Babulal Vs. State

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SooperKanoon Citation : sooperkanoon.com/964739

Court : Chennai

Decided On : Apr-04-2013

Judge : C.T.Selvam

Appellant : Babulal

Respondent : State

Judgement :
IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:

04. 04.2013 CORAM THE HONOURABLE MR. JUSTICE C.T.SELVAM Crl.O.P.Nos.51 and 780 of 2010 and M.P.Nos. and o

1. Babulal @ Lakshmichand Bafna .. Petitioner/ first accused in Crl.O.P.No.51/2010 2.Pinku @ Dharmendra Bafna .. Petitioner/ second accused in Crl.O.P.No.780/2010 -Vs- 1. State by The Inspector of Police CBCID, Chennai 2. Kishanlal .. Respondents (Second respondent impleaded as per order of this court dated 08.01.2010 in M.P.3/2010.) Criminal Original Petition filed under Section 482 of Criminal Procedure Code to call for the records and quash the proceedings in C.C.No.13970/2007 pending on the file of the learned III Metropolitan Magistrate, George Town, Chennai and quash the same. For Petitioners : Mr.Udhay Lalit, Senior Counsel for Mr.P.Krishnan For Respondents : Mr.K.P.Anantha Krishna, Addl.Public Prosecutor for R1 Mr.C.Manishankar for R2 in both cases O R D E R The petitioners who are accused of offences under Sections 406,420 and 120-B IPC in case pending trial in C.C.No.13970 of 2007 on

the file of III Metropolitan Magistrate, George Town, Chennai seek to quash the proceedings against them.

2. For convenience the petitioner in Crl.O.P.No.51/2010 is referred to as first accused and the petitioner in Crl.O.P.No.780/2010 is referred to as second accused.

3. In brief, the case of the prosecution is that the accused induced the second respondent/defacto complainant into speculative trade in Gold. They alongwith other accused deprived him of the gains that accrued to him and falsely informed that he had sustained loss of about Rs.2,00,00,000/- (Rupees Two crores).

4. Mr.Udhay Lalit, learned Senior counsel for the petitioners submitted that though wrong doings of nine persons had been informed in the complaint of the second respondent, a charge sheet came to be filed only against the petitioners herein. The finding of the investigative officer was that the defacto complainant having collected monies also through others had delivered an amount of Rs.4,65,00,000/- (Rupees Four crores and sixty five lakhs only) to the second accused between 06.10.2005 and 17.11.2005 on several occasions believing the representations of the petitioners/accused. The representations of the petitioners were not genuine and were meant dishonestly to induce the second respondent/defacto complainant. The petitioners conspired and abetted each other and whilst it had been represented to the second respondent/defacto complainant that the monies would be invested in gold trade by following all legal norms, the petitioners did not enter trade in gold and did not return the principal and profit. Therefore, they were charged of offences under Sections 406,420 and 120-B IPC. The second respondent/defacto complainant moved an application under Section 173(8) Cr.P.C for further investigation in Crl.M.P.No.11979/2007 in C.C.No.13970/2007 on the file of III Metropolitan Magistrate, GT court, Chennai towards arraying as accused also the other persons informed in his complaint. Though the Magistrate allowed such application, this court under orders in Crl.R.C.No.245/2008 dated 13.03.2008 set aside such order. Aggrieved thereby, the second respondent/defacto complainant moved the Hon'ble Apex court which had dismissed the Special Leave Petition. A review petition against such order also

had been dismissed. In suit preferred by the second respondent/defacto complainant in C.S.No.965/2008 invoking the Ordinary Original jurisdiction of this court, in paragraph 4, the second respondent/complainant has stated as follows: "4. The plaintiff states that Mr.Lakshmichand Bafna, the seventh defendant herein, visited the Ghoshala during the year 2004 and became a frequent visitor till the year 2005. During such visit, the seventh defendant induced the plaintiff to construct compound wall to the Ghoshala. The plaintiff stated that it requires huge fund. The seventh defendant told the plaintiff that his brother's son Mr.Dharmendra Bafna, the sixth defendant herein is the expert in buying and selling of Gold and sliver, he is doing bullion trading as Sub-agent in his father-in-law Mr.Shanthilal Surana's company, the fourth defendant herein, who was carryin on business of bullion trding on gold and silver under the name and style "Surana Corporation Limited" and that if the plaintiff could invest money on the said trade, it would fetch high substantial returns and from the profits so earned therefrom, the compound wall could be constructed. The plaintiff states that the seventh defendant took the plaintiff to the business premises of M/s. R.B. Jewellery on 29.09.2005 and got him introduced to the Executives of M/s. Surana Corporation Limited, who are arrayed as Defendants 2 to 5. There the defendants 1 to 7 explained to the plaintiff the 'modus operandi' of the business which prompted the plaintiff to agree for the investments. There upon the plaintiff mobilized the funds for investment and made a payment of Rs.7,00,000/- to the sixth defendant on 06.10.2005 in the presence of the second defendant." Again in paragraph 7 it has been stated as follows: "7. The plaintiff submits that the total purchases and sales effected by the defendants on behalf of and at the instruction of the plaintiffs are set out in Annexure-II to the plaint herein which was duly acknowledged by the sixth defendant, Sub-Agent of Surana Corporation Limited which may be read as par and parcel of this plaint".

