj; and

v. Jamnagar.

(collectively referred to as the "Franchisee Stores"). Needless to state, that the above stores are the stores that the Plaintiffs are aware of as on date.

d. No outside stock of jewellery would be sold in the five designated franchisee outlets;

e. GJRL. would retain a lien on [a] the franchisee's investment; and [b] on all memo stocks provided by GJRL to the franchisee;

f. All intellectual property rights including but not limited to the product designs, brand name, logos etc. would remain the sole property of the Plaintiffs;

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g. GJRL would under take:

i marketing and advertisement. of the stores;

ii the operational activities of the, franchisee stores; and

iii; to bear all operational expenses such as rent, electricity expenses, staff salary etc.'

h. Necessary leases would have to be executed in relation to the various stores with the property owners of the premises where the stores were situated;

i On termination of the arrangement between the parties the Defendants would return the stock of gold and diamond jewellery both owned by GJRL and / or all memo stocks to GJRL; and in turn GJRL would return the investment made by the Defendants after settling the outstanding accounts, if any

j. if any scheme(s) were launched by the Defendants on behalf of the Plaintiffs, accounts and stocks pertaining to such scheme(s). would have to be maintained separately;

k. Standard terms with respect to confidentiality, warranty and termination rights were agreed upon as per standard franchisee agreements

10.On the basis of the above. understanding ("the understanding") 'the Parties exchanged several draft agreements time to time. As the Defendants were desirous of imposing their own onerous terms, the Defendants with male fide intentions did not sign the same despite several attempts made by the Plaintiffs; and kept delaying the process. As a result the parties continued to act on the basis of this understanding. It is pertinent to note that during this period the entire franchisees business including but not limited to the dealing with the Defendants was handled by the erstwhile Managing Director of GJRL, one Mr. Santosh Srivastava. i.e,, Defendant No. 4.

11. Based on the understanding and the various representations made by the Defendants, GJRL accepted an investment of approximately Rs.19.82 crores from Defendants Nos. 1 to 3, and in turn provided the Defendants with a stock of gold and diamond jewelry equivalent to Rs.34 crores, by March 2013 " (i.e, of approximately twice the value of investment). '

12. However to the shock and surprise of the Plaintiff from about May 27 2013 onwards the Defendants were reluctant to provide GJRL with the sales proceeds of the franchisee outlets, citing one

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excuse or another; and assured that the same would be shortly provided.

13.GJRL entrusted and instructed Mr. Srivastava (who was the then Managing Director of GJRL and was primarily involved in the day to day affairs of GJRL including the transaction with the Defendants) to ensure that the sale proceeds from the outlets of the Defendants are submitted to GJRL in a timely manner. Mr. Srivastava assured GJRL that not only would be obtain the outstanding sales proceeds from the. Defendants but he would also close out the loop on the franchisee agreement incorporating the understanding between the parties (which was in turn based on the 'standard franchisee agreements executed all other franchisees). Accordingly, the Plaintiffs acting on the basis of the understanding, as also the assurances provided, continued to replenish the stocks of gold and diamond jewelry with Defendant Nos. 1 to 3, at the Franchisee Stores. However, it is evident; that the Mr. Srivastava along With Defendant Nos. 1 to 3 have systematically perpetrated the present fraud upon the Plaintiffs by executing the alleged Agreements which apart from being at a complete variance from the Plaintiffs' standard franchisee terms are highly onerous.

14. Effectively, GJRL's goods were with the Defendants and they refused. to provide any particulars in retrospect, it is evident that these refusals were to enable the Defendants to jointly and severally perpetrate this systematic and massive fraud upon the Plaintiffs. The Defendants continued to provide the Plaintiffs with false assurances from time to time with the intent to steal the goods and defraud the Plaintiffs and are now illegally attempting to sell and / or transfer and / or dispose of and / or alienate the goods / property of the Plaintiffs' in the open market and consequently illegally profiteer from the said transactions.

FRAUDULENT PUPORTED AGREEMENTS ENTERED INTO BETWEEN MR. SRIVASTAVA AND MR. JADEJA/DJ/DGL;

15.Despite the assurances madeby the Defendants and Mr. Srivastava as no results were forthcoming and the Defendants continued to withhold sales proceeds from GJRL, GJRL actively started following up with Mr. Srivastava for a positive outcome. However, Mr. Srivastava was tight lipped on his interactions with the Defendants; and most secretive about providing any information to GJRL. Such conduct of Mr. Srivastava was most suspicious and dubious. In retrospect it is amply clear that the Defendants were in cohorts with each other to jointly and severally illegally usurp the Plaintiffs' Property and / or other assets / goods/jewelry (gold diamonds) of the Plaintiffs with the

intention of making windfall gains.

16. Around this time to the shock and surprise of GJRL, on December 9, 2013,. Mr. Srivastava suddenly submitted his resignation letter to GJRL. soon after his exit from GJRL, several discrepancies in the transactions) that Mr. Srivastava oversaw with regards to the understanding with the Defendants arose. Due to his untimely resignation and' keeping in mind the then recent events and suspicious turn of events GJRL commenced an internal investigation into its transactions with the Defendants. To the utter shock and surprise of the Plaintiffs' a large number of document(s) and data were retrieved whereby it became clear that a fraud of massive proportions had been perpetrated by the Defendants acting in concert and/ or collusion with Mr. Srivastava. At this stage, the Plaintiffs state and submit that the internal investigation is on going and has been prolonged due to large and systematic nature of the fraud perpetrated upon the Plaintiffs by the Defendants.

17. In the course of the investigations. certain documents and data have come to light. On a perusal of the limited documents and data in respect of the Defendants that have been retrieved by GJRL. it appears that the following documents had been fraudulently signed and / or executed between the Defendants and Mr. Srivasteva an alleged:

l. Memorandum of Understanding dated August 1, 2012;

Ii. Agreement to confirm deposit of 24 Karat pure Gold Bars dated July 25 2013 and amendment thereto dated August 25 2013'; and

III. Operational and commercial Agreement dated August 13, 2013. (hereinafter collectively referred to as 'alleged Agreements") Hereto annexed and marked as EXHIBiT B to EXHIBIT E is a copy of the aforementioned agreement(s)..."

9 In the plaint, more than a fair idea has been given as regards the scheme. The same is as under;

"20, As stated above the understanding between GJRL and the Defendants to enter into various jewellery accumulation schemes. Illustratively, one of the schemes entailed the following:
i. the customer would "pay a requisite amount for 11 (eleven) equal monthly installments "to Defendant Nos. 1 to 3. which would then be handed over to GJRL;

ii. the 12th (twelfth) monthly installment would be paid by GJRL;

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and

iii. On maturity of the term of the scheme, the customer would. be permitted to. redeem the entire amount by "purchasing 'GJRL manufactured jewellery from the franchisee equivalent to the entire amount.

21.Owing to the brand value and reputation of the Plaintiffs, several customers approached the Defendants to sign up for (the scheme and avail of the benefits thereunder.

22. Pursuant to the initial-investigation (which is still ongoing), it has come to light that the Defendants had in fact not been, handing. over the money(ies) deposited by customers under the scheme; to the Plaintiffs; and had in fact been wrongfully retaining the same with the sole aim to unjustly enrich themselves to the detriment and loss of the Plaintiffs its customers.

23.The customers have now started raising claims and/or queries on the Plaintiffs seeking their benefits under these schemes. In this manner, the Plaintiffs are now being forced to deal with the complaints raised on it by individuals arising out of the wrongful acts of the Defendants. It is pertinent to note that the Defendants. had and continue to have in their possession more than enough jewellery stock and consumers' funds to redeem the claims in relation to the schemes as raised by the customers. However, in light of the systematic fraud perpetrated upon the Plaintiffs the Defendants are wrongly and illegally attempting to foist this liability also upon the Plaintiffs. which has resulted in a duplication of loss suffered by the Plaintiffs. .

24. It is clarified that the Defendants are (1) retaining the stock provided by the. Plaintiffs and/ or not transferring the installment(s) collected towards the schemes extended by the Plaintiffs; and simultaneously, (2) directing the customers to the Plaintiffs to collect the gold/ jewelry/ products as applicable Accordingly. It is evident that the Plaintiffs' suffer a double loss whilst the Defendants make windfall gains.

25. Shockingly, the Defendants are now also instigating the customers to take action against the Plaintiffs. So much so that the Defendants are attempting to instigate the customers and public at large against the Plaintiffs by resorting to publicly defaming the Plaintiffs through:

a. various social. media networks such as facebook forums.

illustratively, a forum in the name and style of 'GITANJALI FRANCHISEE VICTIMS" Forum has been created on Facebook by the Defendants

The Plaintiffs crave leave to refer to and/ rely upon the posts on the said facebbok Page, as and when necessary.

b. writing emails to customers and other franchisees of the plaintiff; and the plaintiffs crave leave to refer to and / or rely upon any Such correspondence, as and when necessary.

"c. providing customers with extracts of the alleged agreements which are onerous for the Plaintiffs with a view to extort-monies from the plaintiffs. illustratively, the Defendants provided a one page extract to a customer, who in turn handed the same over to the Plaintiffs shockingly, the said one page extract does not tally with any of the purported executed version of the Alleged Agreements

Hereto annexed and marked as EXHIBIT G is a copy of the one page extract of a purported contract / Agreement entered into between the Defendant No. 1 to 3 and Defendant No.4, purportedly on behalf of the Plaintiffs.

