

HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

S.B.: **HON'BLE MR. S. C. SHARMA, J**

MISC. CRIMINAL CASE NO. 6624 / 2016

M/S. COTT BEVERAGES INC.  
(ROYAL CROWN COLA INTERNATIONAL DIVISION) USA  
AND THREE OTHERS

Vs.

M/S. TRISTAR BEVERAGES PVT. LTD., INDORE

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Counsel for the petitioner : Mr. Ravindra Shrivastava, learned senior counsel appearing with Mr. Trinath and Mr. Vijay Assudani, learned counsel for the petitioner.

Counsel for the respondent : Mr. Ashok Kumar Singh, Mr. Awanish Sinha, Mr. Vivek Singh and Mr. Chandra Shekhar Yadav , learned counsel for the respondent.

Whether approved for reporting : Yes

Law laid down : The criminal proceedings manifestly attended with malafide and/or where the proceeding is maliciously instituted with ulterior motive for wreaking vengeance on the accused and turning a civil litigation into a criminal litigation, deserves to be quashed.

Significant paragraph numbers : 34 to 43

**ORDER**

( 18/06/2018)

The petitioner before this Court has filed this present petition under Section 482 and Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 for quashment of the order passed by the 12<sup>th</sup> Additional Sessions Judge, Indore in Criminal Revision No. 641/2015

and for quashment of the complaint filed by the respondents.

**02.** Facts of the case reveal that petitioner No.1 is a Company incorporated under the laws of United States of America, having its registered Office at 1001, 10<sup>th</sup> Avenue, Columbus, GA 31901, USA. The petitioner No.2 is the Managing Director, petitioner No.3 is Financial Head and petitioner No.4 is head of Indian operations. Facts of the case further reveal that petitioner No.1 Company is carrying on manufacturing of non-alcoholic cold beverage under the brand name of R. C. Cola and on 09/05/2003 the petitioner Company informed the complainant that he would get a commission for each new Bottler who is appointed by the petitioner No.1 by signing a bottler's agreement and trade mark licensing agreement. The document is on record as Annexure P/1 page 55 of the compilation. It is a letter dated 9/5/2003 and that is the only document in respect of the so-called agreement between the petitioners and the respondent No.1. The document on record reflects that the arrangement between the parties was for a period of 5 years, which is evident from the opening sentence itself.

**03.** Further contention of the learned counsel for the petitioner that a letter was issued on 31/8/2010 to the complainant and the complainant was informed that the petitioner Company has paid the entire commission to the complainant till end of May 2011. Facts further reveal that on 1/8/2011 official of the petitioner No.1 informed the complainant that final commission which would cover the period upto 2011 as per the agreement is being processed and shall be paid. The document is on record as Annexure P/3. The complainant vide letter dated 5/8/2011 acknowledged the receipt of the commission upto a particular date, however, wanted details of the commission earned on the supplies to other Indian bottlers since start of business, stating that the information is required for submission to Reserve Bank of India (Annexure P/4 Electronic Mail dated 5/8/2011).

**04.** That the petitioner's informed the complainant that the details desired cannot be disclosed as the details relates to private business transaction between the petitioner No.1 Company and other private persons and the agreement to

pay commission was only for a period of 5 years. It has been further stated that the complainant did not dispute contents of the letter dated 5/8/2011 and 10/8/2011 and again issued a email on 11/8/2011 threatening the petitioner that the act of the petitioner in not revealing calculation is an offence (Annexure P/6). The petitioner Company vide email informed the complainant that all obligations and relationships between the parties have come to an end and final payment has also been done.

**05.** That vide letter dated 9/5/2011 the complainant accepted the letter of 9/5/2003 and it is evident that the period of payment of commission started from 1/1/2003 and ended on 31/12/2007. The complainant also threatened the petitioner No.1 Company that the complainant shall be lodging a protest with the U.S. Embassy and with Indian Merchants / Industries Associations. In the light of the aforesaid correspondence, the petitioner referred the matter to their corporate counsel for response and email was sent to the complainant on 18/11/2011 seeking the contact details of the complainant therein for further communication.

**06.** That vide letter dated 5/12/2011 the complainant responded by providing details of his legal counsel and vide letter dated 16/11/2011, the legal counsel of petitioner No.1 wrote to the complainant that the entire commission has been paid for a period of 5 years and the agreement was for a period of 5 years and the complainant was also asked to furnish any other document in respect of the agreement between the parties.

**07.** The complainant thereafter started alleging commission of offence u/S. 406 and 420 of the Indian Penal Code and finally filed a complaint in the matter. After the complaint was filed in the month of March, 2013 and 3 witnesses were examined by the trial Court, the first witness was the complainant himself and the other two witnesses were the employees of the complainant. The complainant in his statement before the trial Court has categorically stated that the petitioner Company was paying 10% commission from the purchases made by the bottlers and the commission was paid for a period of 5 years, thereafter no such commission has been paid. Other witnesses namely; Nilesh

Purkar and Prakash Sharma also gave statement before the trial Court. Before the trial court as the statement of the complainant nor the independent witnesses could establish a case against the petitioners, the trial Court on 27/1/2015 dismissed the complaint (Annexure P/15) and against which a revision was preferred u/S. 397 of the Code of Criminal Procedure, 1973 and notices were issued on 27/1/2015 and finally the impugned order has been passed on 4/6/2016.

**08.** Learned senior counsel argued before this Court that the revisional Court even though the scope of revision is quite limited, has held that commission was required to be paid for 10 years and has also held that ingredients of Sec. 406 and Sec. 420 of the Indian Penal Code are fulfilled and in those circumstances, the revisional Court has remanded the matter to the trial Court.

**09.** Learned senior counsel has argued before this Court that the impugned order dated 4 June 2015 is contrary to law, and suffers from grave and serious irregularity and illegality, causing serious miscarriage of justice arising from misconception of law as well as perpetuating the abuse of

process of court at the instance of the respondent, which requires to be interfered with by this Court. The order of the Magistrate Court was perfectly legal and justified and there was no legal ground for the revisional Court to upset the said order. None of the findings and observations given by the Magistrate Court have been stated to be incorrect by the revisional Court. The revisional Court, without examining as to how the complaint discloses the alleged criminal offences has erred in law in setting aside the Magistrate Court order dismissing the complaint. The Magistrate Court order deserves to be upheld and the revisional Court order deserves to be set aside. It is further submitted that on the face of the complaint in its entirety, no case even prima facie, disclosing commission of any cognizable offence such as section 420 and 406 IPC is made out. The allegations in the complaint are not only prima facie untrue, but, unsubstantiated, inherently contradictory and incoherent; fanciful and concocted, do not constitute even in minimum basic of the ingredients of the offences alleged under section 420 and 406 IPC. The complaint itself is prima facie abuse

of process of law, is malafide and motivated. Even as for the allegations in the complaint, which are not admitted, it is clear that a false and concocted civil dispute, if any, is being converted into a criminal complaint malafide. It has been argued that the Court below has failed to appreciate that in the complaint, the complainant alleged that the complainant would be entitled to royalty / compensation / commission of 10% of net FOB value of the sale of concentrate effected in India or South Asia by any bottler or franchisee appointed by it, and that being induced by the petitioners, the complainant invested Rs.6 Crores and established an industry and the brand of the petitioner No. 1 Company in India. It is not the case of the complainant that upon such purported inducement, the factory so established was entrusted by the complainant to the petitioner Company or its officials, rather the admitted position is that the factory is and continues to be owned and run by the complainant and the Petitioners have no access or control over it. Thus, even if the allegations made in the Complaint are taken on their face value, the setting up of the factory by the



