

HIGH COURT OF GUJARAT

**O P AGARWAL - CEO SOUTH, INDIABULLS REAL ESTATE LTD & 2 ORS
V/S
STATE OF GUJARAT & 1 ORS**

Date of Decision: 21 December 2017

Citation: 2017 LawSuit(Guj) 2081

Hon'ble Judges: [A Y Kogje](#)

Eq. Citations: 2018 (3) GLR 2374

Case Type: Special Criminal Application; Criminal Miscellaneous Application

Case No: 1345 of 2013, 1346 of 2013, 1349 of 2013, 1352 of 2013, 1354 of 2013, 1355 of 2013, 1631 of 2013, 1633 of 2013, 1977 of 2013, 1980 of 2013, 5206 of 2014, 5207 of 2014, 5245 of 2014, 4002 of 2015; 23489 of 2016, 23492 of 2016, 23495 of 2016, 23496 of 2016, 18463 of 2017, 18466 of 2017

Subject: Constitution, Criminal

Acts Referred:

[Constitution Of India Art 227](#), [Art 226](#)

[Indian Penal Code, 1860 Sec 415](#), [Sec 420](#), [Sec 409](#), [Sec 120\(b\)](#), [Sec 506](#), [Sec 406](#)

[Code Of Criminal Procedure, 1973 Sec 156\(3\)](#), [Sec 482](#), [Sec 173\(2\)](#), [Sec 204](#), [Sec 245](#), [Sec 173](#), [Sec 200](#), [Sec 190\(1\)\(c\)](#), [Sec 220](#), [Sec 202](#)

Advocates: [M J Thakore](#), [Tarak Damani](#), [H K Patel](#), [B D Karia](#), [Bhargav Karia](#), [Bharat K Dave](#), [N D Nanavaty](#), [Hemant Makwana](#), [J M Panchal](#), [K J Panchal](#), [Dipen Desai](#)

Reference Cases:

[Cases Referred in \(+\): 22](#)

Judgement Text:-

A Y Kogje, J

[1] Rule. Learned Advocates Mr.B.D.Karia and Mr.Dipen Desai waives service of Rule on behalf of the respondent-complainant and learned APP Mr.H.K.Patel waives service of Rule on behalf of the respondent-State.

[2] This group of 27 petitions is arising from the same nature of offence which are registered by different complainants against almost same accused persons. In all, before this Court, criminal proceedings in five separate Criminal Cases are called for in question, i.e. Criminal Case Nos.242 of 2013, 30 of 2012, 92 of 2012, 99 of 2012 and 175 of 2014. The case-wise petitions and reliefs claims can be segregated as under :-

SR. No.	Petition No.	Petitioner/s	Complainant/s	Criminal Case No.	Prayers	Civil Suit No.
1.	Sp. Cr. A. No. 1345 of 2013	1. O. P. Mohanlal Agrawal 2. Nathulal Shah 3. Mr. Narinder Gahlot Mr. Saurabh Mittal		24 of 2012	B) To quash the proceedings being Criminal Case No. 242 of 2013 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.	

2.	Sp. Cr. A. No. 1346 of 2013	1. Mr. Ashish Mehta 2. Mr. Sanjay Chandel	Mr. Mohanlal Nathulal Shah	24 of 2012	B) To quash the proceedings being Criminal Case No. 242 of 2013 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.
3.	Sp. Cr. A. No. 1631 of 2013	Mr. Vipul Bansal	Mr. Mohanlal Nathulal Shah	24 of 2012	B) To quash the proceedings being Criminal Case No. 24 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed

					therein in connection with the case.
4.	Sp. Cr. A. No. 1351 of 2013	1. Mr. O.P. Agrawal 2. Mr. Saurabh Mittal	1.Kantilal Punamchand Jain 2. Narendrabhai Babubhai Shah. 3. Bhavarlal Tarchand Nagori.	30 of 2012	B) To quash the proceedings being Criminal Case No. 30 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.
5.	Sp. Cr. A. No. 1355 of 2013	Mr.Ashish J. Mehta	1.Kantilal Punamchand Jain 2.Narendrabhai Babubhai Shah. 3.Bhavarlal Tarchand Nagori.	30 of 2012	B) To quash the proceedings being Criminal Case No. 30 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B)

					of IPC and for all orders passed therein in connection with the case.	
6.	Sp. Cr. A. No. 1349 of 2013	1.Mr.O.P. Agrawal. 2.Mr. Narinder Gehlot. 3.Mr. Saurabh Mittal	Rajesh Giriraj Shah	92 of 2012	B) To quash the proceedings being Criminal Case No. 92 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.	1013 of 2015 before the City Civil Court
7.	Sp. Cr. A. No. 1354 of 2013	1. Ashish J. Mehta. 2. Sanjay Chandel.	Rajesh Giriraj Shah	92 of 2012	B) To quash the proceedings being Criminal Case No. 92 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences	1013 of 2015 before the City Civil Court

					under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.	
8.	Sp. Cr. A. No. 1632 of 2013	Mr. Vipul Bansal	Rajesh Giriraj Shah	92 of 2012	B) To quash the proceedings being Criminal Case No. 92 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.	1013 of 2015 before the City Civil Court
9.	Sp. Cr. A. No. 1350 of 2013	1. Mr. O.P. Agrawal 2. Mr. Narinder Gahlot 3. Mr. Saurabh Mittal	Dhaval J Langnaoja	99 of 2012	B) To quash the proceedings being Criminal Case No. 99 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2,	

					Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.	
10.	Sp. Cr. A. No. 1352 of 2013	1. Mr. Ashish J. Mehta 2. Mr. Sanjay Chandel	Dhaval Langnaoja	J	99 of 2012	B) To quash the proceedings being Criminal Case No. 99 of 2012 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.
11.	Sp. Cr. A. No. 1633 of 2013	Mr. Vipul Bansal	Dhaval Langnaoja	J	99 of 2012	B) To quash the proceedings being Criminal Case No. 99 of 2012 pending before the Ld. Additional Chief

					Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 420 and 120 (B) of IPC and for all orders passed therein in connection with the case.	
12.	Sp. Cr. A. No. 5206 of 2014	Mr. Narendra Gehlaut	Satkul Enterprise	175 of 2014	B) To quash the proceedings being Criminal Case No. 175 of 2014 pending before the Ld. Additional Chief Metropolitan Magistrate for the offences under Sections 406, 409, 420, 120(B) and 506(1) of IPC and all orders passed therein in connection with the case. C) To quash the proceedings being M Case no. 1 of 2014 registered before Madhavpura Police Station,	634 of 2015 before the City Civil Court



					Ahmedabad for the above-mentioned offences and all orders passed therein in connection with the case.	
13	CRMA 23495 of 2016 in Sp. Cr. A. No. 5206 of 2014	M/s. Satkul Enterprise	Mr. Narendra Gehlaut	175 of 2014	A) The Hon'ble Court may be pleased to vacate the ad-interim relief granted in Special Criminal Application no. 5206 of 2014 (Application for vacating interim relief under Article 226(3) of the Constitution of India)	634 of 2015 before the City Civil Court
14	CRMA 18464 of 2017 in Sp. Cr. A. No. 5206 of 2014	M/s. Satkul Enterprise	Mr. Narendra Gehlaut	175 of 2014	A) The Hon'ble Court may be pleased to hear the Special Criminal Application nos. 5206 of 2014, 5207 of 2014, 5245 of 2014 and 4002 of 2014 separately from the proceedings being Special Criminal Application nos. 1345 of 2013, 1346 of	634 of 2015 before the City Civil Court

					2013, 1350 of 2013, 1351 of 2013, 1352 of 2013, 1354 of 2013, 1355 of 2013, 1977 of 2013 and 1980 of 2013	
15	Sp. Cr. A. No. 5207 of 2014	Mr. Ashish J. Mehta	Satkul Enterprise	175 of 2014	<p>B) To quash the proceedings being Criminal Case No. 175 of 2014 pending before the Ld. Additional Chief Metropolitan Magistrate for the offences under Sections 406, 409, 420, 120(B) and 506(1) of IPC and all orders passed therein in connection with the case.</p> <p>C) To quash the proceedings being M Case no. 1 of 2014 registered before Madhavpura Police Station, Ahmedabad for the above-mentioned offences and all orders passed therein in</p>	634 of 2015 before the City Civil Court



					connection with the case.	
16	CRMA 23496 of 2016 in Sp. Cr. A. No. 5207 of 2014	M/s. Satkul Enterprise	Mr. Ashish Mehta	175 of 2014	A) The Hon'ble Court may be pleased to vacate the ad-interim relief granted in Special Criminal Application no. 5207 of 2014 (Application for vacating interim relief under Article 226(3) of the Constitution of India)	634 of 2015 before the City Civil Court
17	CRMA 18463 of 2017 in Sp. Cr. A. No. 5207 of 2014	M/s. Satkul Enterprise	Mr. Ashish Mehta	175 of 2014	A) The Hon'ble Court may be pleased to hear the Special Criminal Application nos. 5206 of 2014, 5207 of 2014, 5245 of 2014 and 4002 of 2014 separately from the proceedings being Special Criminal Application nos. 1345 of 2013, 1346 of 2013, 1350 of 2013, 1351 of 2013, 1352 of 2013, 1354 of 2013, 1355 of 2013, 1977 of 2013 and	634 of 2015 before the City Civil Court