At this stage; it is repeated and reiterated that the Plaintiffs are unaware of any such agreement that includes the purported extract

26. From the above, it is evident that the defendants act from the very beginning have been to create substantial losses to the Plaintiffs and this is evident from the systematic manner in which the Defendants have jointly colluded with each other. The acts of the Defendants' are solely aimed at causing loss of goodwill and reputation of the Plaintiffs and it is clear that the Defendants' are ready and willingly to do any act including but not limited to illegal acts to achieve this aim.

27.Accordingly, the Plaintiffs' are not only facing monetary losses but also a substantial loss .of reputation as it is also dealing with the grievances of the customers so as to ensure that they receive. Their rightful claiml(s) which has been 'wrongfully usurped by the Defendants who have in a clandestine mariner cheated the public at large and the Plaintiff. The Plaintiffs crave leave to refer to and/or rely upon any such correspondence in this regard, as may be necessary "

10 Thereafter, there are averments relating to the parallel business which the first informant started quite detrimental to the interest of the

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accused company. The following are the averments;

> *"28.The investigations have also revealed that the Defendants have attempted to inter alia:*
>
> *i. copy the designs and marks belonging to the Plaintiffs and/or the Gitanjali Group; and*
>
> *ii. steal and / or misuse the company secrets and/or business models and/ or data and / or software and/ or confidential information of the Plaintiffs which would cause immense loss and /or prejudice to the Plaintiff;*
>
> *29. This was done With the sole mala fide motive of starting and running a parallel business by emulating the Plaintifts' business model, so as to defraud and cheat the Plaintiffs but also to perpetrate a grave and heinous fraud on the public at large. This is evidenced from the following:*
>
> *I the Defendants are adding the brand name "GITANJALI" o their own. company's name Divyanirman;*
>
> *ii stealing and replicating the designs of jewelry manufactured by the Plaintiffs and/or the Gitanjali group. and*
>
> *iii. affixing the name of GlTANJALl to the jewelry made illegally by the Defendants. '*
>
> *The Piaintiffs' crave leave to refer to and/ or rely upon any such further information that may be made available, as and when necessary.*
>
> *30. In retrospect, it is evident that the Defendants' from the very beginning merely sought to entice the Plaintiffs into giving the franchisee to the Defendants. Upon receiving such a permission the Plaintiffs (much like the mythological depiction of the Trojan Horse), learnt the business(es) of the Plaintiffs, including but not limited to the specialties of the trade and upon doing so duped the Plaintiffs by parallel establishing their own business empire. This was systematically done by the Defendants as they started off by bribing / luring the employee(S) of the Plaintiffs as to assist them in this illegal scheme. Subsequently, upon placing a mole in the business (es) of the Plaintiffs the Defendants, began their systematic plan of shifting / transferring the business(es) to their own entities by inter alia using the brand name, name and style of the Plaintiffs; business(es) the expertise of the Plaintiffs' and also their modern software /systems of*

carrying out business(es) on a pan-india level. Accordingly, in retrospect, it is evident that the Defendants never intended to do business with the Plaintiffs but from the very inception merely engage the Plaintiffs' under a false pretext so as to learn the business of the Plaintiffs and subsequently establish their own business(es) which is based on the goodwill and standing of the Plaintiffs' itself.

31. Typically, every product of the Plaintiffs bears a unique bar code, which enables the system of the Plaintiffs' to record the details/and the sale of the product(s). It has surfaced that the Defendants have been, without authority, replicating the bar codes of the plaintiffs' products and illegally affixing them to their own products; The Defendants have therefore affixed the same bar code on two separate products, one manufactured by Divyanirman and the other by Gitanjali. As a result, with every two sales made by the Defendants, the system of the Plaintiffs will have only one record whereas in fact the Defendants have made excess sales and are pocketing the proceeds of the sale wrongfully. The above has been set out as and by way of an illustration as to how the Defendants" have systematically not only mirrored the business(es) of the Plaintiffs' but also duped the Plaintiffs' by usurping the Plaintiffs' goods / property and also destroying its goodwill and standing.

32.The Plaintiffs' has also recovered emails addressed by the Defendants from their systems, wherein details of sales proceeds have been detailed under two separate heads of "DIVYANIRMAN SALES", and GITANJALI SALES", which confirms the Plaintiffs' allegations that Defendants have mirrored the Plaintiffs' business and were not only carrying out a parallel business but have set out their own business empire which has its foundations on the business(es) of the Plaintiffs. The above clearly entails that the entire modus of the Defendants in entering into the present arrangement with the Plaintiffs was to create a parallel business by selling sub- standard jewelry manufactured by the Defendants to the public at, large by illegally using the Plaintiff's brand and goodwill apart from profiteering at the Plaintiffs' expense.

The defendants' as and by way of parallel sales have been secretly profiteering at the expense of the plaintiffs and consequently recorded windfall gains over the years.

The plaintiffs' crave leave to refer to and/or rely upon any such information that may be made available, as and when necessary.'

11 On receipt of the summons, the first informant appeared before the Court and filed his written statement, *inter alia,* stating as under;

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"8. The averments made in Para 10 are not true and are denied. The Plaintiffs have used vague terms of the understanding as referred in Clause-10, was never reached between the parties as alleged. The Plaintiffs are making vague averments concerning "understanding" without referring to any documents: It is denied that the Defendants were desirous of imposing their own terms as alleged and in this context, it is clarified that the defendants were not franchisee as alleged. It is further denied that the Defendants can be equated with retail investors. The Defendants reiterate that in view of investment in 24 karat pure gold bars in such huge quantity which is over 100 KG 24 karat pure gold bars, the investment of over 100 KG 24 karat pure gold bars cannot be equated with others and considering and treating the Defendants as special class of investors, the agreements were accordingly negotiated and signed. It is mentioned here that the Plaintiffs were proposing and soliciting even further investments from the Defendants. The Defendants were seriously considering this option. However, in view of subsequent conduct of the Plaintiff's, the Defendants did not go ahead with further investment plan and restricted investment at 105.853 Kg only. Thus, it is ridiculous on the part of the Plaintiff to expect that the party investing to such a large extent will accept franchisee model It is obvious that the investor of such a profile will agree and negotiate his own terms and will not accept standard terms, as alleged.

The averments made in Para 11 and 12 are not true and the same are denied. It is denied that the investment was made by the Defendant No.1, 2 and 3 as alleged. The investment was made by the Defendant No.2 only. Moreover, it is also denied that the plaintiff gave stocks worth Rs.34 crores by March, 2013 as alleged. The defendants reiterate that the transactions were for investment in gold quantity only and rupee value was irrelevant.

58. As a matter of fact, the Defendants herein are not franchisee who can be equated with other franchisee of the Plaintiff Company, as the Defendants have invested gold in huge quantity i.e. over 100 KG pure gold bars owned by and belonging to the Defendants are in possession of the Plaintiff It is clarified at the, outset, that the Plaintiffs have absolutely no right to file suit against the Defendants and the Plaintiffs are dishonest parties who have come to this Hon'ble Court by suppressing material information including information that the Plaintiff has deposited over 100 KG 24 karat pure gold bars The Defendants further submit that the quantity of gold bars invested by Defendants with Plaintiff is part of the record of the suit and gold bars

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are in possession of the Plaintiffs It is submitted that the Agreement dated 25.07.2013 that records acknowledgement given by the Plaintiffs to the effect that the Defendants have invested in terms of gold and such gold bars were purchased by the Plaintiff on behalf of the Defendant No 2 and is acknowledged in the Agreement and detailed more particularly in Annexures to the agreement. It is mentioned here that the amount was transmitted by Defendants to the Plaintiff through Bank and the Plaintiff has acknowledged date wise weight of gold bars purchased by GJRL Plaintiff on behalf of the Defendant No.2.

The Annexure also shows month wise quantity of gold bars purchased by the Plaintiff Company, by using the funds transferred by the Defendant No.2, through RTGS and by using such money, the Plaintiff purchased gold bars for and on behalf of the Defendant No: 2, to be retained by them in fiduciary capacity, returnable to the defendant No.2 in terms of the Agreement. Thus, the transaction between the Plaintiff and Defendants was not ordinary transaction or franchisee arrangement.

To be precise, the Defendants submit that they have deposited and thereby invested 105.853 KG 24 karat part gold bars. The above vital fact that the Defendants have invested 105.853 KG 24 karat pure gold bars as recorded' in Agreement date 25.07.2013 is suppressed by the Plaintiff. It was also condition of Agreement that stocks equivalent to 95% of this quantity of gold must be retained at the stores by the Plaintiffs.

it is ridiculous to state that the party will hand over such a precious and valuable metal in such a huge quantity and on the contrary, the Plaintiffs who have defrauded the Defendants by grabbing over 100 Kg pure gold bars deposited by the Plaintiff and by not performing reciprocal obligation of providing jewelery stock at five outlets Operating under various schemes.

62. It is mentioned here that the Defendants commenced operations with the plaintiff during the year 2010 and it may be noted that between 2010 and execution of First Agreement, the Defendants had deposited huge quantity of gold in anticipation of execution of agreement. It is further mentioned here that agreement execution was pending, however, operations had commenced. It is mentioned here that at no point of time, the Defendants were expected to Sign standard agreement as alleged. In fact, the arrangement was different and distinct and therefore, parties decided to have their own agreement. Accordingly, thereafter agreement draft preparation commenced after 2011 and Plaintiffs along with others were involved

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with the process of drafting of the agreements. It is mentioned here that the entire legal team was involved in preparation of the draft and actual draft agreement was forwarded to the Defendants by Ms. Shikha Palsule, who was Manager Legal by her Mail dated August, 2013, and forwarded all agreements which were drafted by Legal and Operational ' team of Plaintiff Company. It may be noted that Ms. Shikha Palsule along with one Shivendra Slngh forwarded draft agreement to the Defendants. Similarly, Agreement to confirm 24 karat pure gold bars also came from Plaintiff's side, and Kaushik Hariya, Shivendra Singh, Ms. Shikha Palsule were part of the team working on the Agreement. This Agreement was forwarded by Kaushik Hariya who was part of team as stated above. It is mentioned here that copy of the agreement was also marked to Mr. Sharat Dash who was all India business Head of the Plaintiff Company. It is further submitted that one Vinod Dhavre and Kaushik Hariya forwarded to the Plaintiff a scanned copy of the agreement date 25.07.2013 on 29.07.2013.