5. Learned Senior counsel would submit that the averments in the second respondent/defacto complainant's plaint reflected that

(1) the transactions were at the instance of the plaintiff and

(2) that assessment of the investigation officer was wrong. Learned Senior counsel would submit that where the second respondent/defacto complainant was an

active participant, there could be no allegation of fraud. Learned Senior counsel would refer to the counter by the first respondent/Investigating officer in the Special Leave Petition before the Hon'ble Apex court, particularly to the following: REASONS FOR DROPPING A3 TO A10:

(1) It is respectfully submitted that the De-facto complainant in his complaint has alleged that he handed over money Rs.4.65 crores to Dharmendra Bafna (A2) who is a first respondent on the introduction of Babulal @ Lakshmichand Bafna (A1) during the period from 06.10.2005 to 02.12.2005, the money was handed over on different dates for the purpose of purchase and sale of gold by Dharmendra Bafna (A2) who is a first respondent on the instructions of the De-facto complaint. Accused Mahendra Kumar Bafna (A3), Rakesh Kumar Bafna (A4), Shanthilal Surana (A5), Gowthamraj Surana (A6), Vijairaj Surana (A7), Deneshchand Surana (A8) and Maran @ Elamaran (A9) had no role in the transactions. According to the De-facto complainant as stated by him in the F.I.R that he came to know about the other accused only on 08.12.2005, while Dharmendra Bafna (A2) represented that the defacto complainant's money was invested with Surana brothers. In the F.I.R the complainant's himself had referred to (as having met) the Surana brothers for the first time only on 08.12.2005.

(2) It is respectfully submitted that in the section 151 Code of Criminal Procedure 1973. Statement, the same de-facto complainant gave a different version stating the Dharmendra Bafna (A2) had informed him that he is doing business with Surana Corporation with the complainant's money in the name of MEGHA G.G. He had further stated that he would instruct Dharmendra Bafna (A2) to buy gold from Surana Corporation and in the same manner he would sell the same for a higher price than that of the purchase price. In that connection 90 lots of gold and 22 lots of silver had been purchased by him through Dharmendra Bafna (A2) from Surana Corporation. He had sold 12 lots of gold and 22 lots of silver for profit, retaining 78 lots of gold in stock with Dharmendra Bafna (A2) who is a first respondent to pay margin money and he paid the margin money. This version of the de-facto complainant in the section 161 Code of Criminal Procedure 1973 statements that he instructed Dharmendra Bafna (A2) to purchase ad sell gold through Surana Corporation. The version of the de-facto complainant is neither proved by any