					1980 of 2013	
18	Sp. Cr. A. No. 5245 of 2014	Mr. Vipul Bansal	Satkul Enterprise	175 of 2014	B) To quash the proceedings being Criminal Case No. 175 of 2014 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 406, 409, 420, 120(B) and 506(1) of IPC and all orders passed therein in connection with the case. C) To quash the proceedings being M Case no. 1 of 2014 registered before Madhavpura Police Station, Ahmedabad for the above-mentioned offences and all orders passed therein in connection with the case.	634 of 2015 before the City Civil Court
19	CRMA 18465	M/s. Satkul Enterprise	Mr. Vipul Bansal	175 of 2014	A) The Hon'ble	634 of 2015

	of 2017 in Sp. Cr. A. No. 5245 of 2014				Court may be pleased to hear the Special Criminal Application nos. 5206 of 2014, 5207 of 2014, 5245 of 2014 and 4002 of 2014 separately from the proceedings being Special Criminal Application nos. 1345 of 2013, 1346 of 2013, 1350 of 2013, 1351 of 2013, 1352 of 2013, 1354 of 2013, 1355 of 2013, 1977 of 2013 and 1980 of 2013	before the City Civil Court
20	CRMA 23489 of 2016 in Sp. Cr. A. No. 5245 of 2014	M/s. Satkul Enterprise	Mr. Vipul Bansal	175 of 2014	A) The Hon'ble Court may be pleased to vacate the ad-interim relief granted in Special Criminal Application no. 5245 of 2014 (Application for vacating interim relief under Article 226(3) of the Constitution of India)	634 of 2015 before the City Civil Court
21	Sp. Cr. A. No. 1977 of	Uday H. Vora, Director of	H. Mohanlal Nathulal Shah	24 of 2012	To issue appropriate writ or order	

	2013	Safal Realty Pvt. Ltd.			to quash and setaside Complaint bearing inquiry case no. 24/2012 and subsequently converted to Criminal Case no. 242/2013 pending before the Ld. Addl. Chief Metropolitan Magistrate Court no. 2, Ahmedabad as well as order issuing process and all consequential further proceedings arising out of the same case
22	Sp. Cr. A. No. 1978 of 2013	Uday H. Vora, Director of Safal Realty Pvt. Ltd.	H. 1.Kantilal Punamchand Jain 2. Narendrabhai Babubhai Shah. 3. Bhavarlal Tarchand Nagori.	30 of 2012	To issue appropriate writ or order to quash and setaside Complaint bearing inquiry case no. 30/2012 and subsequently converted to Criminal Case pending before the Ld. Addl. Chief Metropolitan Magistrate Court no. 2, Ahmedabad

						as well as order issuing process and all consequential further proceedings arising out of the same case	
23	Sp. Cr. A. No. 1979 of 2013	Uday H. Vora, Director of Safal Realty Pvt. Ltd.	Rajesh Giriraj Shah	92 of 2012	To issue appropriate writ or order to quash and setaside Complaint bearing inquiry case no. 92/2012 and subsequently converted to Criminal Case pending before the Ld. Addl. Chief Metropolitan Magistrate Court no. 2, Ahmedabad as well as order issuing process and all consequential further proceedings arising out of the same case	1013 of 2015 before the City Civil Court	
24	Sp. Cr. A. No. 1980 of 2013	Uday H. Vora, Director of Safal Realty Pvt. Ltd.	Dhaval J Langnaoja	99 of 2012	To issue appropriate writ or order to quash and setaside Complaint bearing inquiry case no. 99/2012		

					and subsequently converted to Criminal Case pending before the Ld. Addl. Chief Metropolitan Magistrate Court no. 2, Ahmedabad as well as order issuing process and all consequential further proceedings arising out of the same case 25 Sp. Cr.
25	Sp. Cr. A. No. 4002 of 2014	Mr.Omprakash H.Agrawal	Satkul Enterprise	175 of 2014	B) To quash the proceedings being Criminal Case No. 175 of 2014 pending before the Ld. Additional Chief Metropolitan Magistrate, Court No. 2, Ahmedabad for the offences under Sections 406, 409, 420, 120(B) and 506(1) of IPC and all orders passed therein in connection with the case.



					C) To quash the proceedings being M Case no. 1 of 2014 registered before Madhavpura Police Station, Ahmedabad for the above-mentioned offences and all orders passed therein in connection with the case.	
26	CRMA 23492 of 2016 in Sp. Cr. A. No. 4002 of 2015	M/s. Satkul Enterprise	Mr. Omprakash Agrawal	175 of 2014	A) The Hon'ble Court may be pleased to vacate the ad-interim relief granted in Special Criminal Application no. 4002 of 2015 (Application for vacating interim relief under Article 226(3) of the Constitution of India)	634 of 2015 before the City Civil Court
27	CRMA 18466 of 2017 in Sp. Cr. A. No. 4002 of 2015	M/s. Satkul Enterprise	Mr. Omprakash Agrawal	175 of 2014	A) The Hon'ble Court may be pleased to hear the Special Criminal Application nos. 5206 of 2014, 5207 of 2014, 5245 of	634 of 2015 before the City Civil Court

					2014 and 4002 of 2014 separately from the proceedings being Special Criminal Application nos. 1345 of 2013, 1346 of 2013, 1350 of 2013, 1351 of 2013, 1352 of 2013, 1354 of 2013, 1355 of 2013, 1977 of 2013 and 1980 of 2013
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2.1 Though the criminal cases are numbered differently and are filed by different complainants, but the genesis of the complaints appears to be one and the same. All these matters having common issue, are taken up for joint hearing with consent of all concerned.

However, the facts are extracted from lead matter, i.e. Special Criminal Application No.1345 of 2013.

[3] Respondent No.2-Mohanlal Nathulal Shah (original complainant) (hereinafter to be referred as "the complainant") filed Criminal Case (Inquiry) No.24 of 2012 on 17.07.2012 against nine accused persons in the Court of Metropolitan Magistrate, Court No.2, Ahmedabad for offences punishable under Sections 406, 409, 420, 120(B) and 506(1) of the Indian Penal Code, alleging inter-alia that the complainant and his family members had booked flat in the scheme which was floated by Indiabulls Ltd., through its sister company Albina Real Estate Ltd. (hereinafter referred to in short as 'Albina'), which was managed by the Directors, etc., who were named in the complaint as accused persons, 8 in number and accused No.9 is a separate company, viz. Safal Reality Pvt. Ltd., which is made party-accused through its Director Mr. Uday Vora.

3.1 It is alleged that scheme was floated by accused Nos.1 to 3 of Indiabulls Company Ltd. in the compound of Jupiter Mills in the name of "Riverside" and the Development Agreement was entered for that purpose between

India Bulls and Albina (accused Nos.4 to 8) and in the period between April and May 2010, huge hoarding and newspaper advertisements were published to attract individuals to book their flats. The complainant along with his family members met the accused person on site on 07.05.2010 and were informed that from 08.05.2010, booking process of the flats was starting and for that purpose, a meeting is organized in Fortune Landmark Hotel and if the booking is made on that day, substantial discount was offered.

3.2 It is alleged that in the meeting on 08.05.2010, the complainant and other persons interested in the scheme were given to understand that the accused company has purchased the land falling in the compound of Jupiter Mills and that the accused company is having very high reputation in the market and thus, attracted and induced the complainant to make booking.

3.3 It is further alleged that as the complainant were residing in a joint family, there was need for bigger premises. The complainant was therefore, impressed by the representation made by accused No.7 and 8 and booked 2 flats. An amount of Rs.50,000/= for each flat was paid by cheque towards the booking and accused No.7 and 8 issued the Receipt to that effect. It is further alleged that complainant was informed that remaining amounts will have to be paid as and when accused would demand by making phone call and the possession of the flat is to be given in period of one year.

3.4 It is further alleged after some time accused No.7 and 8 again called up the complainant for paying installments in months of August and September 2010. According complainant deposited Rs.1,00,000/= each towards the two flats for which again the receipts were issued. Every now and then, the complainants visited the site. But no construction was seen. However, upon frequent inquiry the complainants were given solace about quick work commission and completion as they had received the necessary permission / plan sanction.

3.5 However, all of a sudden in February 2012 the complainant received communication about refund of the booking amount from the accused No.1 to 3 company. The ground mentioned therein was regarding Order of

Government of India under the Ancient Monuments and Archaeological Sites and Remains Ordinance 2010. The offer to refund was refused by the complainant again by a letter dated 17.03.2012 by the accused company. The complainant was informed that the Company has sought for N.O.C. from Archaeological Department for construction on site. However, by order dated 27.01.2010 necessary permission was not granted till further directions in the matter.

3.6 It is therefore alleged that the accused persons without getting essential permissions from Government Agencies have proceeded to make inducing offers about the Scheme and collected the monies under the guise of House Booking. It is also alleged that wrong representation was made by accused persons that all necessary permission is received to build the flats.

Thereafter, though amounts for allotting flats were received no flats were actually allotted but booking amount was sought to be refunded and without consent of the complainant as cheques equivalent to booking amount and interest were sent to the complainant.

3.7 It is alleged as the refund of booking amount was not acceptable to the complainant, the complainant went to the site alongwith cheques and upon inquiry was informed that the Archaeological Department has refused to give permission to put the construction on site and that the Department is to take over the entire site. From the conduct of accused No.7 and 8 on site, the complainant doubted their intentions.

3.8 It is alleged that thereafter from the site, the Boards of accused No.1 to 8 company was removed and its place, the Board of accused No.9 was placed. Apparently, the accused No.9 has floated a different scheme on the same site. Upon inquiry, the complainant came to know that by Registered Sale Deed dated 12.04.2012, the accused No.1 to 8 have sold this land to accused No.9 for a huge amount of Rs.219 crores and 60 lacs and that too without taking no objection from the members of the Scheme like the complainant.

3.9 It is further alleged on the basis of R.T.I. Application, the complainant received a copy of the Registered Sale Deed and from the Sale Deed, the complainant came to know about a pre-plan to refund the booking amounts to the complainant and that in the document amount of Rs.21 Crores is transferred by RTGS on 29.03.2012 and Rs.138 Crores on 11.04.2012 but there is no reference to payment of Rs.66 Crores.