"These facts are mentioned here to place it on record that whole team of the Plaintiff Company was involved with execution of agreement and Plaintiff participated in the process. It is mentioned here that entire process of agreement, drafting, negotiations, finalization and execution was initiated, controlled, handled and completed by Plaintiffs only. The Plaintiffs were desirous of retaining business relationship with the Defendants. As mentioned hereinabove, the Defendant No.1 and 2 are major investors who invested over 100 KG pure gold bars. The Defendant No.2 was the only major investor who invested such a huge quantity of gold and therefore, he did not sign in the standard agreement as he was concerned for security of his investment. The story propounded by the Plaintiff concerning fraud and collusion with Defendant No.4 is completely false. The Plaintiffs are absolutely dishonest and liars when they say that they had no information concerning execution and existence of agreement. It is mentioned here that way back in June, 2014, the Defendant No 2 addressed E-mall to Mehul Choksi and several other representatives of the Plaintiff Company and wrote to them about redemption of investors under Shogun Scheme in the said mall the Defendant No.2 had reproduced contractual provisions, which is produced by the Plaintiff at Annexure-G. The entire provision, along with other matters were part of the E mail addressed to none other then the Chairman of the Plaintiff Company Group President Saurav Bhattacharya, all India business Head Sharat Dash and several other company executives. E-mail of June, 2014 completely exposes the Plaintiff who have actually robbed the Defendant No.2 by taking

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custody of Defendant's' pure gold over 100 Kg, under various schemes which were prepared by them, negotiated by them, executed by them and which were within their knowledge even subsequent to execution thereof. Having pocketed Defendants' precious gold under above schemes and by playing fraud with the Defendants, the Plaintiffs did not perform their contractual obligations. The above facts are mentioned only to dispel cloud of doubt created by the plaintiff by repeatedly using the words fraud and fraudulent Whereas, in reality, the Plaintiff and people in management of the Plaintiff Company who are cheaters and who have after taking away Defendants' gold, raised their hands off and are pretending complete ignorance about existence of agreement.

It is mentioned here that the Defendant has a huge claim against the plaintiffs as since over TWO years, the Plaintiffs have not paid the dues to the Defendants under the Agreement and have not reimbursed the expenses to the defendant in terms of the Agreement.

12 In para-63 of the written statement, the first informant, being the defendant No.1, explained the nature of the business transaction, in the following words;

"63. To explain to this Hon'ble Court the nature of business, that was to be transacted by the parties, following facts are mentioned.

A) Four Agreements as mentioned hereinabove relating to confirmation of deposit of gold by defendants and terms of operation of business were entered into by the parties.

B) The transactions as agreed under aforesaid agreements stipulated performance of reciprocal obligations to be performed by the plaintiffs after the defendant has deposited the gold bars. As agreed by parties, the plaintiff was required to deposit 24 karat pure gold bars and by way of performance of reciprocal obligations, the Plaintiffs were required to supply 22 karat pore gold jewelry as provided by Page 2 of the Agreement The Plaintiffs were also required to maintain stock of jewelry at all times, equivalent to 95% of the gold deposited by the Defendant The business was to be operated as per terms of the Operational and Commercial Agreement which clearly mentioned that the Plaintiff will employ necessary sales personnel and business will be managed in terms of agreement.

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The amendment agreement stipulated that in the event of closure of business, the Defendants would be eligible for refund of gold. This commitment was given by the Plaintiffs by their letter dated March 18th 2013, that was signed by Mr. Shivendra Singh, along with the Defendant No.4.

Under the agreement the 'defendants were eligible to minimum guaranteed return and were also eligible for margin/discount whichever is higher. it is mentioned here that all five stores as mentioned herelnabove were operated under this Agreement only

C) It is mentioned here that the above agreements are agreements governing all operations within the State of Gujarat and even Inorblt Mall was part of the same agreement.

D) The plaintiffs, in performance of their reciprocal obligations were required to maintain stock of 22 karat gold jewellery as mentioned hereinabove in preparation agreed on page 2 of the said agreement. That the agreement also provided that in the event of plaintiff's failure to maintain such stock and/or replenish such stock, the defendant no.2 would be authorized by agreement not to part with sale proceeds realized at various stores. Thus, since March 2013, as a consequence of plaintiff's failure to maintain the stock and non-payment of minimum guaranteed returns, reimbursement of expenses etc., besides default committed in performance of other obligations the defendant did not part with the sale proceeds as authorized by the agreement and this was known to the plaintiff as such action was in terms of the agreement owing to the plaintiffs default.

E) The defendants therefore starting from March 2013 stopped giving sale proceeds to the plaintiff and as of that day the the plaintiffs were induced to the defendant no.2. After March, 2013, until date of the suit, the plaintiff has never made any payments.

F) it is mentioned here that some time during August, 2013, amendment agreement was signed and it was agreed at Clause – 3 that the plaintiff will also bring their running stores at Inorbit Mall, Mumbai under the Agreements with the Defendants and accordingly, the defendants invested further quantity of gold.

G) Even, after the defendant no.2 performed in obligations and deposited gold, the plaintiff did not enter into agreement for Inorbit

Mall and did not maintain committed stock at stores operating in the state of Gujarat.

H) In view of the breach committed by the plaintiffs, the Defendant No.2 was forced to serve notice to the plaintiff on 15.07.2014. Instead of complying with the notice, the plaintiff filed present suit which is absolutely false and frivolous.

64. The defendants reiterate that the plaintiffs were in breach from the beginning and defendants repeatedly requested them to regularize working and operation. The defendant also requested the account, reimbursing the expenses, paying the minimum guaranteed amount and it was brought to the notice of the plaintiff that the stock at various stores was inadequate and customers coming to the stores were finding it extremely difficult to select items for want of proper choice. It is denied that the defendant was carrying on any parallel business as alleged. In any event this was not forbidden and prohibited by agreements.

65. The defendant No.2 reiterated that the plaintiff had distinct agreement with the plaintiff and therefore, signing of standard agreement was out of question. As mentioned hereinabove, aforesaid four agreements were executed by parties with full knowledge, complete understanding out of free will and consent. All these agreements therefore are enforceable and binding upon the Plaintiff. The Defendants submit that once agreement is signed the parties are bound by terms written and performance of contractual obligations, even if they are onerous, parties are bound to perform. The Defendants further submit that it is a settled legal position that parties to a contract are bound to perform contractual obligations and party cannot be absolved from liability to perform a part merely because performance becomes onerous. Thus, once the contract is signed by parties, it is not open for the Plaintiff to avoid and circumvent performance thereof claiming that terms are onerous. It is further submitted that the Defendants cannot avoid performance of the contract.

66. The Plaintiffs after receiving Defendants' notice dated 15.07.2014, instead of complying with same or replying filed the present suit only with an oblique motive of raising false and frivolous issues so as to avoid liability to return 105.853 KG 24 karat pure gold bars. It is mentioned here that business at the above stores was carried on as per terms agreed under the aforesaid agreements and

entire stock was subject to Defendants lien. The contract also provides that in the event of default committed by the plaintiff, the Defendant No.2 can recover entire stock and such recovery of the stock and realization of the value would be subject to Defendants right to recovery of 105.853 KG 24 karat pure gold bars

67. It is submitted that all the allegations pertaining to Defendants collusion with the erstwhile Managing Director, Defendant No.4 are false; As mentioned hereinabove, the Defendants have deposited huge quantity of pure gold and have nothing in return. It, is mentioned here that the Defendant No.2 has huge pending schemes as detailed more particularly in their notice dated 15.07.2014.

68. As stated hereinabove, after notice was served, false suit has been filed by the plaintiff. It is evident from the suit that the plaintiff is completely pleading ignorance as regards existence of the agreement and is branding the defendants as fraudster. It is settled position of law that only by repeatedly using the word "fraud", fraud is not established and the allegations are completely false. In view of this behaviour, the defendant No.2 had no choice but to terminate the agreement B and D, by serving a Terminator Notice dated 21.08.2014. Subsequent thereto, the defendant no.2 also demanded 105.853 KG 24 karat pure gold bars that was entrusted to the plaintiff in fiduciary capacity. It is mentioned here that the entire stock of gold was exclusive property of the defendant No.2 and was transferred by the plaintiffs under invoices and hence, the sale was any way completed within the meaning of the Sale of Goods Act. The defendant has become owner of the stock under the invoices as well as under the terms of the agreement and therefore, the plaintiff has not right in relation to the stock of gold jewelery at the stores.

69. That subsequent to the termination and serving demand notice, the Defendant No.2 has moved stock that was available at five stores. It is mentioned here that out of total stock lying at Bhavnagar, about 35965.17 gms 22 karat gold jewelery, about 180.50 gms 18 karat gold jewelery in addition thereto, there is certain quantity of diamond jewelery of stock in possession of the defendants as detailed more particularly Annexure A hereto."

13 It also appears that the accused company thought fit to lodge a criminal complaint in writing dated 28th August, 2014 addressed to the

Senior Inspector of Police, BKC Police Station, Bandra (East), Mumbai for the offence punishable under sections 406, 415, 420, 465, 467, 468, 471, 506, 120B read with section 34 of the Indian Penal Code against the first informant and others. However, I am informed that the Investigating Agency filed a report and closed the matter finding various faults at the end of the accused herein.

