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Reserved

Court No. - 16

1. Case :- U/S 482/378/407 No. - 4253 of 2012
Applicant :- M/S Fertico Marketing And Investment Pvt., Ltd., And Ors.
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Gaurav Gupta, Himanshu Hemant Gupta, Nandit K Srivastava, Yasovardhan Swaroop
Counsel for Opposite Party :- Birshwar Nath, Anurag Kumar Singh, S.B. Pandey
2. Case :- U/S 482/378/407 No. - 4251 of 2012
Applicant :- M/S Swastic Cement Products Pvt., Ltd., Chandauli And Anr.
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Gaurav Gupta, Himanshu Hemant Gupta
Counsel for Opposite Party :- Birshwar Nath
3. Case :- U/S 482/378/407 No. - 4252 of 2012
Applicant :- M/S Drolia Coke Industries Pvt., Ltd., Chandauli And Anr.
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Gaurav Gupta, Himanshu Hemant Gupta
Counsel for Opposite Party :- Birshwar Nath
4. Case :- U/S 482/378/407 No. - 4250 of 2012
Applicant :- M/S Jai Durga Industries And Anr.
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Gaurav Gupta, Himanshu Hemant Gupta
Counsel for Opposite Party :- Birshwar Nath
5. Case :- U/S 482/378/407 No. - 4446 of 2012
Applicant :- Sunil Kumar Singh
Opposite Party :- The State Of U.P Thru C.B.I.,
Counsel for Applicant :- Santosh Srivastav, P.C. Mishra, Syed Zafar Abbas Zaidi
Counsel for Opposite Party :- Bireshwar Nath
6. Case :- U/S 482/378/407 No. - 4553 of 2012
Applicant :- Shailendra Kumar Singh
Opposite Party :- The State Of U.P And Ors.
Counsel for Applicant :- Yashovardhan Swarup, Rajesh Kumar Pandey
Counsel for Opposite Party :- Govt. Advocate, Bireshwar Nath
7. Case :- U/S 482/378/407 No. - 4554 of 2012
Applicant :- Rajiv Poddar
Opposite Party :- The State Of U.P And Ors.
Counsel for Applicant :- Yashovardhan Swarup, Rajesh Kumar Pandey
Counsel for Opposite Party :- Govt. Advocate, Bireshwar Nath
8. Case :- U/S 482/378/407 No. - 4555 of 2012
Applicant :- Rajesh Kumar Gupta
Opposite Party :- The State Of U.P And Ors.
Counsel for Applicant :- Yashovardhan Swarup, Rajesh Kumar Pandey
Counsel for Opposite Party :- Govt. Advocate, Bireshwar Nath

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- 9. Case :- U/S 482/378/407 No. - 4556 of 2012**
Applicant :- Dinesh Kumar Srivastava
Opposite Party :- The State Of U.P And Ors.
Counsel for Applicant :- Yashovardhan Swarup,Rajesh Kumar Pandey
Counsel for Opposite Party :- Govt. Advocate,Bireshwar Nath
- 10. Case :- U/S 482/378/407 No. - 4682 of 2012**
Applicant :- Vinay Kumar Agarwal And Anr.
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Himanshu Hemant Gupta,Ashwariya
Sinha,Gaurav Gupta
Counsel for Opposite Party :- Bireshwar Nath
- 11. Case :- U/S 482/378/407 No. - 4683 of 2012**
Applicant :- Jay Narayan Agarwal And Anr.
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Himanshu Hemant Gupta,Ashwariya
Sinha,Gaurav Gupta
Counsel for Opposite Party :- Bireshwar Nath
- 12. Case :- U/S 482/378/407 No. - 4684 of 2012**
Applicant :- Vinay Kumar Agarwal And Anr.
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Himanshu Hemant Gupta,Ashwariya
Sinha,Gaurav Gupta
Counsel for Opposite Party :- Bireshwar Nath
- 13. Case :- U/S 482/378/407 No. - 4852 of 2012**
Applicant :- Ramji Singh
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- Anand Dubey
Counsel for Opposite Party :- Bireshwar Nath
- 14. Case :- U/S 482/378/407 No. - 4904 of 2012**
Applicant :- Yogendra Nath Pandey
Opposite Party :- C.B.I., Anti Corruption Branch Lucknow And Anr.
Counsel for Applicant :- K. Saran,Alok Saran,Rajul Kumar Vaish
Counsel for Opposite Party :- Bireshwar Nath
- 15. Case :- U/S 482/378/407 No. - 5013 of 2012**
Applicant :- Aftab Ahmad And Anr.
Opposite Party :- The State Of U.P Thru C.B.I., Lucknow
Counsel for Applicant :- P.C Mishra
Counsel for Opposite Party :- Bireshwar Nath
- 16. Case :- U/S 482/378/407 No. - 5014 of 2012**
Applicant :- Iqbal Ahmad Khan
Opposite Party :- The State Of U.P Thru C.B.I., Lucknow
Counsel for Applicant :- P.C Mishra
Counsel for Opposite Party :- Bireshwar Nath
- 17. Case :- U/S 482/378/407 No. - 5015 of 2012**
Applicant :- Sanjeev Kumar Singh And Anr.
Opposite Party :- The State Of U.P Thru C.B.I., Lucknow
Counsel for Applicant :- P.C Mishra
Counsel for Opposite Party :- Bireshwar Nath

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18. Case :- U/S 482/378/407 No. - 5016 of 2012

Applicant :- Shahnawaz Ahmad

Opposite Party :- The State Of U.P Thru C.B.I., Lucknow

Counsel for Applicant :- P.C Mishra

Counsel for Opposite Party :- Bireshwar Nath

19. Case :- U/S 482/378/407 No. - 614 of 2013

Applicant :- Ravinder Aggrawal

Opposite Party :- C.B.I Anti Corruption Branch Lucknow And Anr.

Counsel for Applicant :- Ashwarya Sinha, Himanshu Hemant Gupta

Counsel for Opposite Party :- Bireshwar Nath

20. Case :- U/S 482/378/407 No. - 615 of 2013

Applicant :- Ravinder Aggarwal

Opposite Party :- C.B.I Anti Corruption Branch Lucknow And Anr.

Counsel for Applicant :- Ashwarya Sinha, Himanshu Hemant Gupta

Counsel for Opposite Party :- Bireshwar Nath

21. Case :- U/S 482/378/407 No. - 616 of 2013

Applicant :- Subhash Chand Tulsian And Anr.

Opposite Party :- C.B.I Anti Corruption Branch Lucknow And Anr.

Counsel for Applicant :- Ashwarya Sinha, Himanshu Hemant Gupta

Counsel for Opposite Party :- Bireshwar Nath

22. Case :- U/S 482/378/407 No. - 617 of 2013

Applicant :- Sh. Subhash Chand Tulsian

Opposite Party :- C.B.I Anti Corruption Branch Lucknow And Anr.

Counsel for Applicant :- Ashwarya Sinha, Himanshu Hemant Gupta

Counsel for Opposite Party :- Bireshwar Nath

23. Case :- U/S 482/378/407 No. - 618 of 2013

Applicant :- Gajraj Kumar Jain And Anr.

Opposite Party :- C.B.I Anti Corruption Branch Lucknow And Anr.

Counsel for Applicant :- Ashwarya Sinha, Himanshu Hemant Gupta

Counsel for Opposite Party :- Bireshwar Nath

Hon'ble Dinesh Kumar Singh, J.

1. This is second round before this Court after these cases have been remitted back by the Supreme Court vide judgment and order dated 17th November, 2020 passed in Criminal Appeal Nos. 760-764 of 2020 and, other connected criminal appeals, for decision by this Court on three questions, which were framed vide order dated 24.02.2015, but not dealt with by this Court in its final judgment and order dated 14th August, 2019 passed in these cases, which was challenged before the Supreme Court in the afore-mentioned criminal appeals.

2. This Court did not deal with the three questions in its judgment dated 14.08.2019 as the learned counsels, appearing for the petitioners herein, at the time of final arguments pressed only first question. Be

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that as it may, since the Supreme Court has remitted back the matters to this Court for decision on Question Nos. 2, 3 and 4, this Court has proceeded to hear the arguments of the learned counsels, representing the petitioners as well as the learned counsel, representing the Central Bureau of Investigation.