documentary evidence, nor referred to in the FIR. The de-facto complainant has made contradictory statements in the FIR and Section 161 Code of Criminal Procedure 1973 statement." .... "13. (a) It is submitted that the first respondent placed orders with the Surana Corporation Ltd on behalf of the de-facto complainant. The de-facto complainant was assigned an account number MEGHA GG A/c ad commenced trading through the first respondent on 10.10.2005 by placing an order of purchase of one lot of gold at the rate of U.S.$479. One per tally ounce. The first respondent on behalf of the de-facto complainant had deposited a sum of Rs.7 lakhs with the company/trader towards margin money on 05.10.2005. The de-facto complainant continued to place purchase orders after 10 days the defacto complainant increased the quantum of his purchase orders. On each purchase, the d-facto complainant paid the margin money as and when required. All transactions are effected on verbal instruction of the client received by the first respondent and transmitted to the company. Initially the de-facto complainant incurred moderate losses. The de-facto complainant commenced selling from 24.10.2005 and profited. On 27.10.2005 the de-facto complainant commenced selling from 24.10.2005 and profited. On 27.10.2005 the de-facto complainant earned a profit of Rs.778622/-. Similarly, on 17.11.2005, he earned a profit of Rs.1034844/-. His total earning was Rs.53,60,971/-. He withdrew Rs.60,026- in cash from his account. (b) It is submitted that the second week of November, the defacto complainant changed his trading strategy and went in for shot selling contracts. On 09.11.2005, the de-facto complainant placed orders to short sell 20 lots of silver. These orders were placed when the rate of silver was around U.S$762/763. The delivery was to be effected on 05.12.2005. The de-facto complainant anticipated a fall in prices in the month of December and hoped to make huge profits. The de-facto complainant continued to place short selling (contracts) orders up to 17.11.2005 i gold and silver. The above averments would only disclose the role played by Pinku @ Dharmendra Bafna (A2) in the trade. There is no direct link between Mahendra Kumar Bafna (A3), Rakesh kumar Bafna (A4), Shanthilal Surana (A5), Gowthamraj Surana (A6), Vijairaj Surana (A7), Deneshchand Surana (A8), Maran @ Elamaran (A9) and Bhanwarlal Sharma (A10) and the first respondent, nor is there any admission by Mahendra Kumar Bafna (A3), Rakesh kumar Bafna (A4), Shanthilal Surana (A5), Gowthamraj

Surana (A6), Vijairaj Surana (A7), Deneshchand Surana (A8), Maran @ Elamaran (A9) and Bhanwarlal Sharma (A10) they had received amount as per trade instructions from the first respondent directly."

6. Learned Senior counsel submitted that the above contentions of the investigating officer was consistent with the position informed by the petitioner/ second accused in the suit filed by him in C.S.No.200/2006 for recovery of sum of Rs. 1,83,72,162/- together with interest and costs. The relevant portion of the plaint reads as follows: "4. The plaintiff states that on 10.10.2005, the defendant had instructed him over phone top purchase one lot of Gold bullion at the prevailing market rate. In turn the plaintiff requested M/s. Surana Corporation Limited, to purchase one lot of Gold bullion on defendant's account, "MEGHA GG". The defendant continued to issue similar instruction through the plaintiff to purchase Gold bullion or Silver on his behalf. The defendant used to send the margin money after purchase of Gold bullion or Silver as and when required. The defendant had on 04.11.2005 withdrawn a sum of Rs.60,026/- out of the profits earned by him.

5. The plaintiff states that as and when instructions were received from the defendant, he conveyed the same to M/s. Surana Corporation Limited, who carried out the instructions of the defendant. The plaintiff further submits that as and when margin money was required to regularize the defendant's account he was intimated of the same and he in turn remitted the required amounts. The plaintiff states that the defendant had in all remitted a sum of Rs.4.65 crores towards margin money upto 17.11.2005.

6. The plaintiff states that the defendant short sold excess quantity of Gold beyond the coverage of margin and he had short sold of Gold and Silver between 09.11.2005 and 18.11.2005. Thus the defendant had short sold of 36 lots of Gold and 63 lots of Silver as detailed below: --- S1.No Date of Gold Silver No of Lots Selling Rate Buying Rate Sell order Selling USD ---

09. 11.2005 - Silve

762. 862 --

09. 11.2005 - Silve

763. 862 --

09. 11.2005 - Silve

762. 862 --

09. 11.2005 Gold

463. 7 505.5 --

09. 11.2005 Gold

462. 517.3 --

09. 11.2005 Gold

464. 8 517.3 --

14. 11.2005 - Silve

776. 862 --

14. 11.2005 - Silve

778. 872 --

14. 11.2005 - Silve

780. 872 --

14. 11.2005 - Silve

780. 876 --

14. 11.2005 - Silve

781. 886.5 --

17. 11.2005 Gold

480. 2 517.3 --

18. 11.2005 Gold

486. 2 517.3 -- The second respondent/defacto complainant in his written statement in such suit had not disputed the tabular statement above produced or that he had given 'short sale' instructions. Turning to the second respondent/defacto complainant suit in C.S.No.965/2008 before this court, learned Senior counsel would touch upon the Annexures there to: ANNEXURE-I The Details of Cash Deposits made by the plaintiff and duly acknowledged by the defendants:. --- S.No DATE AMOUNT --