3.10 It is further alleged that accused No.9 is an influential person and as a builder has several schemes. Still he has not done due diligence before entering into an Agreement of this magnitude which reflects his complicity in the offence. It is alleged immediately after the registered Sale Deed, the accused No.9 has floated a commercial scheme and has already made arrangements to proceed with the construction. The issue of grant of construction permission on the very site to the accused No.9 by the Department of Archeology also creates doubt that the accused No.1 to 8 and accused No.9 are all hand in glove.

3.11 It is further stated that the complainant approached Madhopura Police Station with a written complaint dated 16.04.2012. However, no action was taken by the police. Even the reminders and representations to the Superior Police Officers did not yield any result and hence, the complainant file the complaint before the Magistrate Court.

3.12 It appears that after recording of the verification on 17.07.2012, on same day, the Metropolitan Magistrate Court has passed an order purportedly u/s. 156(3) of Cr.PC directing the complaint to be sent to concerned Police Station for investigation and submit the same (sic) on or before 20.08.2012. It was also directed not to assign this matter to an Officer below the rank of Police Inspector. On 09.04.2013 another order came to be passed in connection with three other complaints dated 30/12, 92/12 and 99/12 that as they were all identical to be clubbed with the main complaint and be tried together u/s. 220 of the Code of Criminal Procedure, 1973 (hereinafter referred to in short as 'the Code').

3.13 It appears that after conducting of the investigation as per the directions in the Order mentioned hereinabove the Investigation Officer submitted 'C' Summary Report on 26.07.2012 before the Metropolitan Magistrate Court. The Magistrate Court issued Notice to the complainant.

3.14 The complainants of various complaints filed their objections against the Summary Report. The Magistrate Court after recording the contents of the Report and the objections disagreed with the Summary Report and proceeded to pass an order on 09.04.2003 which reads as under:-

"Cognizance u/s.190(1)(c)(sic) Code of Criminal Procedure has been taken against all the accused and also against Saurabh K. Mittal, Director, India Bulls Real Estate Co., for offences punishable u/s. 420 and 120-B. Process be issued accordingly on furnishing P.F."

3.15 It appears that upon the order thus passed, the petition for quashing the proceedings thereto is filed. From the records, it appears that by a detailed order dated 06.05.2013, the proceedings of the criminal cases were stayed and was extended time to time till date.

3.16 Since there are several criminal proceedings based on identical cases but at different stages which were consolidated by the Magistrate Court for brevity necessary classification is comprehended in table form as below :-

TABLE I

Matters arising out of Criminal Case No.24 of 2012, wherein the verification has been done and order of investigation has been passed under Section 156(3) of the Code by the learned Additional Chief Metropolitan Magistrate, Ahmedabad on 17.07.2012. Report under Section 173(2) is filed and thereafter, by impugned order dated 09.04.2013 process is issued.

Sl. No.	Case No.

1	SCRA No.1345/2013
2	SCRA No.1346/2013
3	SCRA No.1631/2013
4	SCRA No.1977/2013

TABLE II

Matters arising out of Criminal Case No.99 of 2012, pending before the learned Additional Chief Metropolitan Magistrate, Ahmedabad, wherein verification has been done and order has been passed to keep it with Inquiry Case No.24/2012.

Sl. No.	Case No.
1	SCRA No.1350/2013
2	SCRA No.1352/2013
3	SCRA No.1633/2013
4	SCRA No.1980/2013

TABLE III

Matters arising out of Criminal Case No.175 of 2014, pending before the learned Additional Chief Metropolitan Magistrate, Ahmedabad, wherein verification has been done and order of investigation has been passed under Section 156(3) of the Code of Criminal Procedure Code, 1973 and matters are pending for investigation.

Sl. No.	Case No.
1	SCRA No.5206/2014
2	SCRA No.5207/2014
3	SCRA No.5245/2014
4	SCRA No.4002/2014

TABLE IV

Matters in which no verification has been done, no order of investigation has been passed, but wherein only the order of keeping it with Inquiry Case No.24 of 2012 has been passed.

I. Arising out of Criminal Case No.92 of 2012, pending before the learned Additional Chief Metropolitan Magistrate, Ahmedabad on 27.07.2012.

Sl. No.	Case No.
1	SCRA No.1349/2013
2	SCRA No.1354/2013
3	SCRA No.1632/2013
4	SCRA No.1979/2013

II. Arising out of Criminal Case No.30 of 2012, pending before the learned Additional Chief Metropolitan Magistrate, Ahmedabad.

Sl. No.	Case No.
1	SCRA No.1351/2013
2	SCRA No.1355/2013
3	SCRA No.1978/2013

[4] Heard learned Senior Advocate Mr.N.D.Nanavaty and learned Senior Advocate Mr.M.J.Thakore with learned Advocate Mr.Tarak Damani and learned Advocate Mr.J.M.Panchal for the petitioners and learned Advocate Mr.B.D.Karia and learned Advocate Mr.Dipen Desai for the respondent No.2 in all these matters and learned APP Mr.H.K.Patel for the respondent-State in all these matters.

[5] The gist of submissions on facts and chronology of events on the part of the learned Advocate jointly for the petitioner's side may be summarized as under:-

5.1 That Ahmedabad Jupiter Textile Spinning and Knitting Mills (herein after referred to as "Mill" for the sake of brevity and convenience) was in the possession of permanent lease hold land by lease deed executed on

4/2/1952 with regard to premises being Town Planning Scheme No.14, Final Plot No.52, 113, 114, 121 and 123 admeasuring 70738 sq. mtrs. of Dariapur-Kajipur sim, Ahmedabad (hereinafter referred to as "said land" for the sake of brevity and convenience).

5.2 That the said mill became a sick unit and thereby rights of the said mills were transferred in favour of NTC Ltd.

5.3 That NTC was also declared as sick unit under the provision of SICA on 6/3/1993.

5.4 That in the scheme drafted in the reference pending before BIFR the said land of the mill had been interwoven, whereby it was decided that the properties be sold including the said land with a view to clear dues of NTC.

5.5 That NTC by public auction invited public at large to purchase the said land of the mill on 'AS IS WHERE IS' and 'AS IS WHAT IS' basis.

5.6 That in the auction conducted by NTC, Albina participated in the auction and gave highest offer for the purchase of the said land.

5.7 That on 20.12.2007 NTC vide its letter No.NTCG/ASC/558/2007 accepted the bid/offer of Albina for aggregate sale consideration of Rs.60,60,00,000/= (Rupees Sixty Crores and Sixty Lacs Only) for purchase of the said land.

5.8 That NTC made an application to Archaeological Survey of India, Vadodara (hereinafter referred to in short as 'ASI') for carrying out construction on the said land in accordance with the Ancient Monument and Archaeological Site and Remains Act, 1958.

5.9 That in 2009 complete payment for purchase of the said land was duly made by Albina to NTC and possession of the said land was also handed

over by NTC to Albina.

5.10 That on 12.01.2010, letter was sent from Indiabulls to ASI with regard to the Power of Attorney given by NTC in view of the purchase of the said land by Albina. Albina requested ASI to issue Certificate for development and construction of the said land in favour of Albina.

5.11 That on 27.01.2010, Directors (Monument) wrote to ASI stating that no license or any permission for renewal, renovation/construction/reconstruction is to be given in protected area till such time further direction is issued in the matter.

5.12 That on 18.03.2010, Letter issued by ASI to Albina that in view of the letter dated 27.01.2010 issued by Director (Monument) no license / certificate can be given within prohibited and regulated area of Centrally Protected Monument, till further order.

5.13 That on 31.03.2010, Sale Deed executed by NTC in favour of Albina for 70738 sq. mtrs., whereby the said land was purchased by Albina for aggregate sale consideration of Rs.60,60,00,000/= (Rupees Sixty Crores and Sixty Lacs Only).

5.14 That in May 2010, Albina launched scheme in the name of "River Side" on 6219.97 sq. mtrs. of the said land in the name of River Side and in the balance portion, Albina had launched the scheme in the name of "Vatika". That the issue in the present petition pertains to scheme launched in the name of River Side.

5.15 That Provisional Reservation Booking was taken for the commercial as well as residential premises to be developed on the said land in the name of River Side.

5.16 All the applicants duly signed the said provisional reservation

application and agreed to the terms and conditions stipulated therein.

5.17 That on 17.01.2011, a letter was issued by Albina to ASI to kindly grant permission within prohibited and regulated area, whereby Albina requested ASI to issue license at the earliest in view of the fact that Albina were losing time and money after making huge investment, whole project plan was going haywire and thereby requested to do needful at the earliest.

5.18 That on 17.05.2011, a letter from ASI to Albina that in view of some changes made in the application, new application as per prescribed form along with other documents were required to be submitted which was duly done as sought by ASI.

5.19 That on 30.05.2011, form filled-in by Albina as required to be given to the ASI as sought by ASI by its letter dated 17.05.2011. Along with the form all required supported documents were duly supplied.

5.20 Permission was sought for construction of lowrise building as well as high-rise building for residential and commercial as permitted under law.

5.21 That on 08.06.2011, a letter from competent authority to Member Secretary, National Monument Authority (NMA), whereby application made by Albina was duly forwarded to NMA and copy of the said letter was also sent to Albina.

5.22 That on 03.01.2012, decision taken by NMA to request Albina to make power point presentation with regard to the project. Albina made power presentation as per request of NMA, whereby complete details with regard to project was duly informed in the power point presentation. 5.23 That on 24.01.2012, letter from Albina to competent authority, Gujarat, whereby Albina requested the authority to provide photographs, design details, information relating to Historic importance of Monuments.

5.24 That on 07.02.2012, after power point presentation was made by Albina, suggestions were made by members of NMA, whereby various changes were suggested by the members and thereby Albina was directed to take necessary action in the matter.

5.25 That on 28.02.2012, letter was received from one of the complainants seeking to know the date of completion of project.