14 In the aforesaid factual background, the following are the submissions on behalf of the writ applicants;

14.1 Mr. Mihir Joshi, the learned senior counsel assisted by Mr. Salil Thakore, the learned counsel appearing for the writ applicant submitted that even if the entire case of the first informant is believed or accepted to be true, none of the ingredients to constitute the offence of forgery, criminal breach of trust or cheating are spelt out. There is not a single document on record which could be termed as a false document within the meaning of section 464 of the Indian Penal Code.

14.2 According to Mr. Joshi, even as on date, the first informant has not filed any civil suit to recover the amount due and payable running into crores as asserted by the first informant. Till this date, the first informant has not even filed a counterclaim in the suit filed by the accused company. Instead of filing a civil suit against the accused company for recovery of the amount in terms of the agreement, the first informant adopted a dubious tactic of going before the police and filing a first information report so as to exert undue pressure for the purpose of recovering the requisite amount.

14.3 Mr. Joshi submitted that in the first information report, there is no allegation of misappropriation or dishonest conversion of the

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property by the accused to his personal use. The allegations are that the accused failed to refund the security deposit. Thus, the case of the first informant is that of illegal retention of the property entrusted by him to the accused by way of security deposit.

14.4 Mr. Joshi submits that, on the contrary, it is the accused company, who has to recover a huge amount from the first informant and, for which, the civil suit has been filed in the court concerned. Mr. Joshi pointed out that there are serious disputes as regards the terms agreed between the accused company and the first informant, and the genuineness of the documents, on which reliance, is being placed by the first informant, is also highly doubtful. The issues need to be adjudicated by the civil court so as to fix the liability, if any, on either of the parties.

14.5 Mr. Joshi submits that a security deposit is given by a person to the other as a security for the due performance of obligations. It is given in order to secure the interest of the depositee. Like a mortgage created in a loan transaction, a security deposit is a device for the purpose of protecting the depositee and the same, by itself, would not amount to entrustment for the purpose of section 405 of the IPC. Mr. Joshi submitted that if the depositee does not return the security deposit on the ground that the depositor has breached the terms of the contract or has failed to perform his part of the contract, or to put it in other words, has failed to make the payment of the amount due to the depositee, then the depositor should not be permitted to initiate the criminal proceedings for the offence under sections 406 or 420 of the IPC.

14.6 Mr. Joshi gave an example of a mortgage. A mortgage by deposit of title deeds under section 58 of the Transfer of Property Act, whereunder the mortgagor hands over the title deeds to the mortgagee

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as a security against the repayment of the loan or for due performance of some obligation, and if the mortgagee exercises his rights on the ground that a default had been committed by the mortgagor, and if the mortgagor is permitted to pursue the criminal proceedings, the same will be nothing but gross abuse of the process of law.

14.7 Mr. Joshi submitted that so far as the writ applicant of the connected matter is concerned, she happens to be the wife of the writ applicant of the Special Criminal Application No.4758 of 2015. Being the wife of the chairman and the managing director, she might be on the Board of Directors, but she has hardly any role to play, more particularly, keeping in mind that the allegations are of the offence of cheating, criminal breach of trust and forgery. According to Mr. Joshi, no vicarious liability can be fastened upon a person for the offence under the IPC. There are no allegations, direct, or indirect against the wife of the chairman and the managing director of the accused-company so as to even remotely infer any criminal conspiracy.

14.8 Mr. Joshi, the learned senior counsel laid much emphasis on the fact that the case put up by the first informant in his written statement runs quite contrary to what he has alleged in the first information report. Mr. Joshi submits that the first informant, somehow, even managed to win over one Srivastava, the ex-employee of the accused company and after winning him over, got a written statement filed through him in the civil suit filed by the company supporting the case of the first informant in the civil suit. According to Mr. Joshi, the first informant has to pay more than Rs.90 crore to the accused company towards the damages as against the claim of the first informant of Rs.49 crore. Mr. Joshi submits that the stance taken in the F.I.R., if is found to be inconsistent with the stance taken in the civil proceedings, then the

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same would assume significance. The criminal proceedings are not a shortcut of the other remedies. In support of his submissions, Mr. Joshi, has placed reliance on the following decisions;

(1) In the case of ***B. Suresh Yadav vs. Sharifa Bee & Anr.***, *2008 Cri. L.J., 431*;

(2) In the case of ***Rex vs. V. Krishnan***, *AIR 1940 Madras 329*;

(3) In the case of ***Re Raghava Menon***, *AIR 1941 Madras 250*;

(4) In the case of ***Nageshwar Prasad Singh @ Sinha vs. Narayan Singh & Anr***., *AIR 1999 SC 1480*;

(5) A judgment delivered by this Court in the case of ***Arvindbhai Maganlal Master & Anr. vs. State of Gujarat & Anr***., *Criminal Misc. Application No.11031 of 2014*;

(6) One another decision delivered by this Court in the case of ***Ronak Ashokbhai Kedia vs. State of Gujarat***, *Criminal Misc. Application No.4145 of 2012, decided on 19.11.2014*;

(7) In the case of ***G. Sagar Suri & Anr., vs. State of U.P. & Ors***., *(2000) 2 SCC 636*;

(8) In the case of ***Mohammed Sulaiman vs. Md. Ayub & Anr***., *AIR 1965 SC 1319*;

(9) In the case of ***Dalip Kaur & Ors. vs. Jagnar Singh & Anr***., *(2009) SCC 696*;

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(10) In the case of ***Jehangir Pestonji Wadia vs. Framji Rustomji Wadia***, *1928 (30) BLR 962*;

(11) In the case of ***Eicher Tractor Limited & Ors. vs. Harihar Singh & Anr.***, *(2008) 16 SCC 763*;

14.9 In such circumstances referred to above, Mr. Joshi prays that there being merit in both the applications, the same be allowed and the first information report be quashed.

15 On the other hand, both the writ applications have been vehemently opposed by Mr. N.D. Nanavati, the learned senior counsel assisted by Mr. Vishal Anandjiwala, the learned counsel appearing for the first informant. According to Mr. Nanavati, more than a *prima facie* case could be said to have been made out, and the police should be permitted to complete the investigation in accordance with law. The learned counsel would submit that the materials on record would indicate that the intention of the accused was to cheat the first informant from the inception.

16 According to Mr. Nanavati, the offence could be said to have been committed in the following ways;

16.1 Misappropriation of 105.853 kgs of gold bars kept as a security deposit in a fiduciary capacity in the interest of GGRL and the failure to return the same despite the repeated demand;

16.2 Fabricated and forged documents were presented at the time of accepting the gold bars and when time came for the accused to return

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the gold bars, the accused terms those documents as the fraudulent documents.

16.3 Mr. Nanavati submits that once the agreement came to be terminated by his client, then the accused was duty bound to return the gold bars deposited with him in his fiduciary capacity, and the failure to return, amounts to the criminal breach of trust.

16.4 Mr. Nanavati laid much emphasis on para-8 of the agreement dated 25.07.2013, Annexure-F collectively to this writ application. Para-8 of the said agreement reads as under;

> *"GITANJALI hereby give unconditional promise, assurance and trust to Divya-Nirman that in the event of discontinuance/closure of the said business, entire gold bars quantity commodity (without any deduction) mentioned in annexure shall be returned/refunded immediately without fall and without any excuse of any nature whatsoever."*

16.5 According to Mr. Nanavati, despite such clear a condition in the agreement, if the property entrusted, is not returned, then a *prima facie* case of the criminal breach of trust could be said to have been made out.

16.6 Mr. Nanavati pointed out that there are many prosecutions instituted of the similar nature against the accused-company and the office bearers.

16.7 In such circumstances referred to above, Mr. Nanavati, the learned senior counsel, prays that there being no merit in both the writ applications, the same be rejected.

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16.8 Mr. Mitesh Amin, the learned Public Prosecutor appearing for the State submitted that a *prima facie* case could be said to have been made out for the police to complete the investigation in accordance with law. He submits that although there are disputes between the parties as regards the terms of contract, and a civil suit is also pending, yet that by itself, is not sufficient to terminate the criminal proceedings initiated by the first informant at this stage. In such circumstances, he prays that there being no merit in both the writ applications, they be rejected.

ANALYSIS:

17 On 15th July, 2014, one notice was issued to the accused-company, stating as under;

> *"1. M/s. Gitanjali Jewellery Retail Limited*
> *Having registered office at*
> *B-6, Laxmi Tower,*
> *Bandra, Kurla (E)*
> *Mumbai: 400 051.*
>
> *2. M/s. Gitanjali Germs Limited.*
> *Having registered office at*
> *B-6, Laxmi Tower,*
> *Bandra, Kurla (E)*
> *Mumbai: 400 051.*
>
> *sub:- Notice under the clause 8 of Amendment for Operational and Commercial Agreement-Executed on 26th August, 2013, between the paties.*
>
> *Dear Sirs,*
>
> *Under the instructions of my client,[1]DivyaNirman Jewels, having registered office at 59, MadhavDarshan, Waghawadi Road, Bhavnagar 364 001", a Partnership Firm duly registered under the provisions of section 69 of lndian Partnership Act and [2] Mr. DigvijaySinhji H Jadeja, Proprietor of Divya Gems & Jewellery; having its office at DivyaNirman House, Chitranjan Chawk, Vidyanagar, Bhavnagar, we, Advocates, Shri Bhasker H Bhatt (Ghoghawala),*

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having his office at High Court Road, Bhavnagar - 364001 and H R Upadhyaya & Co., High Court Road, Bhavnagar - 364001, do hereby serve you with this notice as detailed herein below . " '

This notice is being issued under the instructions of aforesaid two clients Viz. Divyanirman jewels, Partnership Firm through its managing Partner Shri Digvijaysinh H Jadeja and on behalf of Divya Gems and Jewellery, sole proprietary concern of Shri Digvijaysinh Jadeja.