3. Vide order dated 24th February, 2015 Hon'ble Vishnu Chandra Gupta (since retired) had framed the following four questions for determination:-

"Q.No.1. Whether the investigation conducted by the CBI in these bunch of cases are illegal and without jurisdiction for non-compliance of section 6 of DSPE Act? If so, its effect?"

Q.No. 2. Whether the cases are overwhelmingly and predominanting of civil nature as purely based on breach of contract (FSA) and the criminal prosecutions are liable to be quashed?"

Q. No. 3. Whether CBI did not follow doctrine of parity in filing the criminal prosecutions against the petitioners? If so, its effect?"

Q. No. 4. Whether in absence of Officer/official of NCL, charge of Criminal conspiracy under section 120-B IPC could be made out?"

4. Hon'ble Judge was not in agreement with the view taken by another Single Bench in its judgment in the case of *Srinivas Dwivedi Versus The State of U.P. through S.P., CBI/ACB, Lucknow* in a petition under Section 482 CrPC, being Petition No.3830 of 2013, decided on 9th September, 2013 on the issue of consent by the State Government, permitting the investigation under the Delhi Special Police Establishment Act, 1946 (for short 'DSPEA') and, therefore, referred the following two questions for decision by the Division Bench:-

"1. Whether investigation of such cases having involvement of Public servant under control of State Government of U.P. as well as private individuals for offences punishable under the Prevention of Corruption Act, 1988 (49 of 1988), and attempts, abetments and conspiracies in relation to all or any of the offence or offences mentioned above and any other offence or offences committed in the course of the transaction and arising out of the same facts under the G.O. of State Government

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Dated 15.6.1989 can be investigated by CBI assuming suo moto jurisdiction under section 6 of DSPE Act without the previous permission or consent of State Government?

2. Whether total non compliance / absence of previous consent of State Government under section 6 of DSPE Act could be cured by grant of prosecution sanction under section 197 Cr.P.C. of under section 19 of P.C. Act by State Government or competent authority?"

5. The Division Bench vide its judgment and order dated 6th July, 2015 answered the reference in following manner:-

"Our answer therefore to question no.1 is that since the question as framed proceeds on an erroneous premise of facts available in the case, the same is answered by holding that the Government Order dated 15.6.1989 permits investigation and it was not a case of assuming suo motu jurisdiction by the CBI to investigate on the facts of the present case.

The second question framed by the learned Single Judge is returned unanswered in view of the fact that the affidavit of the State Government had not been invited by the learned Single Judge before proceeding to raise a doubt and frame the second question to be answered in this reference as observed above.

With the aforesaid answers to the two questions framed, let the papers be placed before the concerned court for proceeding in the matter in accordance with law."

6. After the case was remitted back by the Division Bench, this Court vide its final judgment and order dated 14th August, 2019 concluded the issue of sanction by the State Government as under:-

"36. From perusal of the affidavit of the Principal Secretary, Department of Home, Government of Uttar Pradesh, it is evident that the Government has granted the post facto consent vide notification dated 7.9.2018 against the two public servants of the State Government whose names have figured during the course of investigation. The consent given by the State Government vide order dated 7.9.2018 would deem to be sufficient for investigation by the C.B.I. of offences against the two public servants of the State Government whose names find place in the charge sheet, but were not named in the F.I.R. In cases where the name of a public servant is not in the F.I.R., but his name comes to light during the course of investigation and, charge sheet is filed against such a public servant of the State Government, the consent given after completion of investigation would be a valid consent under Section 6 of the

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DSPE Act. It is also relevant to mention here that cognizance has been taken by the competent court of law. The question of valid consent can be raised by the public servants, who have been named in the First Information Report, and not by the private individuals who have come before this Court."

This Court dismissed the petitions with following observations:

"41. This Court has failed to appreciate that how the petitioners are prejudiced even if there is no consent in respect of the public servants whose names have figured during the course of investigation and against whom charge sheets have been filed and, after sanction under Section 19 of the Prevention of Corruption Act, the cognizance has been taken against them along with private entities/individuals. The public servants who have been named in the charge sheet, have not come forward to this Court challenging the investigation or charge sheets, but the private individuals have come before this Court on the ground that the substance of charge is only under Section 120-B read with Section 13(2)/13(1)(c) of the Prevention of Corruption Act and, if the prosecution fails in case of the public servants, the prosecution will also fail against them. However, the aforesaid contention has been rejected in the previous paragraphs. There is no prejudice caused to the petitioners even if it is assumed that there was no proper consent of the State Government under Section 6 of the DPSE Act."

7. The aforesaid judgment and order dated 14th August, 2019 came to be challenged before the Supreme Court. The Supreme Court vide final judgment and order dated 17th November, 2020 had upheld the judgment and order dated 14th August, 2019 passed by this Court and, remitted back the matter for decision on Question Nos. 2, 3 and 4 by observing as under:-

"21. In the result, we find no reason to interfere with the finding of the High Court with regard to not obtaining prior consent of the State Government under Section 6 of the DSPE Act.

22. However, it could be noticed that the learned Single Judge while referring two questions to the Division Bench, had observed that the question Nos. 2, 3 and 4 can be decided only after the question No. 1 was answered. After the matter was returned to the learned Single Judge by the Division Bench, the learned Single Judge was bound to answer question Nos. 2, 3

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and 4. The learned Single Judge, in the impugned order, has not at all dealt with question Nos. 2, 3 and 4.

23. We, therefore, remit the matter to the learned Single Judge for deciding the question Nos. 2, 3 and 4 on its own merits. We clarify, that we have not considered the merits of the matter and all questions available to both the parties are kept open."

8. Some of the facts, though they may appear to be repetitive, but are important to be narrated for decision on Question Nos. 2, 3 and 4, referred to above. In '**Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others (2007) 2 SCC 640**, the validity/legality of the Scheme framed by the Coal India Limited for sale of coal by e-Auction to the non-core sectors and traders came to be challenged. The Supreme Court set-aside the policy of e-Auction of coal and, issued directions to frame a New Coal Distribution Policy (for short 'NCDP'). The Supreme Court concluded the judgment in *Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others* (supra) as under:-

"188. Coal being a scarce commodity, its utility for the purpose for which it is needed is essential. Although, technically, in view of the fact that no price is fixed for coal, there may not be any black marketing in the technical sense of the terms; but this Court cannot also encourage black marketing in general sense. Nobody should be allowed to take undue advantage while dealing with a scarce commodity. The very fact that despite best efforts of the Central Government, the coal companies failed to curb the menace of a section of people and to deal in coal excluding other general people therefrom or the linked consumers misusing their position of obtaining allotment of coal either wholly or in part, it is absolutely necessary that some mechanism should be found out for plugging the loopholes. The Union of India or the coal companies appear to have lost confidence in the State Governments. They had carried out joint inspection and in that process they must have arrived at a satisfaction about the genuineness of the claims of industrial units for which the linkage system was meant for.

189. Before us most of the consumers, with a view to obtain supply of coal had filed documents to prove their genuineness. The said documents must be scrutinised by the authorities of the coal companies. In the event, they have any suspicion,

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inspection should be carried out by officers appointed by the Chairman-cum-Managing Director of the company concerned within whose jurisdiction the unit is situated.