5.26 That on 29.02.2012, in view of changes suggested by NMA, it was impossible for Albina to go ahead with the project that had launched on the said land and thereby Albina decided to scrap the said project and informed the applicant and others that Albina will not be continuing with the said project and thereby requested the applicant to contact required person and take money back along with 12% interest.

5.27 That on 15.03.2012, Albina in furtherance to their earlier letter dated 29.02.2012 sent a letter giving the details of the refund of money which the applicant can collect or the same would be deposited in their account.

5.28 That in the end of March 2012, an Agreement to sell was entered into and executed for the said land by Albina in favour of M/s. SAFAL Developers, whereby Power of Attorney was also given in favour of person of SAFAL to make an application to ASI and follow the necessary procedure for doing the needful.

5.29 That on 31.03.2012, letter from Albina to Competent Authority, Director or Archeology - amended the design, removed all high rise residential blocks and now doing only commercial blocks that too 15 meter height i.e. G + 4 storey, in view thereof request them to grant NOC for the construction.

5.30 That on 31.03.2012, Albina appointed Rajesh Patel and Girish Chudasama, employees of SAFAL to deal with and correspond with NMA on behalf of Albina.

5.31 That on 01.04.2012, Heritage Impact Assessment was duly submitted to ASI and NMA, whereby development plan was totally changed into low rise commercial construction.

5.32 That on 02.04.2012, competent authority, Director of Archeology by its letter to NMA forwarded Heritage Impact Assessment Report alongwith revised plan.

5.33 That on 03.04.2012, 32nd meeting of the NMA held and decided to grant permission only for commercial blocks G+4.

5.34 That on 04.04.2012, a letter along with cheque of the amount deposited and also interest was sent by Albina to one of the complainants.

5.35 That on 09.04.2012, letter from Administrative Office, NMA to Competent Authority, Director of Archeology - recommendation of the NMA given in its 32nd Meeting held on 03.04.2012 for grant of permission for constructing commercial blocks.

5.36 That on 12.04.2012, a Sale deed was entered into and executed by Albina in favour of M/s. SAFAL Developers for the said land.

5.37 That on 16.04.2012, ASI granted permission to Albina for construction of ground + 4 story after Heritage Impact Assessment report was submitted.

5.38 That on 16.04.2012, a complaint was filed by some of the complainants against Albina and its officers before Senior Police Inspector, Madhavpura Police Station under Sections 406, 420, 114, 120(B) and 506(1) of the Indian Penal Code.

5.39 That on 23.04.2012, letter was sent from SAFAL to NMA to state that Albina has sold the said land to SAFAL and thereby requested to change the name of owner in their record.

5.40 That on 02.05.2012, letter from NMA to SAFAL - no objection in change of ownership in the NOC subject to terms and conditions as stipulated in the letter should remain the same.

5.41 That on 03.05.2012, letters in respect of revised N.A. Commercial permission from the office of Dy. Collector whereby certain amount was required to be paid - amount paid - order issued on 08.05.2012.

5.42 That on 16.05.2012, legal notice issued by one of the complainants returning the cheque and sought for specific performance of the contract.

5.43 That on 24.06.2012, a statement was taken of the employee of Albina in view of the police complaint.

5.44 That on 28.06.2012, the Police Inspector after examining and investigating complete complaint filed by the complainant had sent investigation report to the Deputy Police Commissioner, whereby after investigating, Police Inspector had duly come to conclusion that there cannot be said to be any criminal case against the accused in the said complaint.

5.45 That on 17.07.2012, the complainant filed a Criminal Case No.24/2012 before the learned Metropolitan Magistrate, Court No.2, Ahmedabad against the Officers / Directors of Indiabulls Real Estate Ltd., as well as against Officers of Albina Real Estate Ltd. and others under Sections 406, 409, 420, 120(B) and 506(1) of the Indian Penal Code.

5.46 That on 17.07.2012, verification of the complainant was duly done.

5.47 That on 17.07.2012, the learned Magistrate after hearing the complainant, the complaint was sent to the concerned Police Station for investigation under Section 156(3) of the Code of Criminal Procedure, 1973.

5.48 That on 25.07.2012, final report was submitted by police under Section 173, as the investigation was already carried out at the relevant point in time by the police, whereby necessary statements and everything was available and thereby within a period of 7 days final report was prepared and submitted by the police before the learned Magistrate.

5.49 That on 20.08.2012, the complainant filed objections against police report.

5.50 That on 20.10.2012, a reply was filed by the police to the objections filed by the complainant.

5.51 That on 02.11.2012, Rajachitthi/Commencement Letter was issued by AMC for commercial development to be carried out on the said land.

5.52 That on 09.04.2013, impugned order for issuance of process under Sections 420 and 120(B) of the Indian Penal Code was issued by the learned Metropolitan Magistrate, Ahmedabad.

[6] Learned Senior Counsel Mr. Mihir Thakore appearing in some of the applications submitted that this is a case of civil nature which is given a criminal colour. He submits that on 31.03.2010 that the land on which the residential premises apartments were to be constructed originally belonged to Ahmedabad Jupiter Textile Spinning and Knitting Mills and that the Mill became sick. The Mill was transferred to the National Textile Corporation under the provisions of the Sick Textile Undertaking (Nationalization Act, 1974) under the provisions of the Sick Industries Company Special Provisions Act, 1985. The Scheme was provided and placed before BIFR. The Scheme included disposal of the land of the Mill on 'as is where is basis' and accordingly, in an auction one - Albina Real Estate Limited successfully bid and on 31.03.2010, the Sale Deed was executed in favour of Albina. It is submitted that considering the location of land, it was necessary to receive some permissions from ASI for which NTC in the year 2009 had applied for such permission to carry out construction on the land in accordance with the Monuments and Archaeological Sites Remains Act, 1958. After Sale Deed of the land, Albina pursued further the procedures for required permissions from the ASI. By a

letter dated 27.01.2010, Albina addressed a letter to Director (Monuments), ASI requesting for issuing permission / license for carrying out the construction etc. on the land which fell under the Prohibited and Regulated areas of protected monuments. A communication dated 18.03.2010 was received from the Superintendent, ASI, Vadodara Circle referring to the general directions dated 27.01.2010 issued by the Office of the Director General, ASI, New Delhi that no License / Certificate be issued for carrying out construction within the prohibited / regulated areas till further orders. The application was therefore under consideration in the year 2010, when Albina launched a residential cum commercial complex in the name of 'India Bulls Riverside'.

6.1 Upon launch of the scheme for the purpose of inviting public at large interested to purchase property herein, the application forms for reservation of the flats were floated and those persons interested submitted such application forms. It is submitted that the application forms was merely for reservation of a flat by making some payment but did not create any right, title or interest in the land in any manner whatsoever. It is submitted that in fact, the Application Form made it abundantly clear that the building plans are awaiting sanction from the appropriate authorities and that such application would not constitute Agreement to Sale binding the company for allotment of the apartment. The application form also provided for refund at a specified rate of interest in case of inability on part of the company to make the allotment. He therefore, referred to the application Form at Annexure 'E' and drew attention of this Court that the complainants have consciously put their signatures on such application forms.

6.2 It is submitted that the Company did pursue with the Director General of ASI for receiving necessary permission to commence the construction activity on the land upon a communication dated 17.05.2011, from the competent Officer of ASI calling upon the company to make an application afresh as per the new Rules framed in 2010. Accordingly, an application was made on behalf of the company. A fresh application was also pursued.

However, the Company was ultimately unable to receive the necessary permission to put up the construction as per the the decision of the Company for commercial and residential premises of a particular type and classification. The company however in attempt to pursue with ASI but it was

not successful and hence, as the company failed with the project floated by the company and was no more viable it took a conscious decision to wind up the Project and disposed of the land in favour a willing purchaser. Accordingly, the land came to be disposed of to one - M/s. SAFAL Developers. It is submitted that it was on account of sheer impossibility to manage the Project in the manner which the company had projected, it was compelled to disposed of the land to SAFAL.

6.3 It is further submitted that the Company had complied with the conditions of the Agreement entered with the member of the public who had made application for reservation of the Flat and refunded the amount at the rate of interest higher than what was prescribed in the provisional reservation form.

6.4 It is submitted that many of the applicants have received the cheques without any grievances. However, some persons like the complainant have raised the dispute on the basis of the application form and filed the present complaint. It is submitted that such aggrieved persons have also instituted suits for damages which are still pending.

6.5 It is submitted that the entire piece of land was transferred by way of sale to M/s. SAFAL Developers and such SAFAL Developers pursued with ASI with change in their construction plans and received the approval. It is submitted that the transaction on part of the Company was purely a commercial transaction. Originally the Scheme was for a commercial cum residential Flat and both were high rise and low rise. On account of the regulations for construction of the ASI, the said plan was no more feasible leaving no option on part of the Company to abandon the project. It is submitted that even while abandoning the project, the Company had fully complied with the condition on which the application for reservation was received alongwith the payment from the applicants, by refunding the same alongwith interest. It is submitted that new permission which was received subsequently by M/s. SAFAL Developers was for low rise only and that too for commercial purpose from ASI, which goes to show that it was on account of regulations of ASI, the project was rendered impossible to commence as per the company's projections.

6.6 It is submitted that if the chronology of events is gone into, there was no intention to cheat from the inception, i.e. at the time of bookings. The application forms stipulates all the contingencies and was brought to the notice of each of the applicant and were signed by each of the applicants. It is submitted if the entire is complaint read, no ingredients of Section 415 are attracted and hence, the First Information Report deserves to be quashed and set aside.

It is further submitted that the applicants, who are the Directors and/or employees of the Real Estate Company cannot be arraigned as an accused merely on account of their holding an office. No overt act is attributed so as to attract offences of cheating against the applicant.

It is also submitted that the Directors cannot be held vicariously liable for the offences punishable under the Indian Penal Code.