Complainant cannot tantamount to offences of cheating or criminal breach of trust by the Petitioners. Learned senior counsel for the petitioner has submitted that the Court below has failed to appreciate that as per the own case of the Complainant, the factory set up by the Complainant was being used by the Complainant for making soft drink / beverages, therefore, there cannot be said to be any cheating or entrustment in that regard. He has further submitted that the Court below failed to appreciate that as per the letter dated 09.05.2003 annexed by the Complainant alongwith the Complaint petition, the tenure of the arrangement between the parties was very clear and that tenure had come to end with the payment of the last and final commission. As per the said letter, the complainant was to get a commission for each new bottler that was appointed by the Petitioner No. 1 by signing a Bottler's Agreement and Trademark Licensing Agreement in India, during the 5 year period beginning 1 January 2003 and ending 31 December 2007. This commission (which was to be an amount of 10% of the net FOB US Concentrate Price (Selling Price) less any

advertising expenditure / support provided by the Petitioner No. 1) was to be paid for a 5 year period for a new bottler appointed in India before 31 December 2007 commencing with the initial order placed by the bottler. This agreement was not extended further. It has been argued that the Court below failed to appreciate that even the Learned Magistrate had observed in its order that as per the correspondence exchanged between the parties, in particular as per the letter dated 9 May 2003, the agreement between the parties was for a period of 5 years which had already come to an end and there was no document that even after the expiry of this tenure, the parties will be continuing with this arrangement. This finding of the Magistrate was not interfered with by the Revisional Court. He has further submitted that the Court below failed to appreciate that there was no material or evidence, brought along with the complaint or by the parties to establish that the period was extended for 10 years and that there was a liability to pay the commission till 2014. He has further submitted that the Court below has failed to appreciate that the Complainant had referred to an

agreement, but it brought no other agreement on record other than the Petitioner's letter dated 09.05.2003 and if examined from that perspective, the complainant was not able to make out any case against the Petitioners as there was no breach of the said agreement. It is submitted that the Court below has failed to appreciate that as per the documents annexed by the Complainant with the Complaint it was evident that it had been consistent and unchallenged stand of the Petitioner Company [as per email dated 10.08.2011 and 11.08.2011 of the Petitioner in Exhibit F to the Complaint] that the Complainant was entitled to commission for 5 years from the first order in respect of any bottler agreement signed up prior to 31.12.2007 and that the arrangement therefore terminated by end of May, 2011 with the 5 year period coming to an end for the first order of bottler that began prior to December 21,2007. There was no response mail by the Complainant disputing or challenging this position of the Complaint. Also, the Complainant has not stated anything in the complaint petition to demonstrate that the same was in any manner false or erroneous, except

than stating that the commission was payable till 2014, which assertion has no basis or foundation.

10. Learned senior counsel for the petitioner has vehemently argued before this Court that the learned Magistrate in his order dated 27/1/2015 has categorically dealt with the letter dated 9 May 2003, and has correctly interpreted its contents, that the agreement between the Petitioner No. 1 and the complainant was that the complainant would be paid commission @ 10% less any advertising support provided by the Petitioners, on the net FOB US concentrate price (selling price) on the sale of concentrate to each bottler for a period of 5 years from the date of first purchase by such bottler, for each bottler signed on by the Petitioners between 1 January 2003 and 31 December 2007. The complainant in its letter dated 9 November 2011 has categorically admitted such position, and has further not raised any dispute or demur when the same interpretation was reiterated by the Petitioner in its email dated 10 August, 11 August and 16 August 2011, as also by the Petitioner No. 1's legal counsel by email dated

16 December 2011. The above only goes to prove that the complainant is trying to make out a false case by afterthought, and that the allegations in the complaint are false. He has further submitted that even assuming, though not admitting, there was any non-payment of the commission amount, the same cannot amount to criminal breach of trust or cheating. The amount of commission was to be 10% of the net FOB US Concentrate Price (Selling Price) less any advertising expenditure / support provided by the Petitioner No. 1 and not 10% of the amount paid by the franchisee as erroneously observed. He has further submitted that the Court below failed to appreciate that there was no entrustment by the Complainant to the Petitioner of any property or dominion of property, nor there is any allegation of any misappropriation of money. Besides, it is not that the entirety of the 10% amount has to be paid to the Complainant. Further, the payment had to be only for 5 years. He has further contended that the Revisional Court has erred in holding that moment any franchisee paid any amount to the Petitioner No. 1, then automatically 10% of

the amount in it became the property of the Complainant entrusted to the Petitioner which it has to pay on demand by the Complainant. He has further submitted that if this reasoning of the Revisional Court is accepted then any amount payable by one party to the other would become an amount entrusted making an offence of criminal breach of trust. Learned senior counsel has further argued that in the present case, the complaint nowhere discloses as to what was entrusted and when it was entrusted, by whom and to whom. He has further contended that the Revisional Court has erred in assuming that 10% of the amount paid by the franchisee to the Petitioner was an entrustment and the finding of the revisional Court is not at all correct. Firstly, the complainant has nowhere stated as to what was entrusted to the Petitioner. Secondly, the amount paid by the franchisee to the Petitioner cannot be an entrustment by the complainant to the Petitioner. Thirdly, the amount paid by the franchisee was the sale price paid by the franchisee to the Petitioner for the purchase of the concentrates and no part of it was paid as commission payable to the

Complainant. Fourthly, the Complainant does not say that there was any privity of contract between the Complainant and the franchisee, nor does it allege that the payment being made by the franchisee was under the instructions of the complainant, nor is the 10% of the amount paid by the franchisee paid as commission to be paid further to the Complainant. Fifthly, the commission was to be paid out of the selling price received after making deductions as per the letter dated 09.05.2003. There was no entrustment of the commission. It has been further contended that the Court below has erred in law in its interpretation of what is entrustment as required under Section 406 of the IPC. As per the provision, there has to be entrustment with property, or with any dominion over property. The observation in the impugned judgment that by entrustment, it is not necessary that one person gives property to another and that without delivery, the property can be entrusted shows the error of law. He has further argued that for application of Section 405, there has to be entrustment with property or with any dominion over property by the person who is complaining of

having been offended to the accused. He has further contended that the Revisional Court failed to appreciate that in the case of Mr. Robert John D'Souza & Ors Vs. Mr. Stephen Vs. Gomes, it has been held that "it is only after entrustment is shown, it can be said that there was criminal breach of trust". In Para 31 of Indian Oil Corpn. Vs. NEPC India Ltd., (2006) 6 SCC 736 it has been held that "the basic and very first ingredient of criminal breach of trust, that is, entrustment, is missing and therefore, even if all the allegations in the complaint are taken at their face value as true, no case of "criminal breach of trust" as defined under Section 405 IPC can be made out against NEPC India." Applying the said principles of law, no case was made out even if the allegations were to be accepted.

11. Learned senior counsel for the petitioner has submitted that in a similar case of Binod Kumar Vs. State of Bihar, reported in (2014) 10 SCC 663, where the allegation in the complaint pertained to non-payment of money, the Supreme Court quashed the criminal case on the ground that no offence was made out under Section 405 or 420 of the



IPC and held as follows:

“18. In the present case, looking at the allegations in the complaint on the face of it, we find that 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 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.”