1. That You No.1 Company is a subsidiary of You No.2 Company and You No.2 Company is a holding company of You No.1 Company. You No.2 Company have formed several subsidiary companies for carrying out the, business of jewellery. You No.2 Company has complete financial and managerial control over You No.1 Company and other subsidiaries.

2. As stated hereinabove, You No.2, are a Holding Company of You No.1 Company. From the very initial stage of negotiations i.e. since midst of 2010 with my' client, You No.2 have always represented that You No.1 and You No.2 are a group company and that You No.1 company is a part and parcel of commercial organization of You No.2 company. On the basis of such representation made by and on behalf of You No.1 and You No.2 and considering the reputation and financial stability of You No.2 Company, my client entered into agreement with you. Thus, You No.2 are jointly and severally liable with You No.1 Company for all acts and omissions of You No.1 Company. '

3. That You No.1 Company, at the instance of You No.2 Company has entered into series of negotiations with my clients for carrying out the business of jewellery ornaments etc. The terms and conditions which were fixed orally in "S.Y. 2010 and thereafter of the agreement were reduced to writing ,by four different deeds executed as under:

a) "Agreement to confirm deposit of 24 Karat pure Gold Bars" executed on 25th July 2013.' Herein after referred as "Agreement-A"

b) "Operational and commercial agreement" executed on 13th August 2013. Herein after referred as "Agreement-B"

c) Amendment of Agreement to confirm deposit of 24 Karat Gold Bars executed on 25th August, 2013. Herein after referred as "Agreement-C"

d) Amendment of Qperational and Cornmercial Agreement executed on 26"' August 2013. Herein utter referred as "Agreement D".

4. it is clearly understood and reduced to writing that "Agreement~A"

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'and "Agreemenht B" are independent and separate, though they are to be read together to determine the rights and obligations of parties.

5. My client states that under the terms and conditions stipulated in the agreements as aforesaid. my client has deposited 105.853 Kgs. 24kt. pure Gold Bars with you in your fiduciary capacity and as per the terms of agreement. you were bound to maintain minimum stock of 22kt. «gold ornaments and Suggestive Retail Price (SRP) value diamond ornaments to the extent of 95% in various stores run under the agreement. You have not complied with this most vital condition of the agreement. The stock of gold ornaments and Diamond SRP value ornaments supplied by you to the stores is ridiculously low as compared to the gold bars deposited by my client. My client has continuously requested you to maintain the stock to the extent of 95% of the 24kt. pure gold bars as per agreements but you have miserably failed to comply with this most vital condition of the agreements.

6. My client further states that under clause-3 of the "Agreement-C", you were to hand over the entire business of inorbit Store situated at-Malad Link Road, Mumbai in consideration of deposit of 6.500Kgs. 24 Karate pure gold bars with you by my client. My client has already deposited 6.500Kgs. Of 24 Karat pure gold bars With you. You have however failed to handover possession of the inorbit Store to my client with agreed stock level despite my client having deposited the entire gold bars 6.500Kgs. of 24 karat pure gold bars and thus you have committed serious breach of the contract. My client is entitled to hand over the inorbit mall store as well as receive profit margin amount from you as stated "table~A" annexed here with.

7. My client further states that under the terms and conditions 0f these agreements, you were under obligation and duty bound to pay Minimum Guarantee Amount (MGA) @ 12% of the value of the gold bars deposited by my client with you. You have not made regular payment of Minimum Guarantee Amount and thus under the head of MGA,' as stated at "table-A" annexed here with You also failed to make payment to my client as per clause 30 of "Agreement—B" as incentive amount detailed at "Table-A".

8. Under the terms of agreement, you are liable to reimburse to my client, the expenditure to the extent of 50% for furniture, fixtures etc. of all the stores. Till date, under the head of Reimbursement of Expenditure towards furniture, fixtures etc." you are liable to pay amount mentioned as per "table— B" annexed here with. Similarly, you are liable to reimburse to my client as per annexed "table-C", being the amount of expenditure incurred by my client towards business promotion, advance rent / security deposit, and monthly rent

of the show rooms, maintenance and electricity charges,insurance, all taxes, other operational expenses etc."

9. You have committed breach of contract by floating various schemes which were beyond the scope of agreement entered into between the parties. Such schemes have operated against the interest of my client. One of such scheme is Gift Voucher. You have delivered substantial gold ornaments under such schemes from my client's stores. My client is entitled to receive from you the amount as detailed the "table-D" annexed here with. Under various schemes such as Shagun, Tamanna, Swarna Mangal Kalash, Swarna Manga lLabh etc. floated by you, you have delivered gold and Diamond ornaments from my client's stores, the cost of which you are liable to reimburse to my client by not reimbursing the cost of gold ornaments delivered under such schemes, you have caused loss and damage to my client as detailed in "table-D" annexed here with.

11, Your immediate perusal about the breach of contract, the Tables No. 'E' and 'F', ["Table-E" represent receivable compensation amount for deficit stocks. And "Table-F" for receivable stock for current subscriber of FBSS schemes' future liabilities]

12, As you Wanted to expand your business you had requested my client not to deduct the amount of MG, and other expenses for the operation of the stores from the sale proceeds and to send the full amount of sale proceeds, my client has sent more than Rs.10,05,82,541/ through cheques and RTGS as from sales proceed during FY. 2012-13. And as such, my client has made the payment in access and credited the same amount in your account

13. My client is entitled to claim interest on all the aforesaid amounts at the rate of 12% per annum.

14 You have also committed breach of contract by not paying the hub margin money to my client as Hub Agent under clause-5 of the "Agreement-D". Considering total net sale, my client Shri Digvijaysinh Jadeja, Proprietor of Divya Gems and Jewellery, is entitled to claim Rs.43,76,080/-(Rupees Thirty Seven lacs, nine thousand, eight hundred sixty eight only.) from you as additional margin money as contemplated by clause-5 of the "Agreement-D" as mention at Annexed "table~G"

15. Since last one year or more, my client especially Shri Digvijaysinh Jadeja attempted to restore the derailed business activities in the interest of all parties and to protect the goodwill of all concerned. My client says that unfortunately my clients' attempts to amicably settle

the disputes have miserably failed because of your inaction 'to the 'extent that my clients have come to a conclusion that you are no longer interested to abide by the terms and conditions of contract and to continue the state of affairs in a freezed condition.

By this notice, we call upon you to comply within 30 days from the date of receipt of this notice the following requisitions.

i) Please comply with all the terms and conditions of all the agreements entered into between the parties including the handing over store "lnorbit" situated at link road, Malad, Mumbai with agreed stock level.

(ii) Please supply gold ornaments and SRP Value Diamond ornaments to the extent of 35% of the 24kt pure gold bars deposited by my client with you.

(iii) Please pay all the amount stated in all schedule annexed here with, Which are summarized in "Table-H" annexed with this notice, being the total amount due and payable by you under aforesaid heads.

Accordingly, you are hereby noticed and called upon jointly and severally to comply with the terms and conditions of all concerned contractual documents and discharge your all duties expressly imposed undertaken, required to protect the interest of my client and within 30 days, positively and without fail, failing which my client shall be constrained to avail appropriate hard action against you as per Clause 8th of Contract "Agreement- -.D" lt Is needless to say that this is a last notice. This notice is without prejudice to all legal actions available to my client in any form whatsoever.

Note: 1. the figures shown hereinabove and below in the ensuing Tables are as it appears from the record available With my clients.

Note: 2. the aforesaid agreements and other allied documents are not detailed herein for the simple reason as not to burden the paper work and my client has all justification to read and rely upon the aforesaid documents during the course hereinafter including the judicial proceedings, if any.

Note: 3. in eventuality of you need to have any clarification or further details qua the aforesaid Tables please immediately contact my client so as to avoid any future dissatisfaction about the lack of details However, not to delay any inquiry so as to frustrate the time limit of this notice.

Note 4: Shri Digvijaysinh Jadeja is also entitled for the reimbursement for travel expenses related to company work as per clause 6 of Agreement D (which comes around Rs. 12.31 lacs) which you have not paid for which my client will take appropriate steps which please note."

18 On 21st August, 2014, the first informant issued a notice to the accused for return of the gold bars in terms of para-8 of the agreement. The notice reads as under;

"1. M/s. Gitanjali Jewellery Retail Limited
Having registered office at
B-6, Laxmi Tower,
Bandra, Kurla (E)
Mumbai: 400 051.

Subject: Demand notice for returning of 105.853 kgs, 24 kt pure gold bars under clause 8 of "Agreement to Confirm Deposit of 24 karat Pure Gold Bars" executed between the parties on dt. 25th July, 2013.

We, deposited and thereby invested total 105.853 kgs. 24 kt pure gold bars with you and entrusted to you in ficuciary capacity, as follows;

(a) 93.967 kg, 24 kt. Pure gold bar, as per Annexure I of "Agreement To Confirm Deposit of 24 karat pure gold bars" dated 25th July, 2017.

(b) Divyanirman Jewels has transferred money Rs.1,46,51,000/- in your ICICI Account No.000405055537 by RTGS and NEFT in month of May 2013 for the purchase of 5,386 kgs. 24 kt pure gold bars on our behalf to be retained with you in a fiduciary capacity.