06. 10.2005 70000 --

10. 10.2005 1500000 --

13. 10.2005 1800000 --

14. 10.2005 1000000 --

15. 10.2005 2000000 --

19. 10.2005 5000000 --

19. 10.2005 1500000 --

20. 10.2005 6000000 --

24. 10.2005 2500000 --

28. 10.2005 3000000 --

01. 11.2005 5500000 --

02. 11.2005 2000000 ---

02. 11.2005 1500000 ---

03. 11.2005 3500000 ---

04. 11.2005 100000 ---

05. 11.2005 1000000 ---

07. 1.2005 4000000 ---

08. 11.2005 2000000 ---

17. 11.2005 2500000 ---

02. 12.2005 15000000 --- TOTAL 49500 00 --- ANNEXURE II The defendants purchased gold and silver as detailed below:- --- Sl.No Date Purchase Rates in US$ Lots ~~~~~~~~~~~~~~~~~~~~~~ Gold Silver ---

10. 10.2005 479.10 1 ---

12. 10.2005 475.70 1 ---

12. 10.2005 474.50 1 ---

12. 10.2005 473.00 2 ---

13. 10.2005 470.50 1 ---

13. 10.2005 468.50 1 ---

14. 10.2005 468.50 1 ---

14. 10.2005 467.80 2 ---

14. 10.2005 466.80 2 --

18. 10.2005 474.30 1 --

18. 10.2005 471.50 1 --

19. 10.2005 470.50 1 --

19. 10.2005 469.60 2 --

19. 10.2005 468.60 5 --

19. 10.2005 467.60 3 --

19. 10.2005 466.80 2 --

19. 10.2005 465.70 3 --

19. 10.2005 465.50 1 --

19. 10.2005 464.60 4 --

19. 10.2005 463.50 1 --

19. 10.2005 463.00 1 --

24. 10.2005 763.00 1 --

24. 10.2005 763.00 2 --

24. 10.2005 763.00 2 --

26. 10.2005 472.20 5 --

26. 10.2005 473.10 10 --

28. 10.2005 470.30 6 --

31. 10.2005 472.60 3 --

31. 10.2005 472.40 1 ---

31. 10.2005 471.50 2 ---

31. 10.2005 470.30 3 ---

31. 10.2005 468.00 2 ---

31. 10.2005 466.00 3 ---

31. 10.2005 465.50 3 ---

01. 11.2005 465.50 5 ---

01. 11.2005 462.50 3 ---

01. 11.2005 760.00 10 ---

01. 11.2005 756.00 3 ---

01. 11.2005 745.00 2 ---

01. 11.2005 744.00 2 ---

04. 11.2005 456.70 5 --- The defendants sold gold and silver as detailed below:- -- S.No. Date Sale Rates in US$ Lots ~~~~~~~~~~~~~~~~~ Gold Silver ---

24. 10.2005 770.00 1 ---

25. 10.2005 778.00 2 ---

25. 10.2005 779.00 2 ---

27. 10.2005 474.50 4 ---

27. 10.2005 475.50 1 ---

27. 10.2005 473.40 1 ---

28. 10.2005 472.60 2 ---

28. 10.2005 472.60 1 ---

28. 10.2005 472.60 1 ---

04. 11.2005 758.00 4 ---

14. 11.2005 776.00 5 ---

14. 11.2005 780.00 5 ---

14. 11.2005 781.00 3 --- 7. Learned Senior counsel would explain that the entries itemized 16 to 20 in Annexure I (details of cash deposited with the second accused by the second respondent/defacto complainant between the period 05.11.2005 to 02.12.2005 and in a sum of Rs.1,10,00,000/-) reflected the payments towards reduction in margin money. Learned Senior counsel would point out that as admitted in Annexure II the last purchase effected by him was on 04.11.2005. Admittedly thereafter, the second respondent/defacto complainant had issued 'short sale' instructions on 14.11.2005. While his contention was that he had directed sale of 13 lots of silver on 14.11.2005, that of the petitioner's was that sell instructions were issued towards lots of silver on 14.11.2005 and sale of 13 and 3 lots of gold had been instructed by the second respondent/defacto complainant also on 17.11.2005 and 18.11.2005 respectively. Irrespective of the truth of the rival contentions, the position that sale instructions stood issued by the second respondent/defacto complainant on 14.11.2005 is admitted. Therefore, further squaring up of accounts was necessitated and this required the second respondent/defacto complainant to pay up since he had incurred losses. Against a suit preferred by the petitioner on 08.03.2006, the second respondent/defacto complainant had preferred a suit in September 2008. In preferring the complaint the second respondent/de-facto complainant had glossed over the transactions between 14.11.2005 and 02.12.2005 towards putting up a false case.