190. *With a view to evolve a viable policy, a committee should be constituted by the Union of India with the Secretary of Coal being the Chairman. In such a committee, a technical expert in coal should also be associated as most of the projects involve consumers of coal, particularly manufacturers of hard coke and smokeless fuel. In our opinion, it may not be difficult to find out, having regard to the technologies used therein as regards the ratio of the input vis-à-vis the output, with a balance and 10% margin. On the basis of such finding alone, apart from the requirements of five years, supply should form the basis of MPQ. We may, however, hasten to add that the Central Government in collaboration with the coal companies would be at liberty to evolve a policy which would meet the requirements of public interest vis-à-vis the interest of consumers of coal. They would be entitled to lay down such norms as may be found fit and proper. They would be entitled to fix appropriate norms therefor. In the event, any industrial unit is found to violate the norms, it should be stringently dealt with.*

191. *Hard coke plants are also coal mines within the meaning of the Colliery Control Order, 2000. Hard coke is coal within the meaning of the provisions thereof. The Central Government, therefore, may think it fit to widen the definition of coal so as to include the smokeless coal in exercise of its power under the Essential Commodities Act. We may notice in ONGC [1990 Supp SCC 397] that this Court has held that slurries are a part of coal and is governed by the provisions of the Mines and Minerals (Regulation and Development) Act. Such being the wider definition of coal, we fail to see any reason as to why proper measure cannot be taken by the Union of India to have a complete control thereover. Any strict mechanism to find out the genuine consumers would go a long way in taking preventive measures and dealing with coal by unscrupulous persons for unauthorised purposes. Those who do so, should be dealt with stringently but the same would not mean that the genuine consumers should suffer for want of coal.*

192. *We, in the peculiar facts and circumstances of this case, are of the opinion that it may not be difficult to find out as to who the genuine consumers are. So far as owners of the hard coke ovens are concerned, they are members of the association and their identity can easily be verified.*

193. *However, discussions made hereinbefore should not be taken to lay down a law that the Central Government and for that matter the coal companies cannot change their policy*

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decision. They evidently can; but therefor there should be a public interest as contradistinguished from a mere profit motive. Any change in the policy decision for cogent and valid reasons is acceptable in law; but such a change must take place only when it is necessary, and upon undertaking of an exercise of separating the genuine consumers of coal from the rest. If the coal companies intend to take any measure they may be free to do so. But the same must satisfy the requirements of constitutional as also the statutory schemes; even in relation to an existing scheme e.g. Open Sales Schemes, indisputably the coal companies would be at liberty to formulate the new policy which would meet the changed situation. E-advertisement or e-tender would be welcome but then therefor a greater transparency should be maintained."

9. The Coal India Limited framed a new policy, which was introduced with effect from 18th October, 2007. According to the new policy, Fuel Supply Agreements (for short 'FSA') were to be entered into between the Coal Companies and, the purchasers of the coal. The price of the coal was fixed and, notified by the Coal India Limited. Before entering into the FSA, the verification, whether the unit was in operation/working condition, its requirement of raw-material etc. were to be ascertained by the Coal Companies. Once the FSA was entered into, the coal was to be supplied on fixed price, in terms of the NCDP.

10. In respect of the leading case, which is of M/s Fertico, the FSA was entered into between the petitioners and the coal company (NCL) on 30th April, 2008. The FSA was a commercial arrangement for supply of coal on a fixed price. When the FSA was in existence, the Central Bureau of Investigation (for short 'CBI') conducted made a joint surprise check of the factory premises of the petitioners and, noticed large-scale diversion of coal allotted under the NCDP on notified rates in pursuance of the FSA in the black-market in active connivance with the government officials. By diverting the coal in the black-market, these companies made exorbitant profits by wrongful

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gains, which caused a substantial loss to the Central Government/Coal Company to the tune of Rs.36.28 Crores.

11. Similar raids were conducted in the factory premises of other petitioners and FIRs were registered against them by the CBI.

12. The petitioners-M/s Fertico Marketing & Investment Pvt. Ltd. situated at B-20, Industrial Area, Ram Nagar, District Chandauli (for short 'petitioner-Fertico Investment') is registered with U.P. State Industries Department as Small-Scale- Industry (for short 'SSI') for manufacturing Special Smokeless Fuel (SSF) from the raw-material i.e. coal obtained from the coal mine projects of Northern Coal Fields Limited (NCL) to be supplied under the NCDP on notified/subsidized rates. However, the CBI unearthed that the petitioner-Fertico Investment in active connivance with unknown officers/officials of District Industries Center (DIC), Chandauli; unknown officers/officials of NCL, Singrauli and others did not actually process the coal; instead the coal, so received, was sold in black market at a high premium.

13. The petitioner-Fertico Investment during the year 2010-11 lifted 30,569.86 metric-tonnes coal from NCL at an average price of Rs.1700/- per metric-tonne (notified/subsidized rate) and, sold the same at the rate of Rs.4,200/- per metric-tonne in black market. This notified/subsidized rate is the rate on which coal was supplied to Thermal Power Units of the Government of India.

14. The CBI, in the joint surprise check conducted on 25th March, 2011, noticed that the factory of the petitioner-Fertico Investment was in non-operational condition. An electric generator of 125 KVA was found installed in the factory. No power connection for the purpose of manufacturing SSF was found in the factory. The quality of coal, found available in the factory premises of the petitioner-Fertico Investment, did not match with the quality of coal being received by the petitioner-Fertico Investment from NCL. Samples of the coal from

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the factory premises of the petitioner-Fertico Investment were sent for testing the grade/quality. The Mechanical Examiner of coal, in his report, had stated that the quality of coal available in the factory premises of the petitioner-Fertico Investment was Grade-D, while the coal supplied to the petitioner-Fertico Investment by NCL was of Grade-B and Grade-C only. It was clear that coal available in the factory premises was kept for the namesake and, just to display the functional status of the factory to any inspection team.

15. Against the declaration of 18 labourers in the factory, only 04 were available. The conveyor system, bunker and retort of the coal handling plant were found in a dusty, non-lubricated and rusted condition and, it seemed that the plant was not in a functional condition for the last several months. The SSF, available in the factory premises of the petitioner-Fertico Investment, was tallied with their quantities shown in the books of the firm and, huge shortage was noticed.

16. The concept of SSF was developed by Central Mine Planning & Design Institute Limited (CMPDI) for large-scale production of domestic coke for meeting the progressive rise in demand of that type of fuel and, to minimize air pollution. As per technical specification, for a 100 tonnes per day SSF plant, the steam coal requirement would be 167 tonnes. The power supply to the plant should be 440 watt. The connected load was expected to be about 135 KW (including the power for standby equipment), the daily consumption of power would be about 1560 KW and, for a plant of 100 tonnes per day SSF, about 99 persons were required to be employed.

17. From the physical and technical inspection of the factory premises of the petitioner-Fertico Investment, it became very clear that the factory was not in operation for the last couple of years. However, the petitioner-Fertico Investment continued to take supply under the notified/subsidized rate from NCL and, would sell the same

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in the black-market at a high premium. During the period 2010-11, the petitioner-Fertico Investment lifted quantity of steam coal Grade-B (LF) 22618.67 metric-tonnes and Grade-C (LF) 8690.20 metric-tonnes, total steam coal 31303.94 metric-tonnes from NCL at notified/subsidized rates through road by trucks. The total load for faring the coal would be 1899 trucks. However, the coal was lifted by 284 trucks in several trips.

18. The CBI examined most of the owners of the trucks, which brought the coal from NCL and, allegedly unloaded in the factory premises of the petitioner-Fertico Investment. Three truck owners, covering 49 trucks' load and 748.66 metric-tonnes of coal confirmed in their statements that the coal loaded in their trucks from the projects of NCL was unloaded in the Chandasi Coal Market, Chandauli, instead of the factory premises of the petitioner-Fertico Investment. The distance between Chandasi Coal Market and Chandauli Industrial Area is around 15 kilometers.

19. The CBI also concluded that the diversion of coal taken from NCL on notified/subsidized rates in pursuance of the FSA in the black-market got corroborated from the fact that the Mobile Squad of the Commercial Tax, Varanasi, intercepted 4 trucks loaded with the coal from NCL for the factory premises of the petitioner-Fertico Investment going to Chandasi Coal Market. The instances of 4 trucks with their registration numbers have been given in the charge-sheet.

20. It is further recorded in the charge-sheet that on the notified/subsidized rates of B-Grade and C-Grade coal, the petitioner-Fertico Investment had purchased coal from NCL under the FSA and, the e-Auction rate of B-Grade and C-Grade of coal during 2010-11 was fixed to 1368/- per metric-tonn in case of B-Grade coal and Rs.2,421/- per metric-tonne in case of C-Grade coal. This e-Auction would be at-least at the market rate of B-Grade and C-Grade coal. It is also alleged that to camouflage the diversion of coal in the black-

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market, bogus sale of SSF was shown by the petitioner-Fertico Investment in its books. As per the record of the petitioner-Fertico Investment, the company had shown a sale of 18633.05 metric-tonnes of SSF and 7940.60 metric-tonnes undersized coal to different private parties through 880 trucks in the year 2010-11. Out of said 880 trucks, 181 vehicles were found other than trucks (motorcycle, tractor and bus etc.) and/or having unallocated registration numbers by the ARTOs of different districts. The owners/drivers of 47 vehicles, on their examination, stated that their trucks never loaded any coal or coal product from the factory premises of the petitioner-Fertico Investment. However, invoice of each sale had been prepared by the petitioner-Fertico Investment, mentioning therein date, type of commodity, weight, vehicle number and amount etc. In addition, sale of 4094.03 metric-tonnes SSF and 1461.74 metric tonnes undersized coal made through 227 vehicles had been established to be false and fabricated.