He has argued that in the present case, there is no iota of allegation as to the dishonest intention in misappropriating the property or that the Petitioner had dishonestly disposed of the same in some way or dishonestly retained the same.

**12.** Learned senior counsel for the petitioner has argued before this Court that none of the witnesses have deposed before the Court as to how and in what manner the agreement was for 10 years till 2014. In fact, none of the witness examined at pre-summoning stage are of any

assistance. None of them have deposed anything to make out any offence. They have only talked about the financial loss and nothing more. It is argued that as would appear the Revisional Court has set up a new case for the Complainant, which is not made out in the complaint petition or in the pre-summoning evidence stage. He has further argued that it is settled law that while examining the complaint, the allegations and the complaint have to be taken the way they were, without adding or subtracting anything. He has further argued that the Court has observed that the ingredients of Section 405, IPC have been fulfilled, and as such, Section 406 IPC may be invoked. However, to prove an offence under this provision, it has to be proved conjointly beyond reasonable doubt by the prosecution that there was entrustment, and that the Petitioners misappropriated the property and/or converted it to their own use to the detriment of the Respondent No. 1. If there is no entrustment, then there cannot be any offence under this provision. The impugned order clearly states that there was no delivery of property. However, the Revisional Court

proceeded on an incorrect understanding that Section 405 IPC does not specify that there should be delivery of any property from one person to the other and criminal breach of trust can be established without any delivery of property. The transactions between the Petitioner No. 1 and the complainant was governed by the terms of the letter dated 9 May 2003, and the said agreement had expired by passage of time, and no other term could be read into the agreed terms between the parties. The Court has failed to take note of the terms of the agreement governing payment of commission. In support of the above, reliance has been placed by the learned counsel for the petitioner on the following judgments :

Jaswantrai Manilal Akhanev v. State of Bombay, AIR 1956 SC 575  
Ramaswamy Nadar v. State of Madras, AIR 1958 SC 56  
Sadhupati Nageswara Rao v. State of Andhra Pradesh, (2012) 8 SCC 547  
Satyendra Nath Mukherji v. Emperor, 3 ILR [1947] 1 Cal 97  
State of Gujarat v. Jaswantlal Nathalal, AIR 1968 SC 700  
Lake v. Simmons, 4 1927 AC 487  
Madhavrao Scindia v. Jiwajirao Angre, (1988) 1 SCC 692  
Bairo Prasad v. Laxmibai, 1991 Cr LJ 2535 (MP)

**13.** Learned senior counsel for the petitioner has argued before this Court that the Court below failed to appreciate

that the Complainant had alleged “non disclosure of the statement of account and the same leads to cheating and criminal breach of trust and reflects *mala-fide* intention on the part of the accused Company” in Para 21 of the Complaint. He has argued that the Revisional Court has set up a new case that the statement of accounts were required to be revealed so that the Complainant could ascertain that it has been made the complete payment of the commission amount or not. He has further that as per the complaint petition it is not the grievance of the Complainant that it has not been paid full commission so long it was paid the commission for the period till May 2011, rather the grievance was that it had not been paid commission from June, 2011. Also, in the letter dated 05.08.2011 the only reason stated by the Complainant for seeking the accounts is that the details “may be required to submit to Reserve Bank of India” and not because it had any grievance regarding the commission amount paid. Besides, there was no right under any of the agreements that the Complainant would be entitled to the details of accounts from the Petitioner. He

has further contended that the Court below has failed to appreciate that non disclosure of accounts cannot be treated as criminal breach of trust and / or cheating or any other offence as there were confidential information and the Complainant had no right to seek that information. He has further submitted that the Revisional Court did not appreciate the fact that the Complainant wanted disclosure of accounts only for submission before the authorities, and that the complaint has been formulated clearly by way of after-thought and as an arm-twisting measure. The Complainant has not averred in the complaint that even up to June 2011 it had not received the entirety of the commission. The details of the concentrate sales were being asked by the complainant on the pretext that it is required for submission to the Reserve Bank of India any time on demand (see Exhibit F to complaint). Hence the reasoning given in the impugned order that the production of such details of business would have helped the complainant to calculate whether it has received the entire 10% amount or not is erroneous, beyond the averments made in the

complaint, and contrary to the own communication issued by the complainant annexed to the complaint.

14. Learned senior counsel further submitted that the Court has erred in concluding that the allegations make out an offence of cheating. It is stated that the allegations made in the Complaint do not make out an offence of cheating. The ingredients of offence of cheating as held by the Hon'ble Supreme Court in the case of Vir Prakash Sharma Vs. Anil Kumar Agarwal reported in (2007) 7 SCC 373 are as follows:

- (i) Deception of any persons;
- (ii) Fraudulently or dishonestly inducing any person to deliver any property; or
- (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

He has argued that in the present case, no act of inducement on the part of the Petitioner or any accused person has been alleged by the Complainant or that the Complainant had been induced to deliver any property to the Petitioner.

15. Learned senior counsel for the petitioner has placed reliance upon the judgment delivered in the case of Thermax

Ltd. Vs. K.M. Johny reported in (2011) 13 SCC 412, para 37 of the aforesaid judgment reads as under :

“37. It is settled law that the essential ingredient for an offence under Section 420, which we have already extracted, is that there has to be dishonest intention to deceive another person. We have already quoted the relevant allegations in the complaint and perusal of the same clearly shows that no such dishonest intention can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligations between the parties. Since the very ingredients of Section 420 are not attracted, the prosecution initiated is wholly untenable. Even if we admit that allegations in the complaint do make out a dispute, still it ought to be considered that the same is merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction. Inasmuch as there are number of documents to show that the appellant Company had acted in terms of the agreement and in a bona fide manner, it cannot be said that the act of the appellant Company amounts to a breach of contract.”

He has argued that in the present case, no allegation has been made that the Petitioner or any accused person had an intention to cheat the respondent from the very inception.

16. Learned senior counsel for the petitioner has placed reliance upon the judgment delivered in the case of Anil Mahajan Vs. Bhor Industries Ltd [2005(10) SCC 228] , paragraph 8 of the aforesaid judgment reads as under :

“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."

17. Learned counsel for the petitioner has submitted that as regards, the offence of cheating, there was neither allegation or material or evidence of inducement on the part of the Petitioner or delivery of property to the Petitioner or that the Petitioner had an intention to cheat the Respondent from the very inception. He has further argued that the grievance regarding appointment of M/s. Iceberg Foods Ltd. as master bottler during continuation of agreement behind the back of the Complainant is also completely misplaced and cannot amount to a criminal offence. Firstly, there is no material placed on record that any exclusive right was given to the Complainant. Secondly, the agreement was also not placed on record to show that the appointment of M/s Iceberg was during the continuation of the agreement with the Complainant. Thirdly, the CRISIL report relied upon by the Complainant shows that Iceberg was appointed as franchisee and not as master bottler. Fourthly, the



correspondences on record would show that the Complainant was aware about M/s Iceberg in 2009 itself and that the Complainant was getting commission on the purchases being made by Iceberg. Lastly, grant of master bottler license to M/s Iceberg cannot amount to a criminal offence of criminal breach of trust and cheating. He has further submitted that the impugned order has further observed that the provisions of Section 420 IPC has been established, without any reasoning or finding that the ingredients of the provision has to be proved beyond reasonable doubt. He has further contended that the complaint does not contain any averment that there was a deception of the Complainant by the Petitioners, as a consequence of which the Complainant delivered any property to the Petitioners, and thus the Revisional Court could not return any finding to such effect. The facts are to the contrary. The Revisional Court failed to appreciate that even assuming but not admitting that any amount was due or payable, if at all, yet a mere breach of a contract does not amount to cheating. He has further submitted that there is

also nothing contained in the complaint to the effect that the Petitioners had fraudulent or dishonest intention at the time of making the alleged promise, breach of which is being claimed, and thus the Revisional Court could not return any finding to such effect. He has further contended that there is also no averment in the complaint by the complainant that the Petitioners had mala-fide intention to cheat the complainant at the time of entering into the agreement as borne from the letter dated 9 May 2003. The observation of the Revisional Court that such intention if known at the time of entering into the contract would have no legal standing is not at all correct. It is not essential that such intention should be known to the complainant at the time of entering into the contract, rather it has to be alleged and shown that the accused had such intention from the very beginning at the time of making the promise. In support of the above, learned senior counsel has placed reliance upon the following judgments :