6.7 In support of his arguments, learned Senior Counsel has relied upon the judgment of the Apex Court in the case of [Pepsi Foods Limited vs. Sub Judicial Magistrate](#), 1998 5 SCC 749 to contend that this Court has jurisdiction to entertain the petition for quashing while exercising powers under Section 226 read with Section 482 and such powers can be exercised at any stage as criminal prosecution is a serious matter which sets criminal law into motion against the accused persons.

6.8 Learned Senior Counsel Mr. Mihir Thakore has relied upon the judgment of the Apex Court in the case of [Dhariwal Tobacco Products vs. State of Maharashtra](#), 2009 2 SCC 370 in support of his contention that availability of alternative remedy is not a bar to exercise powers under Section 482 of the Code of Criminal Procedure, 1973.

6.9 Learned Senior Counsel has also referred to judgment of the Apex Court in the case of [Hari Prasad Chamaria v. Bishun Kumar Surekha](#), 1973 2 SCC 823 in support of his contention that where it is a business relationship

arising out of a commercial contract, then the liability created is civil in nature and not criminal.

6.10 Similarly, he has also referred to judgments of the Apex Court in the case of in the case of [S.K. Alagh v. State of Uttar Pradesh](#), 2008 5 SCC 662 and in the case of [Maksud Saiyed v. State of Gujarat](#), 2008 5 SCC 668.

6.11 Lastly, Shri Thakore has drawn attention of this Court to to an order passed by this Court in Appeal from Order 500/2014 dated 22.7.2015 which is the civil litigation between these parties and submitted that this Court has held after considering the "Flat Buyer Agreement" that plaintiffs are at best entitled to liquidated damages but refused to grant any injunction.

[7] Learned Senior Counsel Mr.J.M.Panchal appearing on behalf of the accused No.9 submits that the accused No.9 has been falsely implicated in the offence. It is submitted that the accused No.9 is a subsequent purchaser for consideration and has purchased the land by a registered Sale Deed. It is submitted that after the purchase, the Company pursued with ASI for receiving necessary permissions and was so granted. It is submitted that the Project has now already concluded and several people have purchased the commercial property in the Project. It is submitted that insofar as accused No.9 is concerned, there is absolutely no privity of contract between the complainant/ witnesses. There is no communication between his company and the complainants.

He has not received any amount nor is there any allegation that the accused No.9 has made any misleading representation to induce the complainants to pay the amount. Therefore, there is complete lack of any ingredients of Section 415 of the Indian Penal Code to maintain any investigation or prosecution against accused No.9. It is submitted that let alone the criminal liability, the accused No.9 cannot be even held responsible for any civil liability as he has never received a single money from any of the complainants or the witnesses. It is submitted that the accused No.9 cannot be held responsible for any breach or fault on part of the company which was previously holding the land.

7.1 Learned Senior Counsel Mr.J.M.Panchal submitted that the chronology of events clearly suggests that upon filing of the complaint, the Magistrate proceeded with the record verification and called for the Report and it is after the submission of the Report from the concerned Police Officer, the learned Magistrate had passed the order for recording the First Information Report, meaning thereby that the learned Magistrate had committed an error of taking the matter back to the pre-cognizance stage after taking cognizance.

7.2 In support of this contention, learned Senior Counsel Mr. J.M. Panchal relied upon the judgments of this Court reported in the cases of [Jamuna Singh and Others v. Bhadai Shah](#), 1964 AIR(SC) 1541, [Devarapalli Lakshminarayana Reddy and Others v. V. Narayana Reddy and Others](#), 1976 3 SCC 252, [Tula Ram and Others v. Kishore Singh](#), 1977 AIR(SC) 2401 and [Parshottambhai Karshanbhai Surani and Others v. Chandrikaben Karshanbhai Surani and Another](#), 2008 2 GLH 6.

7.3 Shri Panchal then placed reliance on the decision of the Supreme Court in case of [Dalip Kaur & Ors. Vs. Jagnar Singh](#), 2009 14 SCC 696 and contended that in the present case also allegations in the FIR does not disclose commission of offence but only disclose a civil dispute. Also insofar as accused No.9 is concerned, there is no allegation of dishonest intention from very inception as he came in picture much later.

7.4 Shri Panchal also relied on decision of the Supreme Court in case of [V.Y. Jose & Anr Vs. State](#), 2009 1 SCC(Cri) 996 to contend that where a matter essentially involves dispute of civil nature should not be allowed to become subject matter of criminal proceedings as a shortcut to execution of a nonexistent decree.

[8] Learned Senior Counsel Mr.N.D.Nanavaty submitted that a bare reading of the complaint does not make out a case of cheating and conspiracy. It is submitted that in the entire transaction, there is no element of cheating and therefore, there are no corresponding allegations to constitute the offence of cheating. It is submitted that Section 120(B) of the Indian Penal Code cannot be read in isolation. There is no allegation worth the name to suggest that there was any intention between all the

accused persons to commit the offences and in absence of any allegations or evidence, invoking of Sections cannot be left to inference.

8.1 It is submitted that the impugned order for registering the First Information Report does not record any reasons making out ingredients of the offences. No reasons are attributed as to how the learned Magistrate is in disagreement with the Report submitted after the due investigation and therefore, in absence of any reason or disagreement, there is no ingredient to make out the offence.

8.2 It is submitted that the present prosecution is launched with a oblique motive to knock out an additional amount from the Company and this intention of the company is very clear when the complainant also implicates accused No.9 who is a Director of M/s. SAFAL Developers who is the purchaser of the said property. It is submitted that apparently the complainants are aggrieved because Albina was able to earn a good profit from the sale of land to M/s. SAFAL Developers. It is submitted that in all 396 Bookings were received by the Company, out of which 349 have accepted the refund and hence, majority of the applicants have not raised any grievances but it is the complainants who have also instituted Civil Suits and have filed their complaints with obvious reasons.

8.3 It is submitted that allegations / averments made in the complaint itself suggest working of a legal mind rather than approaching the Court with clean hands for filing the complaint and it clearly reflects that attempt is made to make such allegations so as to bring the complaint within the legal framework of the defined offences.

8.4 It is submitted that the Magistrate Court ought to have taken due care and caution before issuing the process as issuance of process is serious.

[9] Learned Counsel Mr.B.D.Karia and Mr.Dipen Desai appearing on behalf of the complainants submits that the intention of the accused persons was very much to cheat as from the inception, the accused persons had prepared a glossy brochure to induce the general public.

9.1 In the standard form of the application for reservation of flat, there were certain hidden conditions which were not very visible and deliberately such conditions were kept so that the public at large were prevented from scrutinizing the contents of such applications and documents. It is submitted that the meeting at a five star Hotel for the purpose of inviting bookings was also one of the steps to induce the general public. It is submitted that in the year 2009, the application to ASI was both for the low rise and high rise which was rejected on 18.03.2010. The Scheme was floated in mid 2010 without proper sanctions. At that time, it was also no disclosed that the ASI has rejected the application for construction. This act on part of the Company suggests their intention to cheat. It is submitted that if the subsequent development is considered, then permission ultimately granted by the ASI was for the low rise and the complainants had booked their flats in low rise apartment of the Scheme.

Therefore, even after the permission by ASI the complainants were entitled to receive allotment of low rise flats as the intention of the accused persons was to cheat deliberately, the Scheme was thereafter floated for low rise. All the management by the accused was with an intention to cheat the complainant and witnesses.

9.2 It is further submitted that perpetration for committing offences was right from the inception and now merely, by creating a facade of a subsequent purchaser in the name of M/s. SAFAL Developers, the criminal liability of the accused persons is sought to be avoided. It is submitted that the entire proceedings before the ASI was in the name of 'India Bulls Albina'. Even the final permission granted is also in the name of Albina and therefore, it is the contention of the complainants that ALBINA and M/s. SAFAL Developers are one and the same.

It is submitted that as far as grant of permission by ASI is concerned, the accused persons had knowledge of the grant of permission before hand, i.e. to say even before order of sanction was dispatched from the Delhi Office to the Gandhinagar Office of the ASI. The accused persons have referred to the permission being granted. It is submitted that knowledge of permission

through Proper Channel was to be received from the Office of the ASI at Gandhinagar for this purpose. Learned Counsel Mr. Karia drew the attention of this Court to certain documents on record where some receipt of documents are applied.

9.3 It is submitted on 16.04.2012, the complainant had given a written complaint to the Police Inspector of Madhupura Police Station bringing to their notice of commission of offence under Sections 406, 420, 114, 120(B) and 506(1) of the Indian Penal Code. Despite there being allegations to that effect, the police did not take action as per law but instead recorded the statements on 24.06.2012 of employees of ALBINA and thereafter, on 28.06.2012 [Annexure 'J'] forwarded a Report to DCP Zone III opining that no criminal offence can be said to have taken place and it is only on account of the complainant who was a dissatisfied customer the complaint is filed.

9.4 It is submitted that the complainants were therefore, compelled to file a private complaint and specific allegations made in this complaint clearly attract the ingredient of Section 415 of the Indian Penal code. Learned Counsel also drew attention to Paragraph 13 of the private complaint and submitted that despite the magnitude of the transaction between ALBINA and accused No.9, no due diligence was carried out while issuing the Public Notice, receiving of title clearance certificate etc. and this indicates the complacency of the accused No.1 and the accused No.9, thereby attracting Section 120(B) of the Indian Penal Code. It is further submitted that all the communication with the statutory authorities till 2013 have continued in the name of Albina, though Albina had already transferred the right, title and interest in favour of the accused No.9 and this would lead to the only conclusion that Albina and the accused No.9 - M/s. SAFAL Developers were either hand in glove or that a facade is created.

9.5 It is submitted that the investigation and prosecution needs to be continued against the accused persons as they have surely influenced the police authorities being powerful and financially strong. It is submitted that despite the directions by this Court of the learned Magistrate, the investigation was to be carried out a Police Inspector, yet the investigation

was carried out by an Officer of the rank of PSI. In fact, the entire police machinery was misused and this is evident from the fact that within a period of six days, a 'C' Summary was filed. It is also submitted that when a separate petition against 'C' Summary was filed by the complainant's side, a reply was filed by the investigating Officer and not by the accused persons.