8. Learned Senior counsel submitted that according to the second respondent/defacto complainant, money paid by him to the petitioners had been

made over to M/s. Surana Corporation on his instructions. The transactions was merely commercial transactions which at best could give rise to a civil action. The investigating officer on affidavit had stated that the second respondent/defacto complainant had indulged in 'short sales' and in anticipation of fall in prices after Deepavali. Therefore, the motive of the second respondent/defacto complainant was to earn profits and he alone would be responsible for the outcome. In the second respondent/defacto complainant's suit, he ingenuinely has not referred to his 'short sale' instructions. The falsity of the second respondent/defacto complainant's case was laid bare by the fact that the Annexures to his suit in C.S.No.965/2008 inform purchase of 22 lots of silver 19 lots of gold, whereas the same reflects sale of 22 lots of silver and only 12 lots of gold. It was apparent that the second respondent/defacto complainant had not approached the matter with clean hands. Explaining that in the multiple commodity exchange, trade was regulated and only accredited dealers could effect the same, learned Senior counsel submitted that ICICI was one accredited dealer with whom M/s. Surana Corporation was registered. It was therefore that the investigating officer found that money was routed by the petitioners to M/s. Surana corporation and through them to ICICI. This was why the second respondent/defacto complainant in his petition seeking further investigation in Crl.M.P.No.11979/ 2007 in C.C.No.13970 of 2007 on the file of III Metropolitan Magistrate, GT court, Chennai had submitted that 'it is nobody's case that the money was misappropriated by the accused, who have been charge-sheeted and are on record as accused in C.C.No.13970/2007. It was pertinent to see that it was the case of the defacto complainant as well as the accused that the second accused is an agent of M/s.Surana Corporation Limited and had collected money on behalf of M/s.Surana corporation Limited from the defacto complainant and others'. Therefore, where upon the second respondent/ defacto complainants decision and mandate, monies were paid over by the second accused, Section 406 IPC would not stand attracted. Towards attracting offence under section 420 IPC, it should be the representation of the accused which was the guiding force. In the instant case, the decisions made were entirely that of the second respondent/defacto complainant. Till the second week of November, the second respondent/defacto complainant had adopted a 'buy position' and thereafter had changed tack and adopting a 'sell position' had suffered losses. This he had sought to conceal and has not referred to in his complaint, written statement or plaint.

9. Learned counsel for the second respondent/defacto complainant submitted that upon complaint dated 10.12.2005 a case came to be registered in Cr.No.60/2006 for offences under Sections 406,409,506(ii) r/w 120(b) IPC on 22.01.2006. The undisputed position was that the accused 1 and 2 were relatives and that first accused had introduced the second respondent/defacto complainant to the second accused. Between 06.10.2005 and 17.11.2005 the second respondent/defacto complainant had handed over a sum of Rs.4,65,00,000/- to the second accused. As late as on 08.12.2005, the second accused had informed of the transactions having resulted in a profit of Rs.30,00,000/- but had stated that the monies were with the members of M/s. Surana Corporation Limited. When they were approached on 10.12.2005, to the shock of the second respondent/defacto complainant, he was informed that after adjustment a sum of Rs.2,00,00,000/- was due from him. One note book informing the various dates of deposits with second accused and the sums deposited in lakhs had been maintained. The same had been counter signed by the second accused. The same reflected the earning of profit of Rs.15,00,000/- as on 02.11.2005 and of Rs.30,00,000/- as on 17.11.2005. Till 17.11.2005 the second accused had not deposited the sums received from the second respondent/defacto complainant even with M/s. Surana Corporation Limited. Learned counsel referred to the petitions moved by the accused persons in Crl.O.P.No.1481/2006 seeking relief under Section 438 Cr.P.C to contend that therein it stood admitted that the defacto complainant commenced selling from 24.10.2005 and profited. On 27.10.2005 the defacto complainant earned a profit of Rs.7,78,622/- similarly on 17.11.2005 he earned a profit of Rs.10,34,844/- and his total earnings was Rs.53,60,971/-. He withdrew Rs.60,026/- in cash from his account. Learned counsel submitted that a reading of the counter affidavit filed by the investigating officer reflected that the second accused had not dealt with M/s. Surana Corporation Ltd or its members as had been represented by him. Learned counsel submitted that even while dismissing the Crl. Appeal which had challenged the order of this court setting aside the direction issued by the Magistrate for further investigation under Section 173(8) Cr.P.C, the Hon'ble Supreme court had observed that 'the question of whether A3 to A10 were