1. V. Y. Jose v. State of Gujarat, (2009) 3 SCC 78
2. Dalip Kaur v. Jagnar Singh, (2009) 14 SCC 696
3. Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168
4. Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736

5. Anil Mahajan v. Bhor Industries Ltd., (2005) 10 SCC 228

6. Suresh Yadav v. Sharifa Bee, (2007) 13 SCC 107

**18.** Learned senior counsel for the petitioner has argued before this Court that the Court below has failed to appreciate that the alleged expenditures made by the Complainant to the tune of Rs. 10.33 crores would not constitute as cheating by the Petitioner. The expenditure by the Complainant in setting up of the factory or purportedly towards travelling, boarding cannot also be treated as handing over of any property to the Petitioner. Hence, the basic ingredients of cheating were not made out in the complaint. He has further argued that the order of the Learned Magistrate clearly stated the evidence and the facts on the basis of which the complaint was dismissed, and stated that the allegations did not prima facie establish the offences. He has further argued that the learned Magistrate had categorically stated that the complaints made by the Complainant arise out of business dealings and the associated contracts, and the Complainant is at liberty to approach the Commercial Courts for adjudication of its disputes. He has further contended that the Complainant

initiated the complaint after nearly two years since the issues were dealt and closed by the Petitioners, as an afterthought and act of vengeance. He has further argued that the disputes as raised are purely commercial and contractual in nature and in support of the same, reliance was placed on the following judgments :

Joseph Salvaraj A. v. State of Gujarat, (2011) 7 SCC 59

Thermax Ltd. v. K. M. Johny, (2011) 13 SCC 412

**19.** Learned senior counsel further submitted that applying the principles in the case of Rajesh Thapar vs Union of India, reported in **(2013) 3 SCC 330** and followed in the case of Prashant Bharti Vs. State (NCT of Delhi), reported in **(2013) 9 SCC 293**, where the following steps were delineated to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

“30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the

accusations as false?

30.3. Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) especially when it is clear that the same would not conclude in the conviction of the accused.”

Learned senior counsel further submitted that present criminal complaint deserves to be quashed entirely as it meets all the four principles laid down in the said case in favour of the Petitioner.

**20.** Learned senior counsel for the petitioner has submitted that while it is evident from the complaint as well as the pre-summoning evidence that no case is made out against the Petitioner or any of its officials, it is stated that the Petitioner has suppressed a large number of documents, primarily being the emails exchanged between the Complainant and the Petitioner. Had the complainant disclosed those documents, then it would have been all the

more clear to the Courts below that the complaint rightly deserved to be dismissed. Since the Petitioner is also invoking the jurisdiction of this Court to prevent abuse of the process of court, the Petitioner urges that these correspondences of impeachable character be also looked into. Besides, the complainant should not be permitted to suppress relevant documents and initiate criminal proceedings on that basis as it has been held by the Hon'ble Supreme Court in the case of Dalip Singh vs State of UP reported in **(2010) 2 SCC 114**, that a party suppressing material facts or placing twisted facts before the Court is not entitled to any reliefs.

**21.** Learned senior counsel for the petitioner has submitted that the Petitioner No. 1 had issued a letter dated 31 August 2010 to the complainant, the contents of which were never questioned, wherein the Petitioner had referred to the letter of 09.05.2003 and stated that the Petitioner No. 1 is obligated to pay a commission to the complainant on all orders placed by M/s. Iceberg Foods until May 14, 2011, the date represents the 5<sup>th</sup> anniversary of the first order shipped

to M/s. Iceberg Foods. The Petitioner No. 1 further stated that in addition to the \$21,686.50 USD accrued in commissions until the end of 2008 and in accordance with the terms of the 9 May 2003 letter, an additional \$40,414.08 USD in commissions for 2009 had been accrued. The Petitioner No. 1 sought for proper banking details to pay the commission immediately to the complainant. The Petitioner No. 1 further stated that commissions for 2010 at the end of the year will be accrued and will be paid to the complainant accordingly in January, 2011, and that the commissions for 2011 will be accrued after 14 May 2011 to properly account for all orders placed until 14 May 2011., and further that the Petitioner No. 1 will pay the last and final commission payment in June 2011. Further, the Complainant had only annexed letters of August 2011, ending with letter of 11 August 2011. The Complainant had not revealed the correspondences of November and December 2011, which letters when looked into would make the position very clear and also show that the Complainant had not only accepted that it was only entitled to commission for 5 years period in

terms of 09.05.2003 letter, but also the Petitioner had given a detailed reply on 16 December 2011, to which the Complainant had not given a reply, nor submitted any document to substantiate its claim towards any commission amount being allegedly due, rather it filed the present complaint case more than a year later. The following documents have been referred by the learned senior counsel:

- i. In the letter of 9 November 2011, the complainant accepted the letter of 9 May 2003, and that as per the said letter, the period of payment of commission started on 1 January 2003 and ended on 31 December 2007, and also that the 10% commission should be paid till 5 years from the first supply.
- ii. In view of accusations of improper and illegal behavior made by the complainant, the matter was referred to the corporate counsel of the Petitioner No. 1 for response.
- iii. The legal counsel for the petitioner addressed an email dated 18 November 2011 to the complainant seeking the contact details of the complainant's attorney for further communication. The legal counsel also asked the complainant to provide any documentation which it had to substantiate its claim.
- iv. By letter dated 5 December 2011, the complainant responded by providing details of its legal counsel and also forwarded some emails exchanged in 2009 – 2010.
- v. By letter dated 16 December 2011, the Petitioner No. 1's legal counsel wrote to the complainant's counsel and the complainant that the commission had been paid to the Complainant for five years on the concentrate orders placed



by Iceberg Foods Ltd., which began in May 2006, and ceased in May 2011, that is 5 years later, and no additional payments were due. The complainant was also asked if it had any other documents to the contrary, as otherwise no further compensation was due to the Complainant. As regards providing of detailed information with respect to sale of concentrates in India, it was clarified that there were no audit rights granted under the 9 May 2003 letter, so the complainant could not ask for the details of the business, which was a private business information. Accordingly, it was informed that if the complainant did not disclose any additional substantive documentation, the issue would be considered closed by the Petitioner No. 1. The complainant or its counsel have not replied to the said e-mail nor given any further information or documentation to substantiate its claim.