21. The CBI, in its investigation, has found that during the year 2010-11, to show the bogus sale of SSF/undersized coal, the petitioner-Fertico Investment forged the purchase and sale documents and, used them as genuine to NCL and Department of Commercial Tax. These sales have been fraudulently and dishonestly shown by accused, Anil Kumar Agrawal and Arun Kumar Agrawal, Directors of the petitioner-Fertico Investment and/or their close relatives. One of the Directors, accused Anil Kumar Agrawal was also the proprietor of firm M/s Anil Traders, Chandasi, Chandauli. Accused, Anil Kumar Tiwari, an employee of Munna Industries (Proprietor accused, Anil Kumar Agrawal) was the Proprietor of M/s Baba Enterprises, Chandauli. Similarly, accused Chandrama Yadav, working as labourer in the petitioner-Fertico Investment was Proprietor of M/s Yadav Traders, Chandauli and Mritunjay Kumar, a domestic help of accused Anil Kumar Agrawal was the proprietor of M/s Om Enterprises, Chandauli.

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Accused Anil Kumar Agrawal, with fraudulent and mala-fide intention constituted these firms viz. M/s Baba Enterprises, M/s Yadav Traders and M/s Om Enterprise and, got them registered with Commercial Tax Department, Varanasi for doing the business of coal in the name of his employees for re-routing coal as SSF. All the said four firms have been found indulging in bogus purchase of SSF/undersized coal by the petitioner-Fertico Investment.

22. The CBI further found that accused Jay Narayan Agrawal is brother-in-law of accused, Anil Kumar Agrawal, Director of the petitioner-Fertico Investment. He was the Director of M/s Ananda Coal Movers and, proprietors of two firms; M/s Shivam Coal Movers, Chandasi, Chandauli and M/s Trishul Industries, Chandauli. All these firms were found indulging in bogus purchase of SSF/undersized coal by the petitioner-Fertico Investment. Accused, Arun Kumar Agrawal, one of the Directors of the petitioner-Fertico Investment and, his brother, accused, Anil Kumar Agrawal were also Proprietors of M/s Surya Industries, Chandauli. This firm had been found indulging in bogus purchase of SSF/undersized coal by the petitioner-Fertico Investment.

23. According to the CBI, the petitioner-Fertico Investment criminally conspired with 11 different firms i.e. M/s Ananda Coal Movers, Pvt. Ltd. (owned by accused Jay Narayan Agrawal), M/s Om Enterprises (owned by accused Anil Kumar Agrawal), M/s Purnagiri Holding Pvt. Ltd., (owned by accused Subhash Chand Tulsyan and accused Muksh Kumar Tulsyan), M/s Anil Traders (owned by accused Anil Agrawal), M/s Baba Enterprises (owned by accused Anil Agarwal), M/s Shivam Coal Movers (owned by accused Jay Narayan Agarwal) M/s Shubhangi Traders (owned by accused Anand Shukla) M/s Surya Industries (owned by accused Arun Kumar Agrawal), M/s Trishul Industries (owned by accused Jay Narayan Agrawal), M/s Yadav Traders (owned by accused Anil Agrawal) and M/s Tulsyan Coal Syndicate (owned by accused Subhash Chand Tulsyan) and in

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furtherance of the said criminal conspiracy, M/s Shree Ram Fuel Pvt. Ltd fraudulently and dishonestly prepared bogus sale invoices in favour of the said firms and the said firms dishonestly/fraudulently reflected the said fake/bogus purchases as genuine in their records.

24. The CBI, in its charge-sheet, has detailed that how-much coal received from the NCL under FSA on notified/subsidized rate was diverted through these firms which was shown to have been purchased by these firms as SSF/undersized coal from the petitioner-Fertico Investment and, the CBI concluded that in the year 2010-11 itself a substantial amount of wrongful gain of seven crores rupees was made by the petitioner-Fertico Investment from diverting the coal received under the notified/subsidized rate in the black market.

25. The investigation by the CBI has also revealed that the coal supply to the petitioner/Fertico Investment was made after taking certification of the operational status from the State Industries Department i.e. District Industries Center (DIC). After allotment of coal by the concerned coal companies, the coal companies used to write to the units directly for verification and, send a copy of the letter to the DICs and the Directorate of Industries. On receipt of such letters from the coal companies, the DICs used to verify and send their report directly to the concerned coal companies. Sometimes, the coal companies used to write to the Directorate of Industries also for the same. It was further disclosed that on request of CIL in December, 2010, the Directorate of Industries, Kanpur forwarded formats I and II to all DICs for compliance.

26. The CBI, in its investigation, had further found that accused, Anil Kumar Agrawal had entered into a criminal conspiracy with accused Ramji Singh, General Manager, DIC, Chandauli and, in furtherance of the said criminal conspiracy, fraudulently and dishonestly sent false status reports regarding the working condition of the petitioner-Fertico Investment during the period June, 2010 to November, 2010 under his

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signature. Accused Ramji Singh, General Manager, DIC, Chandauli deliberately and, dishonestly concealed the real fact that the factory of the petitioners was not in operation. During this period, he sent month-wise false status reports to the Directorate of Industries, Kanpur for onward transmission to the NCL, Singrauli. On the basis of the month-wise status report duly signed by accused, Ramji Singh, the NCL supplied coal at a notified price to the petitioner-Fertico Investment. Further, from December, 2010 to February, 2011, the information regarding the end use and operational status of the petitioner-Fertico Investment was fraudulently and dishonestly submitted in Format No. I & II by accused, Anil Kumar Agrawal, Director of the petitioner-Fertico Investment along with affidavit and, in furtherance of the said criminal conspiracy, the same was fraudulently and dishonestly certified by accused, Ramji Singh, the then General Manager and accused, Yogendra Nath Pandey, Assistant Manager, DIC, Chandauli. These reports were sent by accused, Ramji Singh to the Directorate of Industries, Kanpur, who further sent the same to the General Manager, Sales, NCL, Singrauli. On the basis of the said false certificate regarding existence of the unit, its operational status and, end use of the coal, further supplies of coal were made to the petitioner-Fertico Investment by NCL and, thereby the accused obtained pecuniary advantage for themselves and, for other co-accused by corrupt and illegal means.

27. It has been further said that during the course of investigation role of the officers/officials of NCL and Coal India Limited was examined. As per the provisions of NCDP, CIL was to undertake verification of such consumers of erstwhile non-core sector in a time-bound manner, either directly or through an agency, so as to check the veracity of their claim of being bona fide consumers of coal for allocating coal to such consumers on notified rates. However, there were no clear-cut guidelines/methods regarding the verification of non-

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core sector and, Small Scale Industrial Units. As per the provisions of the FSA, the NCL was bound to supply the coal to the petitioner-Fertico Investment on the notified price. In absence of any clear-cut guidelines, no physical verification of the factory premises of the petitioner-Fertico Investment could take place. However, on the basis of the bogus/false verification certificate issued by DIC, NCL kept on supplying coal to the petitioner-Fertico Investment.

28. It is important to note here that the CBI could not find any incriminating evidence against the officers/officials of the NCL/CIL.

29. Heard Mr. Sri Ajit Kumar Sinha, learned Senior Advocate assisted by Mr. Himanshu H. Gupta, Mr. Yasovardhan Swaroop, Mr. Alok Kumar Singh and Mr. Aishwarya Sinha for the petitioners and Mr. Anurag Kumar Singh for the CBI and Mr. Rao Narednra Singh, learned AGA for the State.