(c) Divyanirman Jewels deposited 6500 kg, 24 kt gold bars with GJRL on 20.08.2013 towards handing over of In-orbit store, as per clause no.3 of "Amendment to Confirm Deposit of 24 karat pure gold bars" dated 13th August, 2013. Thus, total 24 kt gold bars deposited with you in fiduciary capacity is 93.967+5.386+6.5 = 105.5\853 kg gold bars. The contractual provisions reads as follows;

(as per Clause 8 of Agreement "Agreement to Confirm Deposit of 24 karat pure gold bars') Gitanjali hereby give unconditional promise,

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assurance and trust to Divyanirman that in the event of Discontinue / closure of the said business, entire gold bars quantity commodity (without any deduction) mentioned in Annexures shall be return / refunded immediately without fail, and without any excuse of any nature whatsoever.

Following termination of Agreements, terminated vide letter No.DNJ-GJRL/ Termination/08-2014-01 dated 21st August, 2014, resulting into closure/discontinuance of business. I Digvijaysinhji Jadeja, Managing partner of Divyanirman Jewels, in exercise of powers vested in me as per clause 8 of "agreement to Confirm Deposit of 24 karat pure gold bars" executed between the parties on 25th July, 2013, do hereby demand and call upon you to return our 105.853 kgs 24 kt pure gold bars deposited with you in fiduciary capacity on immediate basis. If you fail to comply with the demand, we shall take such further steps for recovery /protection of our rights as may be deemed expedient."

19 On 23rd August, 2014, one another notice was issued by the first informant regarding stock lying at the Bhavnagar Store. It reads as under;

"*1. M/s. Gitanjali Jewellery Retail Limited*
Having registered office at
B-6, Laxmi Tower,
Bandra, Kurla (E)
Mumbai: 400 051.

2. M/s. Gitanjali Germs Limited.
Having registered office at
B-6, Laxmi Tower,
Bandra, Kurla (E)
Mumbai: 400 051.

Subject: Stock: Acknowledgement of taking over stocks lying at Bhavnagar store for protecting our interest and ensuring recovery of gold bars deposited/invested with you:

Dear sirs,

Further to our letter of termination dated 21.08.2014 and Demand

Notice dated 21.08.2014, we are entitled to recovery/refund of 105.853 Kg 24 carat pure gold bars from you. We have already issued a demand notice and are awaiting return of gold bars.

As you are aware as against the Quantity of gold bars deposited by us, weight/value of the stock at various Store is drastically low. Nevertheless for immediate protection of our rights arising out of agreements we acknowledge having taken custody of stocks lying at Bhavnagar store as per Annexure- A annexed hereto and have shifted the same in our safe custody tor security of the stock. The total quantity as shown in Annexure-A is subject to our contractual lien and/or ownership and as you are aware we also have absolute right over these stocks. Please note that we shall return the stock as per Annexure-A against your delivering us 105.853 Kg 24 Karat pure gold bars within 30 days from date of termination notice/demand notice failing which we shall deal with the stock in accordance with the contractual provisions, without prejudice to our rights to recover short-fall i.e. difference between stock quantity realized and 105.853 Kg 24 carat pure gold bars in accordance with law. "

20 The picture that emerges from the materials on record is that the parties entered into a business transaction and pursuant to the same, the accused persons accepted the gold bars in the form of an investment of the value of Rs.19.82 Crore from the first informant. In turn, the accused persons, over a period of time i.e. upto March 2013, provided the first informant with the stock of gold and diamond jewellary worth Rs.34 Crore. It appears as admitted by the first informant himself that from May 27 2013, the first informant stopped paying the sale proceeds to the accused persons on one pretext or the other. It also appears that out of the blue, one Mr. Srivastava, who was working with the accused – company, tendered his resignation on 9th December 2013. *Prima facie,* it appears that the first informant won over the said Srivastava, who, in turn, went to the extent of filing a written statement in the suit filed by the accused persons supporting the first informant. Thus, the sum and substance of the dispute between the parties is the breach of contract dated 25th July 2013, which, according to the first informant, amounts to

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a criminal breach of trust. On the other hand, the say of the accused is that an agreement was entered into between the parties and it is the first informant, who defaulted in complying with the terms of the agreement, thereby, resulting in huge financial loss to the accused – company.

21 It appears from the materials on record that the first informant has with him in his possession and custody:

(i) Approximately invoice gold value of quantity 41.12 kilograms (valued at Rs.11.92 Crore as on August 12, 2014).

(ii) Diamond memo stock approximate value of Rs.15.09 Crore.

(iii) The amount collected through the scheme provided by the accused persons and the first informant which has been illegally retained by the first informant.

22 At this stage, at the cost of repetition, let me take note of the stance of the first informant, as reflected, in his written statement filed in the civil suit. In no uncertain terms, the first informant has admitted that since March 2013, he stopped paying the accused – company the sale proceeds, as authorised by the agreement. The agreement, which the first informant is referring to, is of August 2013. That means that for a period of three years, the parties continued with the business. The following are the averments in the written statement of the first informant:

"D) The Plaintiffs, in performance of their reciprocal obligations were required to maintain stock of 22 karat gold jewelry as mentioned hereinabove in preparation agreed on page 2 of the said agreement. That the agreement also provided that in the event of Plaintiff's failure

to maintain such stock and/or replenish such stock, the Defendant No.2 would be authorized by Agreement not to part with sale proceeds realized at various stores. Thus, since March, 2013, as a consequence of Plaintiff's failure to maintain the stock and non-payment of minimum guaranteed returns, reimbursement of expenses etc., besides default committed in performance of other obligations, the Defendant did not part with the sale proceeds as authorized by the Agreement and this was known to the Plaintiff as such action was in terms of the Agreement and owing to the Plaintiff's default.

E) The Defendants therefore, starting from March 2013 stopped giving sale proceeds to the Plaintiff and as of that day the Plaintiffs were indebted to the Defendant No.2. After March, 2013, until date of the suit, the Plaintiff has never made any payments."

23 Thus, it appears that the first informant wants his stock of gold weighing 105.853 KG said to have been entrusted to the accused in a fiduciary capacity, but he does not want to pay the amount towards the sale proceeds in terms of the agreement and also wants to hold back the stock of jewellary provided by the accused – company to him.

24 In the course of the hearing of this matter, I inquired with Mr Nanavati, the learned senior counsel appearing for the first informant as well as Mr. Mitesh Amin, the learned Public Prosecutor appearing for the State to show me one document on record, which could be termed as a false document within the meaning of section 464 of the IPC. The reply of both the learned counsel was that, as on date, there are no such documents, which could be termed as the false documents within the meaning of section 464 of the IPC, but probably, in the course of the

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investigation, the Investigating Officer might be able to obtain one, which could be termed as a forged document. I am not, at all, convinced with such reply of the first informant as well as of the State. Without there being anything on record to even remotely indicate about the forgery, the first information report could not have been registered for the offence punishable under sections 465, 467, 468 and 471 of the IPC. The law in this regard is well settled. Mere incorrect information or a false recital in a document even, if any, does not amount to forgery. Such a document cannot be termed as a false document within the meaning of section 464 of the IPC.

25 The second question, I put to Mr. Nanavati, the learned senior counsel appearing for the first informant and Mr. Mitesh Amin, the learned Public Prosecutor appearing for the State was whether the case is one of cheating or criminal breach of trust. The reply of both the learned counsel was that the allegations constitute, both cheating as well as criminal breach of trust.

26 The offences of criminal breach of trust (Section 406 IPC) and cheating (Section 420 IPC) have specific ingredients. In order to constitute a criminal breach of trust (Section 406 IPC).

1) There must be entrustment with person for property or dominion over the property, and

2) The person entrusted :

a) dishonestly misappropriated or converted property to his own use, or

b) dishonestly used or disposed of the property or willfully suffers any other person so to do in violation

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i) any direction of law prescribing the method in which the trust is discharged and

ii) of legal contract touching the discharge of trust (see: S.W.P. Palanitkar v. State of Bihar, (2002)1 SCC 241) : (AIR 2001 SC 2960).

Similarly, in respect of an offence under section 420 IPC, the essential ingredients are :

1) deception of any person, either by making a false or misleading representation or by other action or by omission;

2) fraudulently or dishonestly inducing any person to deliver any property, or

3) the consent that any persons shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit (see: Harmanpeet Singh Ahluwalia v. State of Punjab, (2009)7 SCC 712 : (2009) Cr.L.J. 3462 (SC))

27 Thus, it is seen that for identifying the concept of criminal cheating, as provided under Section 416 of the Indian Penal Code, the ingredients of fraudulent, dishonest intention has become the basic sine quo non and if it is there or, identified, then it is to be further ascertained that as a result of which the person so represent must be made to deliver any property to the other and that the inducement must be inherent with the intention to keep the same or to utilise the said property for the use and utilisation of the person, who made such an inducement with such intention. Whereas, in the concept of the criminal breach of trust, as defined under Section 405 of the Indian Penal Code, the voluntary entrustment following the dominion over such property by one to the other person has become necessary to be identified and that the property has become necessarily disentitled, misappropriated or

converted in such a way as provided by the Section. If the ingredients set out in the above sections of law are identified, upon the materials placed by the prosecution, then, Sections 406 and 420 of the Indian Penal Code respectively being the punishment sections come into operation. However, while doing such legal exercises, it has become imperative for the Court to see that the criminal breach of trust and cheating, though, generally involves dishonest intention, but, both are mutually exclusive and different in the basic concept, in the context that criminal breach of trust is voluntary and cheating, is purely on the basis of inducement with dishonest intention. In this regard, in my view, both the concept of law for the respective offences are totally distinct, different in nature and accordingly, mutually exclusive with each.