**22.** Learned senior counsel for the petitioner has submitted that it is clear from the reading of the Complaint and the documents annexed along with the complaint, that not only the Complaint is an attempt to create pressure on the Petitioner to extract money but the entire complaint is tainted with malice and is a clear abuse of process of court. He has further contended that it is settled law that a complaint may also be quashed where it is a clear abuse of the process of the court and the criminal proceeding is found to have been initiated with mala-fide or to cause harm.

23. Learned senior counsel for the petitioner has submitted that it is a settled law that where in the given facts, at best, purely a civil wrong is made out and pertains entirely to a commercial transaction / contractual dispute, the Complainant ought not to have invoked the criminal proceedings against the Petitioner by giving it a cloak of a criminal offence, inspite of the fact that the allegations do not make out any offence. He has drawn the attention of this Court towards paras 13 and 14 of Indian Oil Corpn. (supra), wherein the apex Court has held as under:

“13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged.

He has also drawn attention of this Court towards Para 8 of the judgment delivered in the case of G. Sagar Suri Vs. State of U.P. (supra), and the Hon'ble Supreme Court in paragraph 8 has held as under :

‘8. ... 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. 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.'

24. Learned senior counsel for the petitioner has submitted that the Revisional Court failed to appreciate that the Complaint does not ascribe any specific role to any of the individual accused persons and how each one of them are being accused of the offence alleged, nor is there any allegation of common intention and common object. In absence of any provision of vicarious liability for the offences of the Company on the persons allegedly in charge of the Company, the present complaint also does not disclose any offence against the Petitioner No. 2, 3 and 4 in particular and they cannot be proceeded against on the basis of general and bald allegations. He has further stated that in a similar case, Hon'ble the Supreme Court in the case of GHCL Employees Stock Option Trust Vs. India Infoline Ltd., (2013) 4 SCC 505 had quashed the complaint case

against the Managing Director, Company Secretary and other Directors of the Company and had observed as follows, and the same observations would also apply to the present case also :

“12. From a bare perusal of the complaint and the allegations made therein, we do not find in any of the paragraphs that the complainant has made specific allegations against Respondents 2 to 7. In Para 2 of the complaint, it is alleged that Respondents 2 to 6 are looking after the day-to-day affairs of the Company. With whom the complainant or its authorized representative interacted has also not been specified. Although in Para 11 of the complaint it is alleged that the complainant on numerous occasions met Accused 2 to 7 and requested to refund the amount, but again the complainant has not made specific allegation about the date of meeting and whether it was an individual meeting or collective meeting. Similarly, in Para 17 of the complaint, there is no allegation that a particular Director or Managing Director fabricated the debit note. In the entire complaint there are bald and vague allegations against Respondents 2 to 7.”

**25.** Learned senior counsel for the petitioner has submitted that the Revisional Court did not disclose any reason for acting as a Court of Appeal while exercising its revisional jurisdiction and proceeding to re-appreciate the pleadings and evidence placed before and already examined in detail by the Learned Magistrate. He has further contended that the Revisional Court had proceeded to take it upon itself to re-appreciate only those documents disclosed by the Complainant with its revision petition, without considering the written submission of the Petitioners. He has further contended that the revisional Court's scope of re-

appreciating evidence is very limited, especially when the Trial Court, which is empowered to appreciate the pleadings and evidence, has done so. The impugned order also does not contain any finding that the order of the Learned Magistrate was grossly erroneous or that there was any perverse finding of fact, to justify the attempt of the Revisional Court to re-appreciate the evidence. Learned senior counsel to bolster his submissions has placed reliance upon the following judgments :

Bindeshwari Prasad Singh v. State of Bihar, (2002) 6 SCC 650

Kailash Chand Agrawal v. State of U.P., 1996 Cri LJ 927

**26.** Learned senior counsel for the petitioner has submitted that apart from the aforesaid, the primary duty for assailing any order in any criminal action on any legal or factual ground falls within the exclusive action of the State respondent. It is well settled that when a revisional Court is approached by a private party, the Court should refrain from interfering except when there is a glaring legal defect of a serious nature resulting in a grave failure of justice. There is no finding to this effect in the impugned order so reasons whereof the Revisional Court had proceeded to entertain the revision petition of the Respondent No. 1. In support of the above, he has placed reliance on the following judgments :

Jagannath Choudhary v. Ramayan Singh, (2002) 5 SCC 659

Akalu Ahir v. Ramdeo Ram, (1973) 2 SCC 583

Manijan Bibi v. N. Mangi Singh, 1988 Cr LJ 1438

He has further contended that the learned Revisional Court proceeded on an erroneous and misplaced basis. He has further argued that the revisional Court also failed to appreciate that the transactions between the Petitioner No. 1 company and the Complainant is wholly civil in nature and has no criminality in it, and that the Petitioners Nos. 2 to 4 are officials of the Petitioner No. 1 company, and in absence of any specific averments or proof beyond reasonable doubts, such officials cannot be made personally liable. He has further contended that mere breach of contract simpliciter does not constitute an offence and the allegations in the complaint petition must disclose the necessary ingredients therefor. He has further contended that the complaint by the respondent is a misuse of process of criminal court and has been instituted maliciously with ulterior motive. His further contention is that the impugned order has been passed in a mechanical manner and is illegal, improper and untenable in the law, and discloses non-

application of mind. To bolster his submissions, reliance has been placed on the following judgments :

Ashfaq Ahmed Quereshi v. Namrata Chopra, JT 2014 (5) SC 142  
Vinod Raghuvanshi v. Ajay Arora, (2013) 10 SCC 581  
B. Suresh Yadav v. Sharifa Bee, (2007) 13 SCC 107

27. Learned senior counsel for the petitioner has submitted that in the impugned order, the Revisional Court has observed that the ingredients of Section 34, IPC has been fulfilled, yet no discussion or reasoning appears in the impugned order on the alleged common intention or collusion between the Petitioners or how it existed or resulted in commission of any alleged act. The complaint did not contain any averment to the effect that there was a pre-arranged plan between the Petitioners herein, or a prior concert between the Petitioners to commit any alleged act, or that a common intention existed at a time prior to alleged commission of the acts, or that it was proved beyond reasonable doubt by the prosecution that actual participation for committing the alleged acts was done with a common intention at a prior concert, and thus the Revisional Court could not have given any finding to such effect. As such,

the impugned order is unreasoned and non-speaking. He has placed reliance upon the following judgments :

Suresh Sakharam Nangare v. State of Maharashtra, 2012 (9) SCC 249

Ramashish Yadav v. State of Bihar, (1999) 8 SCC 555

Shyamal Ghosh v. State of West Bengal, (2012) 7 SCC 646

Mrinal Das v. State of Tripura, (2011) 9 SCC 479,

Jai Bhagwan v. State of Haryana, AIR 1999 SC 1083

**28.** Learned senior counsel for the petitioner has submitted that the Court below has erred in law in observing that criminal proceedings are maintainable even if civil remedy is available. He has contended that the grievances raised in the complaint were for recovery of money and is purely a dispute of a civil nature. His further contention is that a matter which is essentially or purely of a civil nature should not be given a cloak of a criminal offence as criminal proceedings are not a shortcut of other remedies available in law. He has further contended that it is imperative for the Criminal Court to exercise a great deal of caution before issuing process. It is also a well settled position that criminal proceedings should not be used for settling scores or for pressurizing parties to settle civil disputes. He has further submitted that the inherent power under Section 482 Cr.P.C.