30. After setting out the facts and findings of the CBI in its charge-sheet dated 13.04.2011 in brief, I would now deal with three questions, on which the Supreme Court, has remitted the matter back for decision by this Court .

"Q.No. 2. Whether the cases are overwhelmingly and predominantly of civil nature as purely based on breach of contract (FSA) and the criminal prosecutions are liable to be quashed?"

31. After the judgment of the Supreme Court in *Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others* (supra), the Government of India, Ministry of Coal, formulated 'New Coal Distribution Policy' and, published the same on 18th October, 2007 in supersession of existing coal distribution policy for core and non-core sectors and, other instructions issued in this regard from time to time.

32. Classification of consumers into core and non-core sectors was reviewed on the basis of new policy and, it was decided to dispense with the same. Instead, each sector/consumers was treated on merit,

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keeping in view, *inter alia*, the regulatory provisions applicable thereto and other relevant factors. Requirement of Defence Sector and Railways was to be met in full at notified price. For power utilities, including independent power producers/captive power plants and, fertilizer sector, under the new policy, 100 per cent quantity as per the normative requirement of the consumers was to be made through 'Fuel Supply Agreement' (for short 'the FSA') by CIL at fixed prices to be declared/notified by CIL. In respect of other consumers, it was provided that under the NCDP, 75% of the quantity as per the normative requirement of the consumers/actual users should be considered for supply of coal through FSA by CIL at notified prices to be fixed and declared by CIL and, balance 25% of coal requirement of the units was to be sourced by them through e-auction/import of coal etc, as per their preference.

33. All the existing linkage holders of erstwhile core and non-core sectors and, not having FSAs were required to be entered into FSAs with coal companies. It was further provided that distribution of coal to units where requirement was upto 4200 tonnes per annum, the distribution was to be done through agencies nominated by the State Government; in units, where requirement was more than 4200 tonnes per annum, coal was to be supplied directly from CIL/Subsidiary companies through FSAs. So far as the linked consumers of erstwhile non-core sector, whose annual requirement was less than 4200 tonnes, were concerned, they were given option to either enter into FSA with the coal company or they could opt out FSA regime and access their coal requirement through agencies nominated by State Governments. In respect of supply of coal to steel plants, it was provided that the same would be based on FSA. In respect of supply of coal to consumers in small and medium sector, it was provided that the State Governments would be requested to work out genuine requirement of such units in small and medium sector like smokeless

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fuel, brick kiln, coke oven units etc in a transparent and scientific basis and distribute coal to them accordingly. It was further provided that all the existing valid linked consumers, whose linkage/MPQ, during the year 2006-2007, was 4200 tonnes or more were to enter into FSAs with coal companies within six months from the date to be notified by CIL. The other valid linked consumers were given option to opt out of FSA regime or enter into FSA within six months. On opting out, such consumers could access their coal requirement through various channels i.e., e-auction, distribution network of State nominated agencies etc. Failure, to enter into FSA would result in discontinuation of supplies at fixed prices.

34. It was further provided that around 10% of the estimated annual production of CIL would be initially offered through e-auction and, the quantity to be offered under e-auction would be reviewed from time to time by the Ministry of Coal. It was for the CIL to undertake verification of erstwhile consumers/non-core sector consumer in a time bound manner, either directly or through an agency, so as to check the veracity of their claim of being *bonafide* consumers of coal and, thereafter, act accordingly.

35. The NCL on 19th March, 2008, intimated to the petitioners herein that under the New Coal Distribution Policy (for short 'NCDP') all the existing valid linked consumers, whose linkage/MPQ was 4200 tonnes or more, they were required to enter into FSAs with coal companies. Other valid linked consumers were having option to opt out of FSA regime or enter into FSA. On opting out, such consumers could access their coal requirement through various other channels, like e-auction, distribution net work of State nominated agencies etc. Failure to enter into FSA with the supplying coal company would result in discontinuation of supply at fixed price.

36. Pursuant to the aforesaid letter dated 19th March, 2008 written by the the Northern Coalfields Limited (for short 'the NCL') to the

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petitioners herein, a Fuel Supply Agreement dated 30th April, 2008 was entered into between NCL and the petitioners. The life of FSA was for five years. Clause 4.4 of the FSA specifically provided that the purchaser should not sell/divert and/or transfer the coal for any other purpose whatsoever and, the same shall be treated as material breach of agreement. In case of material breach, the NCL would terminate the agreement forthwith without any liability or damage whatsoever, payable to the purchaser. The NCL had right to verify including the right to inspect/call for any document from the purchaser and physically verify the ends-use of coal and satisfy itself to its authenticity.

37. Clause-14 provided dispute settlement mechanism.

38. Clause-15 provided that in the event the purchaser re-sells/diverts the coal pursuant to the agreement, the seller would have the right to terminate agreement forthwith and, the NCL would be entitled to forfeit the security deposit of the purchaser in addition to rights vested with the seller (NCL) upon such termination.

39. In pursuance of the aforesaid FSA, the petitioners furnished bank guarantee in favour of the NCL to the tune of Rs. 33,12,913/, which stood fortified.

40. After the first information report was registered by the CBI in the present case, the NCL on 23rd May, 2011 issued notice whereby supply of coal to the petitioners was kept in abeyance in the light of the FIR lodged by the CBI against the petitioners.

41. The learned counsel for the petitioners has submitted that the FSA is a bilateral commercial arrangement which provides mechanism for settlement of dispute and remedies available to the parties in case of a breach. In sum and substance, allegation against the petitioners is that they had breached the terms of the agreement inasmuch as they had allegedly diverted the coal, taken under FSA from NCL at notified price, in the black market at a high premium and for such a breach

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remedy is envisaged in the FSA itself. Further, it has been submitted that the NCL has already taken action under the FSA and, had forfeited the security deposit of Rs.33,12,913/-. Further it has been submitted that for violating the terms of the commercial contract, remedy lies in civil action and, no criminality can be attached to it. It is also submitted that the FSA provides mechanism to handle the situation in case buyer diverts the coal procured under FSA in the open market. Offence under Section 420 IPC is not attracted against the petitioners.

42. It is also submitted that it is well settled that a person to be held guilty of cheating, as defined under Section 415 IPC, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise with an intention to retain the property. Mere failure in complying with the promise would not amount to cheating. Allegation that the petitioners made false representation to enter into FSA for supply of coal by NCL at notified rates and, thereafter sold the coal in open market at high premium of Rs.2,500/- per metric tonnes was completely false. It is submitted that the CIL, in its reply dated 11.02.2010, under the Right to Information Act, had specifically (Annexure-14) informed that there was no subsidy/financial support from the Central Government to CIL and to its subsidiary coal companies for sale of coal under the FSA. The price derived through a process of e-auction could not have been the basis for drawing a conclusion that the coal taken under the FSA by the petitioners from NCL was diverted at a premium of Rs.2,500/- per metric tonne in the open market. Only 10 per cent of the total production of the CIL could have been sold through e-auction and, rest of the coal was to be supplied through FSA at a notified rate.