Therefore, the Court of the learned Magistrate was justified in passing the impugned order of taking cognizance.

9.6 It is lastly submitted that considering the allegations in the complaint, this is not a fit case to exercise powers under Section 482 of the Code. The intention to cheat from the inception is required to be brought on record by permitting the complaints to lead the evidence in the due course of the trial. It is submitted that the order under Section 156(3) of the Code, which is challenged now at this stage cannot be reversed as the order has been completely implemented and the police agency has submitted their Report pursuant to the said order.

9.7 Learned advocate Mr.Karia has relied upon several judgments of the Apex Court to contend that even where civil remedy is resorted to, the accused cannot be absolved from the Criminal liability. He therefore cited decisions of the Supreme Court in case of [Vijayander Kumar and Ors. Vs. State of Rajsthan and Anr.](#), 2014 3 SCC 389, [Kamaladevi Agarwal Vs. State of W.B. and Ors.](#), 2002 1 SCC 555, [Arun Bhandari Vs. State of Uttar Pradesh and Ors.](#), 2013 2 SCC 801. He also relied on the decision of the Supreme Court in case of [Lee Kun Hee, President, Samsung Corporation, South Korea and Ors.](#), 2012 3 SCC 132 to contend that Directors of the Company can also be held liable. On the point of cognizance reliance is placed on the decision of Supreme Court in case of [India Carat \(P\) Ltd. Vs. State of Karnataka and Anr.](#), 1989 2 SCC 132. He lastly, submitted that that while considering prayer for quashing of FIR only the allegations in the FIR are required to be seen and the documents which can be likely defence of the accused side cannot be looked into.

submitted independently that the complainants were induced into making payment towards booking of the Flats. In fact, a rosy picture was drawn, as a result of which the complainants had made preparation for disposing of their present accommodation/ residence and to shift lock, stock and barrel to the new premises. The act on part of the accused persons has caused grave hardship - physically, mentally and financially. It is submitted that the non-disclosure of the status with the ASI and despite categorical prohibition to put up construction, the scheme was launched and therefore, the intention of cheating was evident. It is submitted that despite there being no change in the stand of ASI and there being a communication on record to that effect, still the Company continued to receive payment as per the application form.

10.1 It is submitted that the impugned order U/s 156(3) is not an order which amounts to taking of cognizance. Therefore after recording of the statement as verification it cannot be said that cognizance is taken and an order U/s 156(3) amounts to pre-cognizance stage. He has emphasized upon the language of provisions contained in Section 156(3), Section 190 as well as Chapter 15 of the Cr.P.C. to justify the action of the Magistrate.

10.2 It is strongly submitted that when the order for investigation was passed U/s 156(3) Cr.P.C. the accused persons have participated in such proceedings till the filing of the Report. So now it is not open for the accused persons to contend that the issuance of process is reverting back to pre-cognizance stage or cognizance is taken twice. He relied upon judgment of this Court in case of [Rilesh Batukbhai Beladia Vs. State of Gujarat](#), 2015 3 GLR 2650.

10.3 Mr. Desai thereafter, relied upon Supreme Court in case of [HDFC Security Ltd. Vs. State of Maharashtra](#), 2017 1 SCC 640. He specifically relied on Paras 15 and 24, which read as under:-

"15. We are of the considered opinion that in the present case a fact finding investigation was directed by the impugned order. Consequently, FIR was registered against appellants No.2 to 4 and against RM (Vinod Kopar). The accused under Indian Criminal Legal System, unless proved guilty shall always be given a reasonable space and liberty to defend himself in

accordance with the law. Further, it is always expected from a person accused of an offence pleading not guilty that he shall cooperate and participate in criminal proceedings or proceedings of that nature before a court of law, or other Tribunal before whom he may be accused of an 'offence' as defined in Section 3(38) of the General Clauses Act, i.e., an act punishable under the Penal Code or any special or local law. At the same time, courts, taking cognizance of the offence or conducting a trial while issuing any order, are expected to apply their mind and the order must be a well reasoned one.

24. It appears to us that the appellants approached the High Court even before the stage of issuance of process. In particular, the appellants challenged the order dated 04.01.2011 passed by the learned Magistrate under Section 156(3) of Cr.P.C. The learned counsel appearing on behalf of the appellants after summarizing their arguments in the matter have emphasized also in the context of the fundamental rights of the appellants under the Constitution, that the order impugned has caused grave inequities to the appellants. In the circumstances, it was submitted that the order is illegal and is an abuse of the process of law. However, it appears to us that this order under Section 156(3) of Cr.P.C. requiring investigation by the police, cannot be said to have caused an injury of irreparable nature which, at this stage, requires quashing of the investigation. We must keep in our mind that the stage of cognizance would arise only after the investigation report is filed before the Magistrate. Therefore, in our opinion, at this stage the High Court has correctly assessed the facts and the law in this situation and held that filing of the petitions under Article 227 of the Constitution of India or under Section 482 of Cr.P.C., at this stage are nothing but premature. Further, in our opinion, the High Court correctly came to the conclusion that the inherent powers of the Court under Section 482 of Cr.P.C. should be sparingly used. In these circumstances, we do not find that there is any flaw in the impugned order or any illegality has been committed by the High Court in dismissing the petitions filed by the appellants before the High Court. Accordingly, we affirm the order so passed by the High Court dismissing the writ petitions. The appeal is dismissed."

10.4 Mr. Desai next relied upon in case of [Surendra Mangal Kathia Vs. Bai](#)

[Narmada Wd/o Jethalal Khemchand](#), 1963 GLR 833. to support his contentions that non disclosure of correct facts by seller to intended purchaser pertaining to power or interest of the seller would amount to dishonest concealment.

10.5 Shri Desai then relied on a judgment of Allahabad High Court in case of [Revendra Alias Hawaldar vs. State of Uttar Pradesh](#), 2008 CrLJ 1986 to contend that the petitioners who are named accused in the FIR ordered to be registered U/s 156 (3) Cr.P.C. have no locus to challenge the order U.s 156(3).

[11] The Court has taken into consideration the arguments advanced on behalf of both the parties and the documents annexed with these petitions as well as provided for during the course of arguments.

[12] The Apex Court in the case of Pepsi Foods Limited examined the power of the High Court under Articles 226 and 227 of the Constitution of India and Section 482 of the Code. The Apex Court observed that summoning of an accused in a criminal case is a serious matter and that the criminal law cannot be set into motion as a matter of course. Before passing an order of summoning of an individual as an accused, the Magistrate is required to examine the nature of allegations made in the complaint and evidence both - oral and documentary in support thereof that would be sufficient to bring home the charge for which the accused is sought to be tried. It is also requires that the Magistrate should find out the truthfulness of allegations or otherwise and then examine if any offence is prima-facie committed by any of the accused. Considering the power of the Magistrate to discharge a case at any stage of the trial, vis-a-viz Section 482 of the Code and Article 227 of the Constitution of India and upholding that the provisions of Articles 226 and 227 of the Constitution of India and Section 482 of the Code are devised to advance justice and not to frustrate it. On such principles, the Apex Court set aside the order of the High Court in hand interfering in the facts of this case on the ground that an option was available to the party under Section 245 of the Code.

[13] In the case of Dhariwal Tobacco Products , the Apex Court has observed that issuance of summons as a non interlocutory order and in Paragraph 7 has held that jurisdiction of the High Court would not be barred only because the revisional jurisdiction could also be available. While examining the question where an application under

Section 482 of the Code can be dismissed only on the premise that an alternative remedy is available. Keeping the mentioned principles as laid down by the Apex Court, the Court proceeds further, examined this case holding that this Court would be within its powers to exercise powers under Articles 226 and 227 of the Constitution of India and under Section 482 of the Code.

[14] In the facts of the present case, the question of passing the impugned order directing the registration of the First Information Report needs to be examined. A written complaint was filed before the Court of the Magistrate on 17.07.2012. On the same day, verification was recorded and again on the same day, passed an order under Section 156(3) of the Code. The order of 17.07.2012 directed that the investigation was to be carried out by a particular police station and an officer not below a particular rank and to submit a report on or before 20.08.2012. A report pursuant thereto was submitted on 25.07.2012, praying for grant of 'C' Summary.

[15] After submission of the report, the Magistrate has called upon the complainants of all the complaints of similar nature, passed an order on 09.04.2013 clubbing all the complaints to be tried together by exercising powers under Section 220 of the Code. Thereafter, on the same day, i.e. on 09.04.2013 the Court of the Magistrate have proceeded to pass the impugned order. The operative order is already produced in preceding para.

[16] The Apex Court in the case of Jamuna Singh and Others , it was observed as under:-

"9. In the case before us the Magistrate after receipt of Bhadai Sah's complaint proceeded to examine him under s. 200 of the Code of Criminal Procedure. That section itself states that the Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant and the witnesses present, if any, upon oath. This examination by the Magistrate under s. 200 of the Code of Criminal Procedure puts it beyond doubt that the Magistrate did take cognizance of the offences mentioned in the complaint. After completing such examination and recording the substance of it to writing as required by s. 200 the Magistrate could have issued process at once under s. 204 of the Code of Criminal Procedure or could have dismissed the complaint under s. 203 of the Code of Criminal Procedure. It was also open to him, before taking either of these courses, to take action under s. 202 of the Code of Criminal Procedure. That section empowers the

Magistrate to "postpone the issue of process for compelling the attendance of persons complained against, and either enquire into the case himself or if he is a Magistrate other than a Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint." If and when such investigation or inquiry is ordered the result of the investigation or inquiry has to be taken into consideration before the Magistrate takes any action under s. 203 of the Code of Criminal Procedure.