entitles this Court to quash the proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of Court or that the ends of justice require that the proceeding ought to be quashed. His further contention is that the Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. Any order of a Magistrate summoning the accused must reflect that there was application of mind, and thus the Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record. To bolster his submission, learned counsel has placed reliance upon the following judgments :

G. Sagar Suri and another v. State of UP & Ors., (2000) 2 SCC 636  
Mohammed Ibrahim & Ors Vs. State of Bihar & Ors., (2009) 8  
CCC 751  
GHCL Employees Stock Option Trust Vs. India Infoline Ltd.,  
(2013) 4 SCC 505  
Chandra Ratnaswami Vs. K.C. Palanisamy & Ors., (2013) 6 SCC  
740

Learned counsel has contended that in the light of the judgments referred by him, the impugned order dated 4 June 2015 is contrary to law, and suffers from grave and serious

irregularity and illegality causing serious miscarriage of justice arising from misconception of law as well as perpetuating the abuse of process of court at the instance of the Respondent, which requires to be interfered with by this Court. Even otherwise to meet the ends of justice and to prevent abuse of process of court, the impugned order as well as the complaint proceedings deserves to be quashed by this Court in exercise of its inherent power.

29. Learned counsel for the petitioner has placed reliance upon the judgment delivered by the apex Court in the case of Binod Kumar and others Vs. State of Bihar and another reported in **(2014) 10 SCC 663**; the judgment delivered by the Kerala High Court in the case of N. T. Muraleedharan Vs. State of Kerala reported in **2012 Cri LJ (NOC 1) 1** and the judgment delivered by the Gauhati High Court in the case of Md. Jahirul Maulana @ Jahirul Islam Vs. The State of Assam and others (**Cr. Petition No. 234/2016, decided on 12/7/2016**) and his contention is that in the first place the so-called agreement which was a business arrangement between the parties was for a period of five years only and

they have paid 10% commission to the complainant. He has stated that they have paid the entire commission and even if it is presumed for a moment that commission has not been paid, it is purely a civil dispute and the complainant shall certainly be free to file Civil Suit as held by the learned Magistrate, who has dismissed the complainant at the first instance after recording the statement of the witnesses. Reliance has also been placed upon the judgment delivered in the case of State of Haryana Vs. Bhajanlal reported in **1992 SCC (Cri) 426** and a prayer has been made for quashment of criminal proceedings.

**30.** On the other hand, learned counsel for the respondent has argued before this Court that the scope of interference by this Court u/S. 482 of the Code of Criminal Procedure, 1973, is quite limited and whether the petitioner has committed an offence or not, can be looked into by the trial Court after the evidence is brought on record by both the parties. He has vehemently argued before this Court that there was a business arrangement between the parties and as per the agreement between the parties dated 9/5/2003,

initially the period was 5 years starting from 1/1/2003 and ending on 31/12/2007, however, it was extended by another agreement. He has fairly stated that there is no further agreement on record but the exchange of email between the parties establishes that when the agreement was extended. It has been argued before this Court that the complainant is required to furnish details of the Foreign Exchange received by him to Reserve Bank of India and in those circumstances, request was made to the petitioner to furnish all details in respect of their agreement post December 2007 period. He has stated that respondent No.1 has invested huge sums, 6 crores, in establishing plant at Hyderabad and petitioner No.1 has entered into various agreements with other bottlers in the country. Respondent No.1 has been subjected to great financial loss. Reliance has been placed upon the judgment delivered by the apex Court in the case of Bhushan Kumar and another Vs. State (NCT of Delhi) and another reported in **(2012) 5 SCC 424** and it has been argued that the powers of the High Court u/S. 482 of the Code of Criminal Procedure, 1973 are quite limited. Heavy reliance has been

placed upon paragraph 17 of the aforesaid judgment and the same reads as under :

17) In Dy. Chief Controller of Imports & Exports vs. Roshanlal Agarwal & Ors. (2003) 4 SCC 139, this Court, in para 9, held as under:

9. In determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. This question was considered recently in U.P. Pollution Control Board v. Mohan Meakins Ltd.(2000) 3 SCC 745 and after noticing the law laid down in Kanti Bhadra Shah v. State of W.B. (2000) 1 SCC 722, it was held as follows: (SCC p. 749, para 6)

6. The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process.

There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order.

**31.** Reliance has also been placed upon the judgment delivered by the apex Court in the case of Rajesh Bajaj Vs. State of NCT Delhi and others reported in **(1999) 3 SCC 259**, again a case in which the scope of Sec. 482 of the Code of Criminal Procedure, 1973 has been considered by the apex Court.

**32.** Reliance has also been placed upon the judgment delivered by the apex Court in the case of Mahesh

Choudhary Vs. State of Rajasthan reported in (2009) 4 SCC

439. Learned counsel has referred to paragraphs 14 and 16 of the aforesaid judgment. It was a case for quashment of the FIR. A prayer has been made for dismissal of the complaint.

33. Heard learned counsel for the parties at length and perused the record. This matter is being disposed of at the admission stage itself with the consent of the parties.

34. Facts of the case reveal that the a complaint was preferred u/S. 200 of the Code of Criminal Procedure, 1973 before the ACJM, Class I, Indore by the respondent M/s. Tristar Beverages Pvt Ltd., The averments made in the complaint in respect of Sec. 406 of the Indian Penal Code finds place in paragraphs 14, 17, 19, 20 and 21. Aforesaid paragraphs reads as under :

14. That the accused company appreciated the earnest effort and marketing skill provided by the complainant for entering and establishing accused brand R.C. Cola and accordingly in 2004 agreement was exchanged between the complainant company and accused No.1. There were clear understanding of extending the agreement for 10 years whereby the accused No.1 company agreed to grant licence to complainant company to use their brand name and make them master bottle for a term of 10 years and also offered 10% commission to any of concentrate sales effected in India and South Asia by franchisee or bottler appointed by the complainant company.

17. That the accused company paid the commission on the basis of their own estimate and without providing any account of such purchase by the bottlers in India. The complainant company vide their various correspondence sought details of purchase by different bottler and the calculation on the basis of which the commission were paid till June 2011 and suddenly thereafter, stopped by the accused.

19. That the complainant Company vide their email dated 16<sup>th</sup> May 2009 apprised the accused no.1 the efforts made by the complainant in establishing the RC cola brand in India and investment made in making the brand recognisable and popular in public eyes. Hereto annexed and marked herewith as Exhibit-D is the copy of Email dated 16/5/2009.

20. That the complainant vide e-mail dated 06/8/2011 duly requested the accused company to provide figures regarding sale of concentrate by the accused company to the bottlers in India for which the commission / royalty was paid to the complainant. The complainant sought partywise details of such concentrate sold by the accused company to different bottlers in India. Hereto annexed and marked herewith as Exhibit E is the copy of email dated 6/8/2011.

21. That the accused no. 1 company vide the letter dated 10/8/2011 stated that they cannot disclose business statement as the same are private / confidential matter of the accused company. The complainant says and submits that the complainant as master bottlers are entitled to 10% of total sale effected by the accused no.1 company. The complainant has every right to seek statement of account regarding sale of concentrate to any other bottler in India and South Asia. The non disclosure on the part of the accused company regarding sales figure is totally arbitrary, illegal and devoid of merits inasmuch as the complainant company is entitled to 10% of commission on total sale figure by the accused company and, therefore, the complainant company would not be able to reconcile their account unless the entire sales figures are received and accounted for. Since the commission being the percentage of the total sales it is incumbent upon the accused company to provide details of sales figure to the complainant company. The complainant company states that non disclosure of the statement of account leads to cheating and breach of trust and reflect malafide intention on the part of the accused company and for which the accused No. 1, 2, 3 and 4 are liable to be prosecuted under 406 of IPC. Hereto annexed and marked herewith as Exhibit F is the copy of Email dated 10/8/2011.