43. The learned counsel has also submitted that no offence under Sections 467, 468 and 471 IPC could be said to have been committed by the petitioners as there had been no fraudulent inducement prior to

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entering into the FSA nor any document or electronic document was forged for entering into the FSA. Even ingredients of Section 471 IPC are totally absent as there had been no allegation or evidence of using as genuine a forged document or electronic record. He has also submitted that offences under Sections 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act are not attracted against the petitioners as the same would be attracted when there is a criminal misconduct by a public servant. In support of submission that the present dispute is predominantly contractual in nature and arose from breach of commercial contract, he has placed reliance upon the following judgments:

- i.) *Anil Mahajan Vs. Bhor Industries Ltd. and another*, (2005) 10 SCC 228;
- ii.) *Gorige Pentaiah Vs. State of Andhra Pradesh and others*, (2008) 12 SCC 531;
- iii.) *V.Y. Jose and another Vs. State of Gujarat and another* (2009) 3 SCC 78;
- iv.) *V.P. Shrivastava Vs. Indian Explosives Limited and others*, (2010) 10 SCC 361
- v.) *Sushil Sethi and another Vs. The State Of Arunachal Pradesh and another*, (2020) 3 SCC 240:

44. In respect of Q.No. 3. "Whether CBI did not follow doctrine of parity in filing the criminal prosecutions against the petitioners? If so, its effect?", on behalf of the petitioners it has been submitted that the CBI in identical matter, involving the allegations of diversion of coal and re-sell of coal in open market, had filed closer report before the Special Judge, CBI, Dhandbad and, the same had been accepted by the Special Judge and final format of closure had been submitted. It was specifically recorded that no criminality could be pin-pointed and, the action could be taken under the Income Tax Act. Coal companies were asked to look into the lapses and, take required action for systematic improvement. The closure report has been placed on record with the supplementary affidavit filed on behalf of the petitioners dated 04.12.2013, which was accepted by the learned Special Judge, CBI. It is submitted that in case of *Babloo Kumar Vs. State of*

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Jharkhand and others, 2006 (3) JCR 144, the Jharkhand High Court quashed the FIR registered by the State police and, further proceedings on identical allegations of diverting the coal in the black-market on the ground that the police found allotment of coal and transport of the goods on valid documents and, nothing remained for further investigation by the police. He has said that the Special Leave Petition filed against the aforesaid order was dismissed by the Supreme Court vide order dated 01.12.2006, which has been annexed as Annexure-17. The learned counsel has also placed reliance in the case of ***Ajmer Singh Vs. State of Haryana (2010) 3 SCC 746, paras 23 to 29*** of which read as under:-

"23. The principle of parity in criminal case is that, where the case of the accused is similar in all respects as that of the co-accused then the benefit extended to one accused should be extended to the co-accused. With regard to this principle, it is important to mention the observation of this Court in Harbans Singh v. State of U.P. [(1982) 2 SCC 101 : 1982 SCC (Cri) 361] In that case it was held, that, in view of commutation of death sentence of one of the accused, who was similarly placed as that of the appellant, award of death sentence to the appellant was unjustified and hence, the death sentence of the appellant was stayed till the decision of the President on commutation of sentence.

24. An important observation of this Court on the point need to be noticed at this stage: (Harbans Singh case [(1982) 2 SCC 101 : 1982 SCC (Cri) 361] , SCC p. 107, para 18)

"18. ... it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is shared (sic spared)."

25. In Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra [(2003) 2 SCC 708 : 2003 SCC (Cri) 685] , this Court maintained that as the second accused was placed on the same situation as the appellant, Article 21 of the Constitution would not permit this Court to deny the same benefit to the second accused.

26. The Court of Appeal, Alberta, Canada in R. v. Christie [2004 ABCA 287 : 2004 Carswell Alta 1224 (CA)] discussed

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the meaning of the principle in connection with sentencing in criminal cases. The Court of Appeal stated:

“40. Parity is a principle which must be taken into account in any sentence, and particularly where the offence was a joint venture. There will, of course, be cases where the circumstances of the co-accused are sufficiently different to warrant significantly different sentences, such as where one co-accused has a lengthy related criminal record or played a much greater role in the commission of the offence.”

Thus, expressing its view on “parity in sentencing” the Court observed:

“43. What we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together, particularly in cases involving joint ventures.”

27. Also the observation of the Court of Appeal, Alberta in Wahby v. R. [2004 WASCA 308 : 2004 WL 3061688] , whereby, the Court quoted the explanation given in Goddard v. R. [(1999) 21 WAR 541] , is relevant for the discussion in the present case:

“In considering the application of the principle, all the circumstances of the case are to be taken into account; those concerned with the commission of the offence and those which are personal to the offender before the court and the co-offender. Where there are differences, as almost inevitably there will be, true parity will be produced by different sentences, each proportionate to the criminal culpability of each offender, bearing in mind, as is often said but is worth repeating, that sentencing is not and should not be a process involving a search for mathematical precision, but is an act of discretion informed by the proper application of sentencing principles to the particular case. Inevitably there will be a range of appropriately proportionate sentences which may be passed for the offence before the court.”

28. The Court of Appeal of the Supreme Court of Victoria, Australia in R. v. Hildebrandt [187 A Crim R 42 : 2008 WL 3856330 : 2008 VSCA 142] observed:

“Judicial expositions of the meaning of the parity principle are not entirely uniform. The term ‘the parity principle’ is used in at least two senses in the relevant authorities. First, to express the recognition that like cases should be treated alike (itself an emanation of equal justice). Secondly, the phrase is used to

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describe the requirement to consider the 'appropriate comparability' of co-offenders, and in that sense, comprehends the mirror propositions that like should be treated alike, and that disparate culpability or circumstances may mandate a different disposition."

29. *In Postiglione v. R. [(1997) 189 CLR 295 : 94 A Crim R 397] Dawson and Gaudron, JJ. stated:*

"The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated... Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality."

The Court, therefore, concluded the principle to mean:

"... the concept simply is that, when two or more co-offenders are to be sentenced, any significant disparity in their sentences should be capable of a rational explanation."

What can be inferred from the above decision is, that for applying the principle of parity both the accused must be involved in same crime and must be convicted in single trial, and consequently, a co-accused is one who is awarded punishment along with the other accused in the same proceedings."

45. With regard to Question No. 4 'Whether in absence of Officer/official of NCL, charge of Criminal conspiracy under section 120-B IPC could be made out, it is submitted that the prior meeting of minds of two or more persons is *sine-qua-non* for offence of criminal conspiracy. It is further submitted that an agreement must relate to doing or causing to be done either an illegal act or an act, which is not illegal itself, but it is done by illegal means. In the present case, the CBI did not find any criminality by the officers of the NCL/CIL. If the officers of NCL and CIL were not involved, it negates the possibility

of criminal conspiracy of the petitioners and the officers of the NCL inasmuch as for criminal conspiracy, the criminality of officers of NCL/CIL was to be established, but the CBI had not found any thing against the officers of the NCL/CIL. The learned counsel for the petitioners has placed reliance upon two judgments of the Supreme Court; (i) ***Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra, (2008) 10 SCC 394***, paragraphs 18, 19 and 20 are extracted herein below:

"18. Section 120-A IPC defines criminal conspiracy. The section reads as under:

"120-A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

19. Section 120-B IPC provides for punishment for an offence of criminal conspiracy.

20. The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, as observed by this Court in Shivnarayan Laxminarayan Joshi v. State of Maharashtra [(1980) 2 SCC 465 : 1980 SCC (Cri) 493] a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible."

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and; (ii) ***State of Madhya Pradesh Vs. Sheetla Sahai and others, (2009) 8 SCC 617***, paragraphs 36 to 38 of which are extracted hereunder:-

"36. Criminal conspiracy has been defined in Section 120-A of the Penal Code, 1860 to mean:

"120-A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

Section 120-B of the Penal Code provides for punishment for criminal conspiracy.

37. Criminal conspiracy is an independent offence. It is punishable separately. Prosecution, therefore, for the purpose of bringing the charge of criminal conspiracy read with the aforementioned provisions of the Prevention of Corruption Act was required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of bringing a criminal misconduct on the part of an accused.

38. A criminal conspiracy must be put to action inasmuch as so long a crime is generated in the mind of an accused, it does not become punishable. What is necessary is not thoughts, which may even be criminal in character, often involuntary, but offence would be said to have been committed thereunder only when that take concrete shape of an agreement to do or cause to be done an illegal act or an act which although not illegal by illegal means and then if nothing further is done the agreement would give rise to a criminal conspiracy. Its ingredients are:

(i) an agreement between two or more persons;

(ii) an agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means."

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46. In view of aforesaid, the learned counsel has lastly submitted that the proceedings impugned, in pursuance of the charge-sheet, would result in abuse of process of the Court and, not serve the ends of justice and, therefore, are liable to be quashed by this Court in exercise of its inherent power under Section 482 CrPC.

47. On the other hand, Mr. Anurag Kumar Singh, learned counsel for the CBI, has submitted that there was no compulsion or pressure on the petitioners to enter into the FSA and, it was purely a discretion of the linkage holders to enter or not to enter the FSA. In case, they would have chosen not to enter into the FSA, they could have accessed their coal requirement through agencies nominated by the State Government or other channels like e-auction. The price charged to such consumers entering into the FSA was a notified price on which coal was also made available to the Defence Establishments and the Railways. Such agencies, entering into the FSA, were entitled to charge actual price and upto 5 per cent margin as service charge over and above the basic price charged by the coal company. The State Governments and the Central Government Departments having administrative control over such agencies were held responsible to ensure that coal allotted to the targeted consumers was distributed in a fair and transparent manner and, they were responsible for taking appropriate action to prevent its misuse.