28 Further, in both sections, *mens rea* i.e. intention to defraud or the dishonest intention must be present from the very beginning or inception without which either of these sections cannot be invoked.

29 In my view, the plain reading of the First Information Report fails to spell out any of the aforesaid ingredients noted above. I may only say with a view to clear a serious misconception of law in the mind of the police as well as the courts below that if it is the case of the complainant that an offence of criminal breach of trust as defined under Section 405 of IPC, punishable under Section 406 of IPC, is committed by the accused, then in the same breath it could not be said that the accused has also committed the offence of cheating as defined and explained in Section 415 of the IPC, punishable under Section 420 of the IPC.

30 Every act of breach of trust may not be resulted in a penal offence of criminal breach of trust unless there is evidence of manipulating act of fraudulent misappropriation. An act of breach of trust involves a civil

wrong in respect of which the person may seek his remedy for damages in civil courts but any breach of trust with a *mens rea* gives rise to a criminal prosecution as well. It has been held in **Hari Prasad Chamaria v. B.K. Surekha and others**, reported in **1973(2) SCC 823** as under :

> *We have heard Mr. Maheshwari on behalf of the appellant and are of the opinion that no case has been made out against the respondents under Section 420 Indian Penal Code. For the purpose of the present appeal, we would assume that the various allegations of fact which have been made in the complaint by the appellant are correct. Even after making that allowance, we find that the complaint does riot disclose the commission of any offence on the part of the respondents under Section 420 Indian Penal Code. There is nothing in the complaint to show that the respondents had dishonest or fraudulent intention at the time the appellant parted with Rs. 35.000/- There is also nothing to indicate that the respondents induced the appellant to pay them Rs. 35.000/- by deceiving him. It is further not the case of the appellant that a representation was made, the respondents knew the same to be false. The fact that the respondents subsequently did not abide by their commitment that they would show the appellant to be the proprietor of Drang Transport Corporation and would also render accounts to him in the month of December might create civil liability on the respondents for the offence of cheating.*

31 To put it in other words, in the case of cheating the dishonest intention starts with the very inception of the transaction. But in the case of criminal breach of trust, the person who comes into possession of the movable property receives it legally, but illegally retains it or converts it to his own use against the terms of the contract. Then the question is, in a case like this, whether the retention is with dishonest intention or not. Whether the retention involves criminal breach of trust or only a civil liability would depend upon the facts of each case.

32 The distinction between mere breach of contract and the offence of criminal breach of trust and cheating are fine one. In case of cheating, it depends upon the intention of the accused at the time of inducement,

which may be judged by a subsequent conduct but for this the subsequent conduct is not the sole test but mere breach of contract which cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction i.e. the time when the offence is said to have been committed. Therefore, it is his intention, which is the gist of the offence. Whereas, for the criminal breach of trust, the property must have been entrusted to the accused or he must have dominion over it. The property in respect of which the offence after the breach of trust has been committed must be either the property of some person other than the accused or the beneficial interest in or ownership of it must be of some other person. The accused must hold that property on trust of such other person. But the offence, i.e. the offence of breach of trust and cheating involve dishonest intention but they are mutually exclusive and different in basic concept. There is a distinction between the criminal breach of trust and cheating. For cheating, criminal intention is necessary at the time of entrustment. In criminal breach of trust, mere proof of entrustment is sufficient. Thus, in case of criminal breach of trust, the offender is lawfully entrusted with the property and he dishonestly misappropriates the same. Whereas, in case of cheating, the offender practices fraud or dishonestly induces another person to deliver the property. In such situation, both the offences cannot co-exist simultaneously.

33 I may quote with profit a decision of the Supreme Court in the case of ***Nageshwar Prasad Singh alias Sinha v. Narayan Singh***, *AIR 1999 SC 1480*. In the said case, the allegation of the prosecution was that an agreement was signed between the complainant respondent and the appellant whereby some land was agreed to be sold by the appellant to the complainant on a consideration, and allegedly a part thereof was

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paid as earnest money, the balance being payable in the manner indicated in the deed. The most important term in the deed was that the possession of the plot would stand transferred to the complainant and possession in fact was delivered to the complainant over which they made certain constructions. The complaint was laid on the basis that the appellant had cheated the complainant of the sum of money he had paid as earnest money as his subsequent conduct reflected that he was not willing to complete the bargain for which the complainant had to file a suit for specific performance which was pending in the civil court. Held, that latter part of illustration (g) to Section 415, I.P.C. illustrates that at the time when agreement for sell was executed, it could have, in no event, been termed dishonestly so as to hold that the complainant was cheated of the earnest money, which they passed to the appellant as part consideration and possession of the total amount involved in the bargain was passed over to the complainant/respondent and which remained in their possession. Now it is left to imagine who would be interested for dealing the matter for completing the bargain when admittedly the complainants have not performed their part in making the full payment. The matter was, therefore, before the civil court in this respect. The liability, if any, arising out by breaching thereof was civil in nature and not criminal. Accordingly, the appeal was allowed and complaint proceedings were quashed.

34 It was further held by the Supreme Court in the case of ***Hridaya Ranjan Prasad Verma v. State of Bihar***, ***AIR 2000 SC 2341*** **at Pp. 2345-46 of para 16)** as below :

> "*15. In determining the question it has to be kept in mind that the distinction between, mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent*

conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention, which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

35 Thus, the law as regards the distinction between the offence of criminal breach of trust punishable under section 406 of the IPC, and cheating punishable under section 420 of the IPC, is well settled. Even, on the first informant's own saying, the case is one of criminal breach of trust as the accused failed to return the property entrusted.

36 A Division Bench of the Bombay High Court, in the case of **Jehangir Pestonji Wadia (supra)** held that the mere pendency of a civil suit, by itself, is not sufficient ground for staying the criminal proceedings, however, if the object of the criminal proceedings is to prejudice the trial of the civil suit or to use them as a lever to coerce the accused into a compromise of the civil suit, the criminal proceedings can be stayed till the decision of the civil suit.

37 I am conscious of the fact that in the case on hand, I am not concerned with the issue of staying the criminal proceedings during the pendency of a civil suit. However, the principles laid down in the Bombay High Court decision needs to be closely considered. *Prima facie,* I am of the view that the whole idea in initiating the criminal proceedings by the first informant is to prejudice the trial of the civil suit and to use the same as a lever to coerce the accused persons into a

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compromise of the civil suit.

38 There is one additional feature attached to this matter. It is incomprehensible why if a fraud has been practiced and the complainant has been cheated, he would fail to initiate appropriate civil proceedings for the recovery of his legitimate dues. It is not possible to believe that when the complainant claims that have been duped of crore of rupees, he would rest content with lodging an F.I.R. without doing anything more in order to protect his interest so far as the recovery of the amount is concerned. The point deserves to be underscored (and its importance cannot be overemphasised). The complainant could not have, therefore, been oblivious of the need to protect his interest by recourse to the Civil Court. The criminal prosecution could at best have resulted in the persons responsible for the fraud being punished. The same could not have protected his civil rights in regard to the recovery of the amount due and payable. Again, how could the complainant be sure that the prosecution was bound to succeed and that the Courts were, ultimately, bound to hold that a fraud or cheating has been practiced upon him. It is, therefore, not possible to believe that he would have remained indifferent and waited for long time without instituting any civil suit for recovery of the amount.

39 In the context of the nature of the dispute between the parties, I would like to refer to and rely upon a decision of the Madras High Court in the case of **Rex vs. V. Krishnan [AIR 1940 Madras 329]**. His Lordship Pandrang Row, J., while addressing the jury, observed as under:

> *"I do not care, I am satisfied if I get a receipt and the document;" in these circumstances, is it an entrustment of money? Secondly whether the accused did anything with that money which would show that it was a misappropriation? Misappropriation is the wrongful setting apart or*

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assigning of a sum of money to a purpose or use to which it should not be lawfully assigned or set apart. It is in this connexion that you have heard a fairly long argument addressed to you about the rights of an agent and the rights of an attorney and so on, to which I shall refer shortly. I am reading one or two sentences from Lord Shaw's judgment just to show that it is all important - and indeed of the greatest importance - that you should always bear in mind the difference between civil and criminal liability especially in dealing with a case of criminal breach of trust because it is not at all uncommon to find cases which are really nothing but cases involving civil liability somehow made to assume the form of criminal cases, and unless one is very careful, the person who gives such colour may succeed in achieving his object. As his Lordship says, and it is needless for me to add that what he says is of the highest authority; it is binding on me as well as on you:

> *The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts.*

That is to say, though it is necessary to preserve in its full implication and in its fullest measure the civil responsibility of one person in respect of property which he has received, it is quite a different matter when you come to deal with a crime alleged against him in respect of that property. Then he says:

A Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind, and he points out that in the case before him the Acting Chief Justice of Syechelles did not seem to have present to his mind the distinction between criminal liability and civil liability to account. That is the reason why I am repeating the same thing over and over again to you. It is all important for you to remember that you are not dealing with a civil case but with a criminal case, and you have to decide, not whether this money should be accounted for by the accused or should be paid by him and so on but whether he has committed any crime in respect of it. One thing I might mention that the mere fact that the accused failed to account for the money which he was entrusted with is not in law sufficient to establish that he has committed the offence of criminal breach of trust in the absence of other evidence, unless you prove some kind of conversion, i.e. a wrongful diversion to his own purposes or a purpose not consistent with

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law or with contract."