**35.** The allegations in respect of Sec. 420 of the Indian

Penal Code are spelt out in paragraphs 22, 23, 24, 25, 26 and

28. Aforesaid paragraphs reads as under :

22. That the complainant say and submit that the contract for Royalty/commission for 10 years as agreed between the parties for the services rendered by the complainant company in establishing the brand RC Cola in Indian and other South Countries market and as per the terms of the agreement it expires in 2014 however accused no. 1 company through accused No. 2, 3 & 4 with malafide intention and to deprive the complainant of the legitimate dues suddenly and abruptly contrary to the terms of agreement and understanding reached between the parties stopped paying royalty from June, 2011 onwards. The malafide acts on the part of the accused amounts to cheating, misappropriations of Royalty amounts, and breach of trust and for which the accused No. 1, 2, 3 & 4 are liable to be prosecuted under Section 406, 420 read with Section 34 IPC.

23. That the complainant say and submit that to their shock and utter dismay of the complainant company it was found during perusal of CRISL report by the Director of the complainant company is that Accused have appointed M/s. Iceberg Ltd. on their Master Bottler during continuation of Agreement of Master Bottler with the Complainant Company. It is found that the accused No. 1 company behind the back of complainant company has already appointed M/s Iceberg Food as the master bottler and granted right in favour of said Iceberg Foods Ltd. contrary to the terms of agreement executed between the complainant and the accused No. 1 Since the master bottlers agreement and licence with regard to RC Cola has already granted to complainant way back in 2004 the accused No. 1 does not have right to further transfer the same right till 2014 to any other bottlers. Hereto annexed and marked herewith as **Exhibit – G** is the copy of CRISIL report.

24. That the complainant say and submit that accused No. 1 had granted exclusive right in favour of the complainant way back in 2004 for 10 years the efforts, services, investments, expertise provided by the complainant company in establishing RC Cola brand in India and other Countries of South East Asia. The accused No. 1 company had no right transfer the licence already granted to the complainant to M/s Iceberg Food Ltd. within the period of valid Agreement with the Complainant Company.

25. That the complainant say and submit that accused has committed offences under Section 420 IPC in as much as the accused No. 1 induced the complainant to develop market for



RC Cola brand in India and other South Asia Countries and to invest huge amount of money by setting up the 1<sup>st</sup> factory for production of their product and establishment of the said brand and also to made huge investment by way of travelling boarding conveyance and communication charges.

26. That the complainant was to receive 10% compensation/royalty on the entire sales value for 10 years from 2004 however suddenly and abruptly and at the back of complainant company the right of master bottler and the commission charges were stopped prematurely and licence were granted to M/s Iceberg Food Ltd. during the continuation of agreement between the complainant and accused No. 1 and thereby the Accused No. 1, 2, 3 & 4 have not only committed offence under Section 420 IPC but also offence under Section 406 of IPC.

The statement of complainant is also very material.

Statement of complainant is reproduced as it is, as under :

**Witness No.....01.....for..... परिवादी साक्ष्य धारा  
200 द.प्र.स.....Deposition taken the .....2404-  
2013 day of .....Witness's apparent  
age.....29 व f States of affirmation.....My  
name is.....विशाल Son of, D/o, W/o.....श्री  
कांतीप्रसाद परसरामपुरिया Occupation-व्यापार  
address आर्केट सिल्वर 56, सेकंड फ्लौर न्यू पलासिया,  
इंदौर  
परिवादी कथन :-**

1. मेरी कंपनी का नाम ट्रायस्टार बेबरेजेस प्रा. लि. है। मैं उक्त कंपनी में डायरेक्टर के पर पर पदस्थ हूँ। मेरी कंपनी साफ्ट ड्रिंक्स बाटलिंग्स का कार्य करती है। हमारी कंपनी एवं अन्य ग्रुप इस कार्य में वर्ष 1977 से कार्यरत है। हमारी कंपनी का कार्य पूरे भारत में है। कंपनी का कार्य पूरे भारत में है। कंपनी ने बोर्ड रेज्युलेशन पास करके मुझे परिवाद लगाने हेतु अधिकृत किया है।

2. कॉट बेबरेजेस (आर.सी.कोला) के एम.डी फांसिस लामप्रिया और फायनेंस हेड नाथन लेनी और इंडिया कंट्री हेड कृष्ण मोहन ने हमें उनके ब्रांड (आर.सी.कोला) को मार्केट में चलाने हेतु प्रस्ताव किया। इस हेतु हमें इंडिया एवं साउथ

ऐशियन देशों के लिये मास्टर बॉटलर नियुक्त किया। इस हेतु उन्होंने हमें एक फेक्ट्री डालने के लिये कहा। इस हेतु हमने करीब 7 करोड़ रुपये खर्च कर फेक्ट्री डाली उसके पश्चात उन्होंने हमें अन्य फ्रेंचाईस रखने के लिये भी कहा। उक्त मास्टर बॉटलर हेतु हमने बाजार में विज्ञापन, इवेन्ट्स, अन्य गतिविधियाँ अपने खर्चों से संचालित की। हमने श्रीलंका, नेपाल एवं अन्य ऐशियाई देशों में जाकर खर्चा किया।

3. आरोपीगण के द्वारा इस कार्य के एवज में हमें उपरोक्त समस्त बाटलर्स को नियुक्त करने के उपरांत जो भी व्यवहार फ्रेंचाईजीच का काट बेवरेजेस से होगा उसका 10 प्रतिशत हमारी कंपनी को मिलना था। उक्त व्यवहार पेटे हमें कॉट बेवरेजेस ने पांच वर्ष तक 10 प्रतिशत राशि की अदायगी की किन्तु अचानक बिना किसी कारण दर्शाये हमें उक्त 10 प्रतिशत राशि का भुगतान करना बंद कर दिया। जिसकी सूचना आरोपीगण द्वारा मुझे नहीं देने पर मेरे द्वारा निरंतर उपरोक्त कार्य किया जाता रहा। जिससे मुझे करीब 10.33 करोड़ रुपये का आर्थिक नुकसान हुआ। तत्पश्चात मेरे द्वारा आरोपीगण से अनेकों बार संपर्क कर उपरोक्त 10 प्रतिशत की राशि की मांगनी किये जाने पर न तो उपरोक्त राशि की अदायगी की और न ही उसका हिसाब दिया।

4. जब हमने उक्त 10 प्रतिशत के भुगतान बाबत विक्रय व्यवहार की जानकारी चाही तो उन्होंने विक्रय व्यवहार दर्शाने से इंकार कर दिया। हमारे द्वारा अन्य जानकारी हासिल पर यह माजुम पड़ा कि आरोपीगण द्वारा बिना सूचना दिये किसी अन्य कंपनी को नवीन मास्टर बॉटलर नियुक्त कर दिया गया है। इस प्रकार आरोपीगण द्वारा हमारी कंपनी को धोखा देकर करोड़ों रुपये का नुकसान पहुंचाया है। न्यायालय से आग्रह है कि वह उक्त तीनों आरोपीगण एवं कंपनी के विरुद्ध उचित दंडात्मक कार्यवाही कर हमें न्याय दिलायें।

**36.** The complaint is based upon the communication dated 9/5/2003 which is allegedly an agreement between the parties. The so-called business arrangement reflects that it was for a period of five years starting from 1/1/2003 and ending on December 31, 2007. The business arrangement

dated 9/5/2003, reads as under :

May 9, 2003

M/s. Vishal Parasrampur,  
Tristar Beverages Pvt. Ltd.,  
Arcade Silver 56,  
2<sup>nd</sup> Floor, New Palasia,  
Indore 452 001  
India

Dear Vishal

As per our discussion please be advised that for a 5 year period beginning January 1, 2003 and ending December 31, 2007 for each new bottler we sign to our standard RC/Royal Crown Bottler's Agreement and Trademark License Agreement in India, we will pay you a commission on our concentrate sales to said bottlers.