48. The coal was supplied to the targeted consumers on notified price for the welfare of general public. He has further submitted that the Supreme Court in *Ashoka Smokeless Coal India (P) Ltd. and others Versus Union of India and others* (supra) had held that "The coal companies would have a duty to fix the price of an essential commodity in such a manner so as to sub-serve the common good." In paragraphs-111, it was held that "..... the object of price fixation is to see that the ultimate consumers obtain the essential commodity at a fair price and for achieving the said purpose, the profit margin of the

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manufacturer/producers may be kept at a bare minimum." It is for this reason, the coal was supplied to the petitioners under the FSA on the notified price.

49. The purpose, for which the petitioners were given supply of coal under the FSA on notified price, was that the consumers should get special smokeless fuel (coke), which is a domestic fuel, suitable for cooking at a very reasonable price. He has further submitted that during the course of investigation, the sufficient evidence had been collected against the petitioners that they had sold the coal supplied to them under the FSA on notified price at an average price of Rs. 1700/- per metric tonne in the black market at the rate of Rs.4200/- per metric tonne. This act had not only caused wrongful gain to the petitioners but also dented the entire coal distribution mechanism created for welfare of the common man.

50. The CIL is a public sector undertaking and, it was enjoying monopoly in coal mining in the country. This monopoly was created in favour of the people of the country with the sole purpose of ensuring that the public/consumers get the commodity at a fair price and for this purpose complex mechanism of distribution of coal was created. The coal linkages of the petitioners was existing prior to coming into force the NCDP for the purpose of production of SSF. The petitioners had applied in pursuance of the advertisement issued by the CIL. The SSF was promoted as the same was pollution free domestic fuel and, therefore, public at large was beneficiary. The petitioners, being linkage holders, were given an option to enter into the FSA for supply of coal at a notified price in order to supply smokeless fuel for the common households and small kitchens, canteens/hotels with the sole purpose that smokeless fuel reaches to consumers at a very reasonable price. The petitioners, instead of producing SSF, had diverted the coal, taken on notified price, in the black market as is evident from the charge-sheet. They entered into

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the FSA, misrepresenting and deceiving the NCL in believing that they would use coal for the purpose of producing SSF. Diversion of coal and non-fulfillment of the conditions of the FSA would also entitle the seller to cancel the agreement. In the present case, since the act of the petitioners was deliberate continuous act done over a period of time as they were diverting the coal for the purpose of earning illegal profit against the expressed terms and conditions of the FSA, their act amounts to cheating and forgery etc. for which the CBI had collected sufficient evidence against them and, therefore, they were to be prosecuted for committing criminal offences, besides civil consequence. The petitioners had deceived the NCL, dishonestly induced the coal company to deliver coal to them at notified price under the assurance that they would utilize the coal supplied for the production of SSF only and nothing else.

51. Wrongful loss is not a precondition for the offence of cheating. Offence under Sections 467, 468 and 471 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act are clearly made out against the petitioners, as the petitioners made false documents in connivance with the officials of the District Industries Center, Chandauli and other co-accused persons as bogus certificates regarding the end-use of coal received by the petitioners, the operational status of the production unit of the petitioners as well as the sale invoices in favour of private firms showing the sale of coal to them, showing transportation of coal by vehicles which were later on found to be motorcycles and scooters etc.

52. The learned counsel for the CBI has further submitted that the facts of the case in the case of *Babloo Kumar Vs. State of Jharkhand and others* (supra) cited by the petitioners were different and, the judgment rendered by the Jharkhand High Court had no bearing to the facts of the present case. The learned counsel for the CBI has further submitted that in the present case, not only the NCL had suffered loss

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because of not being able to supply the same quantity of coal by e-auction, but the general public, for whom the coal was intended, had also suffered a loss by the sale of said quantity at a higher price by the petitioners. The learned counsel for the CBI has placed reliance in the judgment of the Supreme Court in the case of ***Rajesh Bajaj Vs. State of NCTE Delhi and others, (1999) 3 SCC 259*** and ***Tulsi Ram Vs. State of U.P., 1963 Supp. (1) SCR 382.***

53. In respect of Question No. 2, the learned counsel for the CBI has submitted that the cases are not purely based on breach of contract and not predominantly of civil nature. The petitioners had committed criminal offences, as mentioned in the charge-sheet. There are sufficient evidence available on the record for their prosecution. The petitioners had caused dent to the programme of the Government aimed at providing domestic coal to the general public at a reasonable price and, they had hugely received wrongful gain in the process. The learned counsel for the CBI has further submitted that in the case of ***Babloo Kumar Vs. State of Jharkhand and others (supra)***, the CBI did not find sufficient evidence, but here in the present case, more than sufficient evidence are available against the petitioners. Here, in the present case for offence of criminal conspiracy and involvement of the petitioners in diverting the coal supplied to them under the SFA on notified price in black-market in active connivance of the government officials and co-accused, the CBI had collected sufficient evidence against them. There can be no claim of parity to desire any benefit against the law. It is further submitted that the charge of criminal conspiracy under Section 120-B IPC was clearly made out in absence of officers of the NCL inasmuch in the present case, the coal was being supplied under the FSA merely on the basis of certificates issued by the District Industries Center, certifying the operational status and production of the Units. The offence has been purportedly committed by the petitioners and, the government officials of District

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Industries Center without any involvement of NCL officials. The basis of offence is misrepresentation by the petitioners before the NCL and forging of documents etc. There is no complicity of the NCL officials and, therefore, offence under Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act is only against the petitioners, and the officials of the District Industries Center, Chandauli is clearly established. It has been further submitted that since the charge-sheet and the evidence collected by the CBI clearly disclose the commission of offence by the accused-petitioners, these petitions are nothing but an abuse of process of the Court and, are liable to be dismissed.

54. I have considered the submissions carefully and, perused the charge-sheet and other documents placed with pleadings.

55. The coal is a raw-material for several industries e.g. power, steel and oil, which were considered to be core-sectors, vital for the economy of the country. The Coal had been a controlled commodity, specially regulated one. It is an essential commodity. Coking coal mines and coal mines were nationalized by The Coking Coal Mines (Nationalization) Act, 1972 and Coking and Non-Coking Coal Mines (Nationalization) Act, 1973. After nationalization, coal consumers were categorized into two main sectors, namely, core-sector and non-core sector. Core Sector's consumers included sectors vital for infrastructural developments e.g. power, steel, cement, defence, fertilizers, railways, paper aluminium, export, central public sector undertakings etc. and, for other remaining sectors/consumers were categorized as non-core sectors. 94.61% of coal produced in India used to be consumed by core-sector, whereas non-core sector used to consume 5.39% of total production of coal. Linkage of coal to be supplied to the consumers was based on: (i) availability of coal; (ii) requirements thereto in respect of each industries, as certified by the State and; (iii) the capacity of Railways to transport coal.

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56. There was always a mismatch between demand of coal in respect of non-core sector and coal availability in the subsidiary companies of the Coal India Limited. After 2001, new linkages could not be granted for non-core sector consumers and, these consumers were constrained to purchase coal from black-market at a higher price/premium. Even the consumers, having linkages, had to depend on secondary market and, they wanted enhancement in supply of quantity of coal.

57. The existence of high premium price in secondary market tempted the linked non-core sector consumers to divert/sell the coal taken on notified price from the nationalized coal companies in open/black market.

58. With effect from 1st January, 2000, the coal became a non-regulated commodity i.e. its price could not be controlled by the Central Government and, henceforth it was the Coal India Limited which became entitled to determine its price. On 06.06.2001, the Coal India Limited authorized its each subsidiary company to decide its own policies for sale of coal to non-core sectors, including the price to be charged.