involved in the matter could be pointed out from the material which had already been brought on record. Further more, whether admissions made in the application for anticipatory bail were binding on them, the same being a matter of inference can also be urged. The other and further remedies as pointed out can be resorted to as as also invocation of the provisions of Section 319 of the Code at the stage of trial is also permissible in law, if a appropriate case is made out therefor'. He would contend that neither the dismissal of the review petition by the Hon'ble Apex court nor the plaint or the written statement relied upon by learned Senior counsel for petitioners were of any bearing. Terming the submission of learned Senior counsel on the failure of the second respondent/defacto complainant to deny the plaint averments of 'short sell' instructions in C.S.No.200/2006 filed by the second accused as misconstrued, learned counsel submitted that the entries in the book maintained informed of the second respondent/defacto complainant having earned profit of Rs.30,00,000/-. Expert opinion had confirmed that the initials found in attestation of entries therein were that of the second accused. Learned counsel referred to the written statement by the second accused in C.S.No.965/2008 wherein the maintenance of dairy and reflection of confirmation and counter signing by the second accused and further that the same would be the basis for settling the final account between the parties stood admitted.

10. Learned counsel towards impressing the contradictory statements taken by the second accused at various stages informed as follows: In the petition for anticipatory bail in Crl.O.P.No.1481 of 2006 moved on behalf of the nine accused named in the First Information Report, it had been contended that the second accused was the sub-agent for M/s.Surana Corporation Limited, the second accused had direct link with the de facto complainant, that A2 was a trader of M/s.Surana Corporation Limited who introduced investors and that the Chairman and Managing Director of M/s.Surana Corporation Limited were connected with the transactions between the second accused and the de facto complainant. It had further been contended that the second accused had traded with M/s.Surana Corporation Limited upon the verbal instructions of the de facto complainant and earned a sum of Rs.60,000/- as profit, that the de facto complainant had to pay Rs.30,97,662/- to M/s.Surana Corporation Limited through the second accused

and that he had commenced selling from 24.10.2005 and earned profits. It had also been informed that the de facto complainant had made his last deposit towards margin money on 17.11.2005. In his plaint in C.S.No.200 of 2006, the second accused had informed that the de facto complainant expressed his wish to trade through M/s.Surana Corporation Limited as the plaintiff (A2) was also trading with M/s.Surana Corporation Limited and he also was related to them and further that the second accused had deposited a sum of Rs.7,00,000/- with M/s.Surana Corporation Limited on behalf of the de facto complainant. As against the contentions made in the above two proceedings, in his written statement in C.S.No.965 of 2008, the suit preferred by the de facto complainant, the second accused had contended that M/s.Surana Corporation Limited had no connection whatsoever with the trade entered by the de facto complainant with him, had taken strong exception to the averment that he was a sub-agent of M/s.Surana Corporation Limited and had contended that he had entered into transactions with the de facto complainant only as an independent dealer. Going back on his stand, he informed that the assertions made in the anticipatory bail petition that he was a sub-agent of M/s.Surana Corporation Limited had been made inadvertently and that made by him in C.S.No.200 of 2006 to the effect that the amounts paid by the de facto complainant were transferred to M/s.Surana Corporation Limited was not correct. He had further contended that by squaring of 42 transactions on gold the de facto complainant had earned a net profit of Rs.15,94,334/- and similarly by squaring of 5 transactions on silver the de facto complainant had earned a net profit of Rs.11,53,711/-. In the written statement, the second respondent had also denied of having received any cash deposit from the plaintiff.

11. Learned counsel placed reliance on the decision reported in Indian Oil Corporation vs. NEPC Indial Ltd, (2006) 6 SCC 73.to submit that even where a dispute arose from breach of contract, civil remedy stood available and stood availed, the recourse to criminal law would not be barred where the allegations made in the complaint reflected commission of criminal offences. Learned counsel also relied on decision in M.Krishnan v. Vijay Singh, (2001) 8 SCC 64.to submit that mere pendency of a civil action between the parties could not be a ground for quashing the criminal proceedings. Reliance was also placed in decision in Ajay Kumar Das v. State of Jharkhand, (2011) 12 SCC 31.to submit that genuineness

of the allegations/charge was an issue to be tried and court in exercise of jurisdiction under Section 482 of Cr.P.C could not delve into factual controversies towards quashing proceedings. The said decision was also relied upon to submit that a document which was in the nature of defence was to be looked into by appropriate court at appropriate stage and not at the stage of consideration of quash petition. It was submitted that great care and caution and much circumspection was required and court would not be justified in embarking upon an inquiry as to the reliability or genuineness of the allegations made in the complaint or whether the allegations were likely to be established by evidence or not. Learned counsel submitted that several questions of fact arose which could be determined only through trial. Pursuant to filing of the charge sheet 33 witnesses stood examined. Submitting that the contentions made on behalf of the petitioner really were in nature of the defences and that the same could be considered only at the stage of trial, learned counsel sought dismissal of the petitions.