The commission to be paid will be 10% of the new F.O.B. U.S. Concentrate price – that is our selling price less any per unit advertising support we provide. You will be paid only after we have been paid in full for the concentrates. The commission you will be paid for each bottler will be for a 5 year period commencing with the initial order placed by the bottler. This commission will not apply to concentrates purchased by Tristar Beverages Pvt. Ltd., or its subsidiary companies.

In closing, allow me to thank you and your family for the assistance you have and continue to provide in our entry into India.

Very truly yours,

Jerry M. Smith  
President

37. The learned Judge before whom the complaint was filed, after taking into account the business arrangement between the parties and the statement of witnesses, has arrived at a conclusion that no offence in the light of the

business arrangement between the parties is made out in the matter. He has also held that no ingredients for constituting an offence under Sec. 406 of the Indian Penal Code is made out nor any offence is made out u/S. 420 of the Indian Penal Code. He has also held that the complainant shall be free to take recourse to the civil proceedings. After the complaint was dismissed, a revision was preferred and the revisional Court has held that the ingredients of Sec. 406 and Sec. 420 of the Indian Penal Code are made out.

**38.** Sec. 405, 406 and 420 of the Indian Penal Code reads as under :

**405. Criminal breach of trust.**—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits “criminal breach of trust”.

[Explanation [1].—A person, being an employer 3[of an establishment whether exempted under section 17 of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee’s contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

[Explanation 2.—A person, being an employer, who deducts the

employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

**406. Punishment for criminal breach of trust.**—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

**420. Cheating and dishonestly inducing delivery of property.**—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**39.** The reasoning given by the revisional Court in respect of an offence u/S. 406 of the Indian Penal Code is erroneous. The complainant nowhere discloses as to what was entrusted, when it was entrusted and by whom and to whom it was entrusted. The interpretation given by the revisional Court in respect of what is entrustment, as required u/S. 406 of the Indian Penal Code is erroneous. The statutory provision provides that there has to be entrustment with property, or with any dominion over property. The revisional Court has failed to appreciate the law laid down

by the apex Court in the case of Mr. Robert John D'Souza & Ors Vs. Mr. Stephen Vs. Gomes (supra) and also the judgment delivered in the case of Indian Oil Corpn. Vs. NEPC India Ltd., (supra). Mere alleged non payment of money will not amount to an offence u/S. 405 or Sec. 420 of the Indian Penal Code, as held by the apex Court in the case of Binod Kumar Vs. State of Bihar (supra). In the present case, there is no iota of allegation as to dishonest intention in misappropriating the property or that the petitioner had dishonestly disposed of the same in some way or dishonestly retained the same. There was an agreement / letter dated 09/05/2003 which was in respect of payment of some commission and the revisional Court has travelled beyond the letter dated 09/05/2003 and has erroneously arrived at a conclusion that there was a breach of trust.

**40.** This Court has carefully gone through the averments made in the plaint, the alleged agreement executed between the parties and the same reveals that the only document which is in respect of the agreement and which has been reproduced by this Court, dated 09/05/2003, was exclusively

for a period of 5 years. The complainant himself has admitted that he has received commission for a period of 5 years and the dispute, if any, is in respect of the period beyond 5 years. If the averments made in the complaint are accepted in toto, even then they do not make out an offence of cheating, keeping in view the judgment delivered by the Hon'ble Supreme Court in the case of Vir Prakash Sharma Vs. Anil Kumar Agarwal (supra). The plaint averments does not reveal that there was an intention to cheat the complainant from very inception and, therefore, again keeping in view the judgment delivered in the case of Thermax Ltd. Vs. K.M. Johnny (supra) no case is made out in respect of cheating. Even if the allegations are looked into and the complainant is able to make out a case of dispute, the same shall be merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction. Not only this, mere use of expression of cheating in the complaint is of no consequence, as held by the apex Court in the case of Anil

Mahajan Vs. Bhor Industries Ltd (supra).

41. The present case is a classic example of turning a pure civil dispute into a criminal litigation. The complaint, if any, is arising of business dealing and business transaction and the complainant is certainly at a liberty to approach the commercial courts for adjudication of dispute, as held by the apex Court in the case of Joseph Salvaraj A. Vs. State of Gujarat (supra) and Thermax Ltd. Vs. K.M. Johny (supra). The present case is an effort to settle the dispute and claims which do not involve any criminal offence by applying pressure through prosecution and deserves to be deprecated, as held by the apex Court in the case of Indian Oil Corpn. Vs. NEPC India Ltd., (supra). The complainant has gone to the extent in impleading the petitioner Company, the Head of the Company and all senior Officers of the Company as accused persons and the complaint does not ascribe any specific role to any of the accused individual persons as to how they are liable for offences mentioned in the complaint. In almost similar circumstances, Hon'ble the Supreme Court in the case of GHCL Employees Stock Option Trust Vs.



India Infoline Ltd., (supra) has granted relief to the Managing Director and other senior members of the Company. Though it has been vehemently argued by the learned counsel for the complainant that a petition u/S. 482 of the Code of Criminal Procedure, 1973 is not at all maintainable and the scope is quite limited and this Court should not interfere with the impugned order. This Court, as a pure commercial dispute has been converted into a criminal dispute, the officers of the multinational Company who have got no role to play, have been impleaded as respondents, their prosecution is not going to serve any purpose, is of the opinion that the present case, is a fit case for invoking the powers vested u/S. 482 of the Code of Criminal Procedure, 1973, as held by the apex Court in the case of Rajesh Thapar vs Union of India (supra) and Prashant Bharti Vs. State (NCT of Delhi) (supra),

**42.** Hon'ble the apex Court in the case of State of Haryana Vs. Bhajanlal reported in **(1992 CrLJ 527)** in paragraph 108, has held as under :-

“**108.** In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law

enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formula and to given an exhaustive list of myriad kinds of cases wherein such power should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where, the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where, the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. 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.”

**43.** In light of the aforesaid judgment delivered by the apex Court, it can safely be gathered that it is a fit case for

quashment of the order passed by the revisional Court as this Court has arrived at a conclusion that allowing the proceeding to continue would be an abuse of the process of the Court and, therefore, to meet the ends of justice and to prevent the abuse of process of the Court, the complaint as well as the proceedings and the order passed by the revisional Court deserves to be set aside and is accordingly set aside. The order dated 04/06/2016 is hereby quashed. The petition preferred u/S. 482 of the Code of Criminal Procedure, 1973 stands allowed and disposed of.

(S. C. SHARMA)  
J U D G E

**KR**