10. We find that in the case before us the Magistrate after completing the examination under s. 200 of the Code of Criminal Procedure and recording the substance of it made the order in these words:-

"Examined the complaint on s.a. The offence is cognizable one. To S.I. Bakunthpur for instituting a case and report by 12.12.56. If the learned Magistrate had used the words "for investigation" instead of the words "for instituting a case" the order would clearly be under s. 202 01' the Code of Criminal Procedure. We do not think. that the fact that he used the words "for instituting a case" makes any difference. It has to be noticed that the Magistrate was not bound to take cognizance of the offences on receipt of the complaint. He could have, without taking cognizance, directed an investigation of the case by the police under s. 156(3) of the Code of Criminal Procedure. Once however he took cognizance he could order investigation by the police only under s. 202 of the Code of Criminal Procedure and not under s. 156(3) of the Code of Criminal Procedure. As it is clear here from the very fact that he took action under s. 200 of the Code of Criminal Procedure, that he had taken cognizance of the offences mentioned in the complaint, it was open to him to order investigation only under s. 202 of the Code of Criminal Procedure and not under s. 156(3) of the Code. It would be proper in these circumstances to hold that though the Magistrate used the words "for instituting a case" in this order of November 22, 1956 he was actually taking action under s. 202 of the Code of Criminal Procedure, 43 that being the only section under which he was in law entitled to act.

11. The fact that the Sub-Inspector of Police treated the copy of the petition of complaint as a first information report and submitted "charge-sheet" against the accused persons cannot make any difference. In the view we have taken of the order passed by the Magistrate on November 22, 1956, the report made by the police officer though purporting to be a report under s. 173 of the Code of Criminal Procedure should be treated in law to be a report only under s. 202 of the Code of Criminal Procedure.

[17] In the case of Tula Ram and Others , the Apex Court has held as under:-

"10. Mr. Mukherjee however submitted that the moment the Magistrate directed investigation he must be deemed to have taken cognizance, and, therefore, he could not have taken any of the steps excepting summoning the accused straightway or directing re-investigation. We have already pointed out that Chapter 12 and Chapter 14 subserve two different purposes. One pre-cognizance action and the other postcognizance action. That fact was recognised by a recent decision of this Court in the case of [Devarpalli Lakshminarayana Reddy v. V. Narayana Reddy](#), 1976 AIR(SC) 1672 where the Court observed as follows : (at pp. 1677, 1678 of AIR):

"The power to order police investigation under S. 156(3) is different from the power to direct investigation conferred by Sec. 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under S. 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3)."

11. XXX

12. XXX

14. In these circumstances, we are satisfied that the action taken by the Magistrate was fully supportable in law and he did not commit any error in recording the statement of the complainant and the witnesses and thereafter issuing process against the appellants. The High Court has discussed the points involved thread bare and has also cited number of decisions and we entirely agree with the view taken by the High Court. Thus on a careful consideration of the facts and circumstances the following legal propositions emerge:

1. That a Magistrate can order investigation under S. 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in case not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Sec. 202 of the Code."

[18] This Court in the case of Parshottambhai Karshanbhai Surani and Others after taking into consideration the pronouncement of the Apex Court examined the issue that the procedure adopted by the Magistrate under Section 200 of the Code would amount to the Magistrate taking cognizance of the offences mentioned in the complaint and proceeded to hold as under:-

"16. In light of the decisions cited hereinabove, the only answer to the said issue can be that once having taken cognizance of the offence by examining the complainant on oath and directing the police to investigate the case under section 202 of the Code, it was not legally permissible to the learned Judicial Magistrate to switch back to the pre-cognizance stage and direct inquiry under section 156(3) of the Code. Though the order dated 13th November, 2007 does not clearly specify the provision under which it is made, considering the fact that the said direction has been given after examining the complainant on oath, the same can be construed to be an order under section 202(1) alone, as that is the only provision under which such direction could have been issued post-cognizance. In the

circumstances, the impugned order dated 14th November, 2007 suffers from the legal infirmity of being contrary to the statutory provisions and as such cannot be sustained."

[19] On this point, the Apex Court in the case of [Madhao and Another v. State of Maharashtra and Another](#), 2013 5 SCC 615 has clearly held as under:-

'17. In CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd. while considering the power of a Magistrate taking cognizance of the offence, this Court held : (SCC p. 471, para 10)

"10... Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath; the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure."

It is clear that any Judicial Magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code.

If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.

18. When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence

and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3)."

19.1 Reliance is placed on the judgment of Apex Court in case of India Carat (P) Ltd by the complainant side more particularly in Para 9 where Supreme Court has referred to provision of chapter 12, 14, 15 and 16 of Cr.P.C. and in para 13 has held as under:-

"13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The Magistrate may take cognizance of the offence at once and proceed to record statements of the complainant and the witnesses present under Section 200. After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint under Section 203. On the other hand if in his opinion there is sufficient ground for proceeding he may issue process under Section 204. If, however, the Magistrate thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the

matter and submit a report under Section 173(2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(c) and issue process straightaway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report 726 under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued."

19.2 However, in the facts of this case the offence was registered in the police station and there was not procedure before the Magistrate Court U/s 200 Cr.P.C..

There was no verification nor an order U/s 156(3) Cr.P.C. unlike the present case. The Apex Court thereafter referring to the earlier judgment in case of "Abhinandan Jha" & H.S. Bains said that after the report is received from the Investigation it is open for Magistrate to defer from the opinion and take cognizance of offence U/s 190 (1) (b) though report may opine that no offence is made out. However, in the cases' before the Supreme Court it is clearly coming out that prior to order U/s 156(3) or the report by police pursuant thereto the cognizance of the offence was not taken unlike in the present case where even before passing the order U/s 156(3) the Magistrate has taken cognizance of the offence when he proceeded to record the verification and the order impugned itself suggest so. The appearance of phrase 'a Magistrate taking cognizance.' both in Section 200 and Section

204 leaves no room of doubt that once Magistrate embarks upon any procedure prescribed under these 2 sections the cognizance is taken.

[20] Therefore, considering the ruling of the Apex Court on the point of cognizance and applying the same to the facts of this case, it is apparent that when the Magistrate in the instant case had examined the witness on oath, a cognizance is said to have been taken and thereafter, passing an order under Section 156(3) of the Code would take the case back to the pre-cognizance stage, which is not acceptable in law. Not only this, there appears to be another error where the Magistrate has thereafter called for the report of the investigation and after considering the Report filed by the investigating agency praying for 'C' Summary refused to accept the report and proceeded to take cognizance by issuing process under the impugned order. This procedure in view of this Court is not in conformity with the Scheme of the Code. The impugned order therefore cannot be upheld. Initially the illegality of first taking cognizance and thereafter taking the matter back to the pre-cognizance stage cannot be cured by acting on the report thereafter, again taking cognizance as if the same is pursuant to the initial order after recording the verification. The Court is therefore, persuaded to hold that the impugned order deserves to be quashed and any action pursuant thereto should also fail.

[21] Now examining the facts of the present case and as is recorded in the preceding paragraphs, chronologically it would suggest that Albina succeeded in purchasing a plot of land belonging to a closed mill in an auction for the purpose of developing residential cum commercial scheme. On account of the proximity of the land to a particular archaeological site, the permission from ASI being necessary, the same was pursued by Albina. Being a commercial venture for the Company, simultaneously a scheme was also floated in public inviting applications from interested persons, on conditions prescribed. It would be relevant to reproduce here the conditions mentioned in the application form which were meant for provisional reservation of residential premises in the Scheme of Albina. This application form was filled by interested parties including the complainant. One of the conditions reads as under:-

"In the event of the Company deciding to provisionally reserve an Apartment, I/we agree to pay further installments of Total Sale Price and all other dues as stipulated in this Application and/or the Apartment Buyers Agreement and the Payment Plan as mentioned by the Company.

I/We have clearly understood that this application does not constitute a binding Agreement to Sell and I/We do not become entitled to the provisional and/or final allotment of an Apartment despite the fact that the company may have issued a receipt in acknowledgment of the money tendered with this application. It is only after I/We sign and execute the Apartment Buyers Agreement on the Company's standard format agreeing to abide by the terms and conditions laid down therein that the allotment shall become final and terms of such Agreement binding upon both the Company as well as me/us. I/We are making this application with the full knowledge that the building plans for the building in which the Apartment applied for is located are not yet sanctioned by the competent authority. If the Company, for any reason/s other than the reasons attributable to me/us, is not in a position to execute an Apartment Buyers Agreement within a period of twenty four Months from the date of this Application, the Company has the option to refund the Provisional Reservation Money deposited by serving a 30 days notice along with simple interest at the rate of 6% per annum, which is the prevailing bank rate, for such period the amount has been deposited with the Company. I am making this application fully aware of the fact, that it shall not be open to me to seek cancellation of said booking and seek refund of Provisional Reservation Money.

I/We have also been shown all the documents pertaining to title of the parcel of the land over which the said Complex is going to be raised and I/We have also been informed of the other requirements, clearances, approvals, requisitions which the Company are in the process of obtaining which includes but are not limited to approval for Site Plan and Building Plan so as to give effect to raising construction of the said Complex."

[22] The documents thus signed by both the sides also included the definitions and interpretations applicable to both the parties and it contained definitions for "Application, Building, Provisional Reservation Money, Payment Plan, Total Sale Price" etc. Condition No.4 stipulated that the decision to make such an application is based on applicants own sound judgment, on the basis of terms and conditions mentioned in the application and after receiving of the necessary information. Condition No.11 provided for refund which reads as under:-

"11. The applicant(s) agree(s) that if the Company, for any reason/s other than the reasons attributable to me/us, is not in a position to execute an Apartment Buyers Agreement within a period of twenty four Months from the date of this Application, the Company has the option to refund the Provisional Reservation Money deposited by serving a 30 days notice along with simple interest at the rate of 6% per annum for such period the amount has been deposited with the Company."