12. Learned Additional Public Prosecutor submitted that the complaint had alleged that at the instance of A1, A2 had been approached towards conduct of transactions in the commodity exchange. He would submit that the second accused has so manipulated the accounts to show losses incurred by the defacto complainant from 09.11.2005. An expert had opined that the book maintained by the defacto complainant had been counter signed by the second accused and that the same had reflected a profit of Rs.30,00,000/- on 17.11.2005. The accuseds' reliance on plaint and written statement made by them in various proceedings were not now of any relevance. Learned Additional Public Prosecutor placed reliance on the decision of the Apex court in Anil Rishi v. Gurbaksh Singh, (2006) 5 SCC 558.to submit that pleadings was not evidence, far less proof. Even while doing so, he would refer to the plaint in C.S.No.200/2006, suit preferred by the second accused and submit that therein while contending that he had acted upon the instructions of the second respondent/defacto complainant, the second accused had admitted to receipt of a sum of Rs.4,65,00,000/- towards margin money up to 17.11.2005. Therefore, entrustment stood admitted. He next would refer to the written statement of the second accused in C.S.No.965/2008, the suit preferred by the second respondent/defacto complainant and to the admission

therein that as on 02.11.2011 the second respondent/defacto complainant had earned a profit of Rs.15,60,029/-. As against the contention of the second respondent/defacto complainant that M/s. Surana Corporation Ltd had accepted the second accused to be its sub-agent, investigation had revealed that such was not the case. Investigation had shown that the second accused had taken a business risk in playing with the funds of the defacto complainant on his own account. Against expectations, gold prices steeply short up. The second accused, through his MEGHA GG account, paid a sum of Rs.4,65,00,000/- to M/s. Vinayaga Vyapar Limited on 16.11.2005 and also paid further monies of his own on various dates towards hedging his risks. When such was the position, the representation that second respondent/defacto complainant had made profits in a sum of Rs.15 lakhs on 02.11.2005 necessarily was false. The entrustment to second accused having been proved, it was for him to explain what he had done with that he had been entrusted with. The conduct of second accused could hardly be considered bonafide. Contending that second accused if indeed was genuine ought to have opened an account in the second respondent/defacto complainant's name, learned counsel submitted that the second accused had opened an account as late as on 16.11.2005 in the name of MEGHA GG, and started transactions with M/s. Surana Corporation Ltd only on such date. There was no evidence to show that the money paid by the second respondent/defacto complainant to the second accused was ever transferred to M/s. Surana Corporation Ltd on day to day basis as per the instructions of second respondent/defacto complainant. Learned Additional Public Prosecutor submitted that in such circumstances, second accused independently would be liable for his activities.

13. In reply, learned Senior counsel for petitioners submitted that the second accused had never disputed receipt of Rs.4.65 crores. Even as per the pleadings of the second respondent/defacto complainant, business transactions had been conducted as per his instructions. The defacto complainant was not a gullible victim and therefore no offence u/s. 420 IPC stood made out. Even the investigating officer had stated that second respondent/defacto complainants had sought to make profit. Mere entrustment was not enough. If the second respondent/defacto complainant's instructions had been carried out, there could have been no breach of trust. Learned Senior counsel submitted that the suit filed

by second accused was the first in point in time and had been filed even before the filing of charge sheet. As contended by the second respondent/defacto complainant himself in his petition moved under Section 173(8) Cr.P.C, it was no body's case that the money had been misappropriated by the accused. In the assessment of the second respondent/defacto complainant, he had made a profit while in that of the accused, he had suffered loss. The dispute purely was civil in nature.