"Assuming for argument's sake that this Rs. 8000 remained in that account all the time, that he did not actually draw it; if for instance in the account of the accused with the Bank all the time Rs. 8000 was kept without being touched, you cannot say that the mere retention was a criminal breach of trust. It was safer and wiser to keep it in a Bank than at home. I am mentioning this; merely keeping the money and not paying it over as required by law, that is to say, even when an agent may have no claim against the principal, even then if he retains it merely and does not pay it, but does not do anything else with it, there is no criminal breach of trust. It is only a civil liability, and of course the principal can at any time, if he chooses, compel him to pay, send him a notice and file a suit. A criminal complaint is not the way to get one's civil rights established. If money due to a particular person is not paid, the law allows only a civil suit and not a criminal proceeding, for in the case of mere retention without any misappropriation, there is only a civil liability. It may be he may have to pay interest; that is a different matter that also is a civil matter. On the criminal side you can take it from me that mere retention of money entrusted to a person without any misappropriation, even though he was directed by the person to pay it to so and so, or to deal with the money in a particular way, is not a criminal breach of trust; unless there is some actual user by him which is in violation of law or contract, there is no criminal breach of trust; and even if there is such user there must be a dishonest intention. In the case pf mere retention it is impossible to say it is dishonest. Apart from that, there must be some definite act to show misappropriation. Putting the money into one's own account in the bank may be misappropriation or may not be misappropriation. If it is drawn upon for his own purposes, it is misappropriation. You can then say he drew the money for his own use, but supposing he did not draw on it but kept the money in the bank there is no misappropriation, and no criminal misappropriation, because unless there is misappropriation there can be no question of dishonest misappropriation."

"If a man is proved to have had a reasonable claim against another for more than the sum of money belonging to the other in his hands, his retention of it, and even his user of it for his own purposes I would say, in law, would not amount to criminal breach of trust because the intention could not have been dishonest, that is to say, to cause wrongful loss or wrongful gain. You have to look at these cases from what I may call a common sense point of view. Did the man act as a criminal; did he act with a guilty mind and with the dishonest intention of walking off with somebody else's money? Or was he merely hanging on to it because he knew he was entitled to more than that? It is for you, Gentlemen of the Jury, to look at the case in that way..."

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40 In the case of **Madhavrao Jiwaji Rao Scindia and another etc vs. Sambhajirao Chandrojirao Angre and others [AIR 1988 SC 709]**, the Supreme Court held that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations, as made, *prima facie* establish the offence. The Supreme Court observed *that i*t is also open for this Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the criminal machinery or the Court cannot be utilised for any oblique purpose. In the said case, the Supreme Court observed that a case of breach of trust is both a civil wrong and a criminal offence. There would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence.

41 I have reached to the conclusion that the case on hand is predominantly a civil wrong and the necessary ingredients to constitute a criminal offence are lacking.

42 In the case of **Binod Kumar and others vs. State of Bihar and another [(2014) 10 SCC 663],** the Supreme Court, while drawing a fine distinction between the offence of criminal breach of trust and cheating, observed in paras 18 and 19 as under:

> *"18. In the present case, looking at the allegations in the complaint on the face of it, we find no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the appellants in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the complainant. Excepting the bald allegations that the appellants did not make payment to the second respondent and that the appellants utilized*

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the amounts either by themselves or for some other work, there is no iota of allegation as to the dishonest intention in misappropriating the property. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the appellants. It must also be shown that the appellants dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the appellants did not pay the money to the complainant does not amount to criminal breach of trust.

19. Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a short cut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the appellants under Sections 406/120B IPC, is liable to be quashed."

43 In **B Suresh Yadav (supra)**, the Supreme Court took the view that although the liability of a person can be, both civil and criminal at the same time, yet the inconsistent stand taken by the complainant would assume significance. I may quote the relevant observations as under;

"10. The short question which arises for consideration is as to whether a case of cheating within the meaning of Section 415 of the Indian Penal Code has been made out or not.

11. Ingredients of cheating are :

(i) deception of a person either by making a false or misleading representation or by other action or omission; and

(ii) fraudulent or dishonest inducement of that person to either deliver any property to any person or to consent to the retention thereof by any person or to intentionally induce that person 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.

12. While executing the sale deed, the appellant herein did not make any false or misleading representation. There had also not been any dishonest act of inducement on his part to do or omit to do anything

which he could not have done or omitted to have done if he were not so deceived. Admittedly, the matter is pending before a competent civil court. A decision of a competent court of law is required to be taken in this behalf. Essentially, the dispute between the parties is a civil dispute.

13. For the purpose of 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. In a case of this nature, it is permissible in law to consider the stand taken by a party in a pending civil litigation. We do not, however, mean to lay down a law that the liability of a person cannot be both civil and criminal at the same time. But when a stand has been taken in a complaint petition which is contrary to or inconsistent with the stand taken by him in a civil suit, it assumes significance. Had the fact as purported to have been represented before us that the appellant herein got the said two rooms demolished and concealed the said fact at the time of execution of the deed of sale, the matter might have been different. As the deed of sale was executed on 30.9.2005 and the purported demolition took place on 29.9.2005, it was expected that the complainant/first respondent would come out with her real grievance in the written statement filed by her in the aforementioned suit. She, for reasons best known to her, did not choose to do so.

14. In this view of the matter, we are of the opinion that in the facts and circumstances obtaining herein, no case has been made out for proceeding with the criminal case.

15. In ***G. Sagar Suri & Anr. v. State of U.P. & Ors. [(2000) 2 SCC 636],*** *this Court opined :*

> *8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the 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 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.*

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Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

Therein, having regard to the fact that a criminal complaint under Section 138 of the Negotiable Instruments Act had already been pending, the criminal complaint under Section 406/420 found to be an abuse of the due process of law.

16. In ***Anil Mahajan v. Bhor Industries Ltd. & Anr. [(2005) 10 SCC 228],*** *this Court held :*

8. 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. According to the complainant, a sum of Rs.3,05,39,086 out of the total amount of Rs.3,38,62,860 was paid leaving balance of Rs.33,23,774. We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence of the accused and the stand taken in reply to notice because the complainants own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question.

17. In ***Hira Lal Hari Lal Bhagwati v. CBI, New Delhi*** *[(2003) 5 SCC 257], this Court opined :*

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 Indian Penal Code does not arise. {*See also* ***Hira Lal Hari Lal Bhagwati v. CBI, New Delhi [(2005) 3 SCC 670] and Indian Oil Corporation v. NEPC India Ltd. & Ors. [(2006) 6 SCC 736]***}."

44 The above takes me to consider whether any case for the offence punishable under Section 506 of the Indian Penal Code is made out. The allegations in this regard are quite vague and general. No F.I.R. in the State of Gujarat is complete without Section 506 of the Indian Penal Code. It appears that only for the sake of levelling allegations that the first informant has tried to invoke Section 506(2) of the Indian Penal Code. Section 506 reads as under:

"*S. 506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;*

and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

45 The essential ingredients -- The offence of criminal intimidation has been defined under Section 503 of the Indian Penal Code and Section 506 of the Indian Penal Code provides punishment for it. Section 503 reads as under:

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"Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threats, commits criminal intimidation.

Explanation: - A threat to injure the reputation of any deceased person in whom the persons threatened is interested, is within this section.

An offence under Section 503 has following essentials:-

1. Threatening a person with any injury;

(i) to his person, reputation or property; or
(ii) to the person, or reputation of any one in whom that person is interested.

2. The threat must be with intent;

(i) to cause alarm to that person; or
(ii) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat; or

(iii) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

46 A bare perusal of Section 506 of the Indian Penal Code makes it clear that a part of it relates to criminal intimidation. Before an offence of criminal intimidation is made out, it must be established that an accused had an intention to cause alarm to the complainant. Mere threats given by the accused not with an intention to cause alarm to the complainant, but with a view to deterring him from interfering with the work of construction of the wall, which was undertaken by the accused-applicant, would not constitute an offence of criminal intimidation. In the entire FIR, there is no whisper of any allegation that the threats which were administered actually caused any alarm to the first

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informant and he felt actually threatened.

47 In my view, even none of the ingredients to constitute an offence under Section 506(2) of the Indian Penal Code are spelt out.

48 Thus, in the overall assessment of the matter, I am not convinced with the case put-forward by the first informant so as to permit the police to continue with the investigation. The agreement provided for mutual obligations and it appears that on account of the disputes, the parties have not been able to strictly adhere to their respective obligations. The matter is at large before the Civil Court. The civil liability will be determined by the Civil Court on the basis of the evidence, that may be led by the parties. As noted above, the first informant has not initiated any civil proceeding. He has not even filed a counter claim in the civil suit filed by the accused persons.

49 So far as the applicant of the connected application is concerned, she is the wife of the Chairman and Managing Director of the company. Let me assume for the moment that a, *prima facie*, case is made out of criminal breach of trust against the company and the other accused. I am of the view that the wife should not be held responsible in any manner by fastening vicarious liability. Even otherwise, no vicarious liability can be fastened on any person for an offence under the Indian Penal Code.

50 In the result, both the writ applications succeed and are hereby allowed. The First Information Report being C.R. No.I-2 of 2015 lodged at the Gandhinagar Zone Police Station, District: Gandhinagar is hereby quashed. All the consequential proceedings pursuant thereto stand terminated. Rule is made absolute.

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51 It is needless to clarify that the civil proceedings shall proceed further expeditiously in accordance with law and the Court concerned shall decide the liability of the respective parties without being influenced, in any manner, by any of the observations made in this judgment. This judgment is confined to the extent of determining the criminal liability of the accused persons, as tried to be fixed by the first informant. The Civil Court is directed to give top priority to the civil suit and see to it that the same is disposed of with the judgment within a period of one year from the date of receipt of the order.

(J.B.PARDIWALA, J.)

Vahid