[23] The Court having gone through this document closely is of the view that the complainant herein has used his sound discretion by going through the conditions mentioned in the application form. Having regard to all such conditions and having put his signature on the application form and this transaction therefore, appears to be a transaction of civil nature between the parties.

It is pertinent to note that on facts when the Albina group found the project to be non-viable commercially, it was constrained to take a certain decision. It appears from the record that non-viability of the project was taken on account of the passage of time and nonavailability of the requisite permission from ASI.

Therefore, Albina was justified in falling back on the terms of agreement when it was clearly stipulated that the building plans were yet to be sanctioned by the competent authorities and also provided for refund of provisional reservation money. It is apparent from the record that invoking such conditions, Albina has forwarded the money and that too alongwith interest at a rate higher than the rate of interest prescribed under the Agreement. This act in the opinion of the Court is an act pursuant to the agreed terms between the parties and would not attract in any manner, the ingredients of offences punishable under Sections 420 and 120(B) of the Indian Penal Code.

23(a) There is no quarrel with the proposition of law laid down by the Apex Court and canvassed strongly by the complainant side that civil remedy & simultaneously criminal proceedings can go on. Or put differently that resorting to civil remedy is not a bar to proceed in criminal prosecution. Para 13 & 14 of the Apex Court in case of V.Y. Jose may be usefully reproduced

herein.

"13. Section 415 of the Indian Penal Code defines cheating as under:

"Section 415.-Cheating-Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'."

14. An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:

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

(ii) fraudulently or dishonestly inducing any person to deliver any property; or 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."

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out."

23(b) This Court in a civil litigation of this very dispute had occasioned to examine the facts in case of Sushilaben Ramchandrabhai Shah and Ors. vs.

Albina Real Estate Ltd. and Ors. in order dated 22-7-2015 in Appeal from Order No.500 of 2014 has observed as under in Para 6 and 7:-

"6. Prima facie, thus it would appear that the defendant No.1 could not implement the scheme for construction of flats on account of nonavailability of permission from the Archaeological Survey Authorities. While abandoning the scheme, the defendant No.1 sold the land to defendant No.2, who framed a scheme for commercial construction. Such construction is also over. While abandoning the scheme, the defendant No.1 also offered to return to all plaintiffs booking and other amounts paid by them over a period of time, which, I am told, with 12% interest. However, the plaintiffs refused accept such amount, instead insisting on allotment of the flats.

7. In view of such facts, I do not see any error in the view of the learned trial Judge. At best, the plaintiffs can hope to press for liquidated damages. Even before that is done, the entire suit shall have to be tried. Payability of compensation for damages and its quantification cannot be decided at this stage. Nevertheless, it cannot be denied that the defendant No.1 would have to account for the booking and other amounts to the plaintiffs. To secure such amounts, the defendant No.1 shall deposit twice the entire booking and other amounts for all the plaintiffs who may not have already accepted return of the amounts before the trial Court latest by 14.08.2015. This would take care of the principal plus interest."

23(c) Therefore, not allotting the flats to the complainant side as per the agreement is to be perceived as inability of Albina to implement the scheme due to lack of necessary permission.

23(d) The Court therefore is persuaded to hold that there was no intention on part of the petitioners to cheat at the time when the application for reservation of flat was made along with prescribed amount paid. The overall facts disclose only a dispute of civil nature which cannot permitted to be given criminal colour.

[24] Over and above this, the Court has also perused the Report submitted by the investigating agency pursuant to the directions of the Magistrate Court and from that report also, it appears that the evidence recorded does not indicate that an offence has taken place.

24(a) The documents produced on record herein are already part of the record before the Magistrate. Magistrate has already referred to all such documents which demonstrates the stand of Albina and Safal. There is no gainsaying that the documents of the accused not to be relied. Moreover, the complainant side itself is basing its claim on such documents.

24(b) The judgment in case of Rilesh Batukbhai Beladia may not help the arguments of the complainant side as in that case the Court was examining the status of the case at the stage & order passed by Magistrate U/s 210 Cr.P.C. in any case in case before High Court 'No verification' U/s 200 was carried out unlike the present case.

24(c) The judgment in case of Surendra Kathia would not help the case of the complainant as in this case the High Court was examining on facts the concept of deception U/s 415 where there is concealment and such concealment of facts is dishonest. Whether such act is dishonest is open for both sides to argue. In the facts of the present case this Court finds that Albina & the complainant side having entered into an agreement containing clauses extensively. Nothing appears to be have been left to imaginations or amount to concealment the least. In case of [Iridium India Telecom Limited vs. Motorola Incorporated and Ors.](#), 2011 1 SCC 74, relied by Shri Karia on the point of liability of Director on the action of the Company reference is made to Para 68. Wherein reads as under:-

"68. 42. A bare perusal of the aforesaid section would show that it can be conveniently divided into two parts. The first part makes it necessary that the deception by the accused of the person deceived, must be fraudulent or dishonest. Such deception must induce the person deceived to: either (a) deliver property to any person; or (b) consent that any person shall retain any property. The second part also requires that the accused must by deception intentionally induce the person deceived either to do or omit to do

anything which he would not do or omit, if he was not so deceived.

Furthermore, such act or omission must cause or must be likely to cause damage or harm to that person in body, mind, reputation or property.

Thus, it is evident that deception is a necessary ingredient for the offences of cheating under both parts of this section. The complainant, therefore, necessarily needs to prove that the inducement had been caused by the deception exercised by the accused. Such deception must necessarily produce the inducement to part with or deliver property, which the complainant would not have parted with or delivered, but for the inducement resulting from deception. The explanation to the section would clearly indicate that there must be no dishonest concealment of facts. In other words, non-disclosure of relevant information would also be treated as a misrepresentation of facts leading to deception."

On facts as narrated hereinabove this Court is satisfied the Company or its office bearers cannot be attributed with non-disclosure of relevant information so as to amount to misrepresentation of facts.

24(d) The judgment of Allahabad High Court in case of Ravendra also may not have application to this case as the same pertains to the locus of Accused to challenge an order passed U/s 156 (3) which is precognizance stage. Here the cognizance is taken and process is issued.

[25] Section 420 of the Indian Penal Code which pertains to cheating and inducing of property essential requires to attract the ingredients of cheating as defined under Section 415. There has to be an element of inducing by the accused, there has to be a dishonest or fraudulent intention and there has to be delivery of property in the hands of such dishonest and fraudulent intent. A perusal of the complaint which contains the allegations do not reflect these ingredients. The complaint does not attribute a specific act or role to the accused person so as to attract these ingredients.

As a matter of fact, the Court is satisfied that the accused No.1,2,3,4,5 and 6

are the office bearers of Albina or India Bulls Ltd. They have never come face to the face with the complainant to make any false hopes or induce them into delivery of any property of fraudulent or dishonest intention. Similarly, the accused No.9 who came into the picture as a subsequent purchaser was not even privy to the written agreement, let alone having met the complainant. In absence of any specific allegations and vicarious liability being foreign to criminal prosecution, the complaint against these persons in any case could not be maintained. Therefore, implicating and everybody and anybody in the complaint demonstrates the tendency of the complainant to convert a civil procedure into a criminal prosecution. This act therefore, smacks of a malicious prosecution. Over and above, it has now come on record that civil suits are also filed for these very issues.

[26] The chronology of events mentioned herein does not suggest in any manner that there was a meeting of mind between all the accused persons even at time when the scheme was floated for public. There is no allegation also to that effect and therefore, the Court finds that not only there was no intention to cheat but there was no intention at the instance of the accused persons together when the application for reservation of flat or entry into. The Court is therefore, of the view that in absence of intention to cheat from the inception, prosecution for cheating cannot be maintained. Once the Court has found on facts that ingredients for the offences for examining the allegations in the complaint on record, which is now available after investigation, that when the offences are not made out for which cognizance is taken by the Magistrate Court, the arguments on behalf of the complainant regarding irregularities in conducting the investigation pursuant to the order of the Magistrate, the hasty manner in which the reports are submitted and the allegations of police having sided the accused persons during the course of investigation would pale into insignificance. The attempt therefore, in pursuing this prosecution appears to be used as a arm twisting technique to get a share.

[27] The fact situation that exists today is that the accused No.9 after due permission from the local authorities has already put up commercial construction, of which majority are already sold for. 2312 shops have been constructed, out of which 2044 are reported to be sold and BU permission is also granted. It is reported that under the original Scheme, 396 bookings were made by Albina. The scheme having not succeeded, Albina has refunded the reservation amount with interest @ 12% and 349 applicants have accepted the refund whereas 47 individuals have not accepted the refund but they

have filed Civil Suits to assert their rights. With the position having crystallized to this extent, the Court deems it fit to quash and set aside the impugned order dated 09.04.2013 passed by the learned Additional Chief Metropolitan Magistrate, Court No.2, Ahmedabad below Exhibit 1 in Criminal Case Nos.242/2013, 30/2012, 92/2012, 99/2012 and 175/2014. In the result, the First Information Report bearing M. Case No.1/2012 of Madhupura Police Station, Ahmedabad City is ordered to be quashed and set aside.

[28] The petitions being SCR.A Nos.1345, 1346, 1349, 1350, 1351, 1352, 1354, 1355, 1631, 1632, 1633, 1977, 1978, 1979 and 1980 of 2013, SCR.A Nos.5206, 5207, 5245 of 2014 and SCR.A No.4002 of 2015 are allowed. Rule is made absolute to the aforesaid extent. CR.MA Nos.23489, 23492, 23495 and 23496 of 2016 are rejected. No orders on CR.MA Nos.18463 to 18466 of 2017. Disposed of accordingly.

Sd/-

After pronouncement of the judgment, a request is made on behalf of the original complainant to stay this judgment. Considering the fact that this Court had already stayed the proceedings by interim directions and considering the present order, the request is refused.