14. Learned Senior counsel would sum up stating that the version of the second respondent/defacto complainant as found in written statement/plaint can be relied upon. The second respondent/defacto complainant had stated that money had not been entrusted to the second accused simplicitor, he had stated that the second accused was a mere conduit. He had not stated that the second accused had not transmitted the monies to M/s. Surana Corporation Ltd. It is his case that monies were spent as per his instructions. Referring to the counter affidavits filed by the respective investigating officers, one in the petition seeking further investigation under Section 173(8) Cr.P.C and the other in the Special Leave Petition against the order of this court in Crl.R.C.No. 245/2008 and the ad verbatim portions therein, learned Senior counsel submitted that it had been informed therein that a sum of Rs.4.65 crores collected by the second accused to be played in online trading had been deposited by the accused with M/s. Surana Corporation Ltd who in turn had deposited the same with the ICICI bank. Besides confirming the position that the instructions of the defacto complainant duly had been carried out, this also revealed that the transaction was of civil nature. The defacto complainant had not denied the second accused contentions of 'short sale' instructions. Therefore, the matter was one calling for the taking of accounts between the parties. There regards, both had preferred suits.

15. Learned Senior counsel relied on the decision in B.Suresh Yadav v. Sharifa Bee and Another (2007) 13 SCC 107.to submit that proceeding against the accused under Sections 405 and 420 would amount to abuse of process of court when civil suit was pending between the parties in respect of the same matter. As informed in such decision, it would be permissible in law to consider the stand taken by a party in pending civil litigation. An inconsistent stand taken would

assume significance. Referring to decision of the Apex court in Hridaya A Ranjan Prasad Verma and others vs. State of Bihar and Others v. State of Bihar and Another, (2000) 4 SCC 16.to impress that to constitute an offence of cheating there must be an element of "deception at inception", learned counsel placed reliance on Alpic Finance Ltd v. P. Sadasivan, (2001) 3 SCC 51.to contend that there was no element of deception or fraud or dishonest inducement or wilful misrepresentation in the entire transaction and therefore the prosecution against the accused was liable to be quashed. Learned Senior counsel further submitted that in the civil action preferred by the second respondent/defacto complainant, he had included others as defendants, therefore his case was that others were also involved. He had prayed for relief also against such others. When the other accused had not been put up for trial there was no justification for prosecution against the present accused. The very purpose behind the complaint preferred by the defacto complainant was to force second accused to make payment. The second respondent/defacto complainant had preferred a suit only in 2008 on the verge of limitation. Informing that the complainant had resorted to arm twisting, learned Senior counsel referred to judgment in Indian Oil Corporation v. NEPC India Ltd and Others, (2006) 6 SCC 736.to submit that in such decision the Apex court had depricated the current practice of misuse of criminal process to put undue pressure in civil disputes. Learned Senior counsel also relied upon the decision of the Apex court in State of Haryana V. Bhajan Lal, 1992 SCC (Cri) 426 to submit that where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, proceedings could be quashed. Learned Senior counsel also touched upon the decision of this court in Emperor vs. John McIver, AIR 193.Madras 353 to inform that charges of offence of cheating and criminal breach of trust would be mutually exclusive.

16. Much which is appealing has been submitted by learned senior counsel towards informing lack of bonafides on the part of the second respondent/defacto complainant. In equal measure has learned counsel for second respondent/defacto complainant pointed out the discrepancies and the incompatibility of the various stands taken by the second accused. Both second

respondent/defacto complainant and the second accused have preferred suits and rightly their rights are to be determined therein. However, the contention of learned Additional Public Prosecutor that it is for the accused to explain how his dealing with the monies of the defacto complainant upto 16.11.2005 were proper and how the representation of profits made before such date were justified. Finding that a prima facie case does exist against the second accused his petition in Crl.O.P.No.780/2010 shall stand dismissed. At the same time, we find that except the allegation of the second respondent/defacto complainant having entrusted monies with the second accused at the instance of the first accused, there is nothing more against such accused. We therefore would allow Crl.O.P.No.51 of 2010 and quash proceedings in so far as the first accused is concerned. We make it clear that we neither are limiting the prosecution case against the second accused to the extent indicated above nor are we to be understood as holding the second accused guilty of any wrong doing. As the second accused now stands alone there could be no charge under section 120-B IPC. The position, however may change if occasion arises for application of Section 319 Cr.P.C. We may indicate that as informed by the Full Bench of this Court in decision in Emperor v. John McIver (AIR (1936) MAD

353) conviction for offences both under Sections 406 and 420 IPC on the same set of facts would not be possible since in such circumstance the one would exclude the other.

17. In the result, (i)Crl.O.P.No.51 of 2010 stands allowed and the proceedings now pending in C.C.No.734/2011 on the file of learned XI Metropolitan Magistrate, Saidapet, Chennai, shall stand quashed in so far as the first accused is concerned. (ii)Crl.O.P.No.780 of 2010 stands dismissed. To 1. The XI Metropolitan Magistrate, Saidapet, Chennai.

2. The Public Prosecutor, High Court, Madras kpr