59. It was well-known that the supply could not meet the demand which was to a great extent artificial and man-made. To prevent black-marketing of coal by procuring in excess of their requirements and/or units being non-existence, a new scheme as e-auction was made to meet the liberalization of policy of Central Government in regard to import of coal on earning of profit to the coal mines and, to provide transparent system of distribution of coal. This policy of e-auction came to be challenged before the Supreme Court in the case of *'Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others'* (supra). The Supreme Court quashed the said policy and, directed to evolve a new vital policy for which a direction was given to constitute a committee by the Central Government with the Secretary of Coal, being the Chairman, which should meet the

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requirements of public interest viz-a-viz the interest of consumers of coal.

59. As mentioned above, in compliance of the judgment in the case of *'Ashoka Smokeless Coal India (P) Ltd. and others VERSUS Union of India and others* (supra) and direction given therein, NCDP was formulated by Government of India, Ministry of Coal. The Supreme Court itself has taken a judicial notice of the fact of diversion of coal taken by the non-core consumers on notified price in black/open market at a high premium.

60. The allegations and findings against the petitioners are that they had taken coal on the basis of FSAs on notified price for manufacturing special smokeless fuel to be supplied for domestic use, but instead of using the coal taken on notified price, they had unauthorizedly diverted the same in the open/black market and, thus, had obtained pecuniary gains and, corresponding caused loss to the coal company/public in general. The CBI had carried out intensive investigation and, filed a detailed charge-sheet against the petitioners.

61. The CBI in its charge-sheet has mentioned following material/evidence in respect of the allegation/charge against the petitioners; (i) the factory premises of the petitioners was found in a non-functional condition; only electric generator of 125 KVA was found installed and no power connection for the purpose of manufacturing SSF was found in the factory premises of the petitioners; (ii) the quality of coal found available in the factory premises did not match with the quality of coal having been received by the petitioners, which was evident from the report of Chemical Examiner of the coal available in the factory premises of the petitioners, which was Grade-D, while coal supplied to the petitioners was Grade-B and Grade-C only; (iii) against the declaration of 18 labourers in the factory premises, only 4 labourers were available. The conveyor system, bunker and retort of the coal handling plant were found non-lubricated and dusted condition, which

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would indicate that the plant was not in running condition for the last several months. However, for the smooth functioning of the plant of capacity of 100 metric tonnes per day, about 99 persons would be required to be employed; (iv) The truck owners, in their statements, had confirmed that the coal loaded in their trucks from the produce of NCL was unloaded in the Chandasi Coal Market, Chandauli District, instead of factory premises of the petitioners. The mobile squad of Commercial Tax Department, Varanasi had intercepted on 4 occasions trucks loaded with coal from NCL supposed to be going to the factory premises of the petitioners, while coming to Chandasi Coal Market instead of factory premises.(v) Sale of 18633.05 metric-tonnes of SSF and 7940.60 metric-tonnes undersized coal to different private parties, as shown in the record through 880 trucks in the year 2010-11 was found false inasmuch as out of said 880 trucks, 181 vehicles were found other than trucks (motorcycle, tractor and bus etc.) or having un-allotted registration numbers by the ARTOs of different districts. Owners/drivers of 47 trucks, in their statements, had stated that they had never loaded any coal or coal product from the factory premises of the petitioners. (vi) Fake invoices were prepared by the petitioners, mentioning therein different type of commodity, weight, vehicle number and amount etc. The sale of 4094.03 metric tonnes SSF and 1461.74 metric tonnes undersized coal made through 227 vehicles had been established to be false and fabricated. (vii) To show bogus sale of SSF/different undersized coal, the petitioners had forged purchase and sale documents and used the same as genuine to NCL and the Department of Commercial Tax and, the most of these sales were to their own companies i.e. accused, Anil Kumar Agarwal and Arun Kumar Agarwal of the petitioners. (viii) Anil Kumar Agarwal and Arun Kumar Agarwal in furtherance of criminal conspiracy with the accused Ramjit Singh, General Manager, DIC, Chandauli used to send false status report regarding working condition of the factory premises

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of the petitioners and, on that basis the coal, on notified price, continued to be supplied to the petitioners, which were diverted unauthorizedly in the black market at a high premium. Thus, there is, *prima facie*, sufficient evidence available in the charge-sheet against the accused for the offences punishable under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act.

62. The FSA is a commercial arrangement between the petitioners and coal company for supply of coal on notified price for the purpose of manufacturing special smokeless fuel. The breach of the FSA provides consequences and remedies. Since the coal on notified price was supplied to the petitioners under a commercial agreement, it would not absolve the petitioners, if the offences, as mentioned in the charge-sheet, were committed by them, in the course of commercial transaction. From the evidence and allegations mentioned in the charge-sheet, it can hardly be said that acts of commission and omission by the petitioners are predominantly of civil nature and/or purely based on breach of contract.

63. The criminal proceedings are based on public policy, while civil proceedings are intended to determine the rights between the parties. The allegations and the findings of the CBI in the charge-sheet would indicate commission of economic offences against the financial and economic well-being of the State as well as the public in general. The offences committed by the accused cannot be said to be overwhelmingly and predominantly of civil nature. The conduct of the accused has both civil and criminal consequences. The NCL is entitled to proceed against the accused under the FSA, but for the criminal offences committed by them, the competent Court has to proceed against the accused for their crimes.

64. The learned counsel for the petitioners has submitted that there has been no criminal conspiracy. For committing the offence, alleged to

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have been committed by the petitioners-accused, the learned counsel has submitted that the CBI has not found any evidence for involvement of the officials of the NCL in commission of alleged offence and, therefore, the charge of criminal conspiracy against the petitioners is not falsified. He has placed reliance in the case of *Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra* (supra), particularly on paragraphs 20 and 25 which read as under:-

20. The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, as observed by this Court in Shivnarayan Laxminarayan Joshi v. State of Maharashtra [(1980) 2 SCC 465 : 1980 SCC (Cri) 493] a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible.

25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.

65. The learned counsel has also submitted that to constitute an offence of cheating, as defined under Section 415 IPC, deception by fraudulent or dishonest inducement has to be from the very beginning of the transaction. In the present case, the CBI has not recorded that when the FSA was entered into between the parties, the accused had

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entered into the FSA with fraudulent intention to deceive the NCL. The learned counsel has also submitted that there is no such finding recorded in the charge-sheet. In support of the said submission, the learned counsel has placed reliance on the judgment of the Supreme Court in the case of **Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another, (2000) 4 SCC 168**. Paragraphs 13, 14 and to 15 of *Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another* (supra) read as under:-

"13. Cheating is defined in Section 415 of the Code as:

"415. 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'.

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section."

The section requires—

(1) deception of any person;

(2)(a) fraudulently or dishonestly inducing that person

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property

14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or

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dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

66. In the present cases, the allegations against the accused-petitioners are that they in connivance with the DIC officials, submitted forged certificate regarding the requirement of coal and status of running condition of the factory premises of the petitioners for supply of coal by the NCL under FSA on notified price, which they, instead of using it to manufacture SSF, diverted in the open/black market at a high premium.

67. Every time if the coal is diverted in an open/black market, it would constitute an offence and, therefore, to say that since there is nothing on record to show that the petitioners had an intention from the very beginning to deceive the NCL dishonestly and fraudulently has no substance. The Supreme Court in the case of *Rajesh Bajaj Vs. State of NCTE Delhi and others* (supra) has held that if, in the course of commercial transaction, offence of cheating is committed, then criminal proceedings cannot be quashed on the ground that the transaction has also a civil consequence. Paragraphs 9, 10 and 11 of the said judgment are extracted hereunder:-

"9. It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the

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complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid¹⁰³. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice.”aid decisions are a sound reminder: (SCC p. 379, para 103)

10. *It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Penal Code, 1860 [Illustration f] is worthy of notice now:*

“(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.”

11. *The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or*

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not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities."

68. The Supreme Court in the case of **Tulsi Ram Vs. State of U.P., 1963 Supp. (1) SCR 382**, in paragraphs-15 and 16 has held as under:-

"15. No doubt, Mr Mulla contended that because the firms were able to obtain temporary credits on the basis of their hundis, it cannot be said that they have made any wrongful gain to themselves. His contention is that the firms had good credit in the market and for obtaining credit in the transaction in question they have good equivalents in the shape of hundis. He also pointed out that out of the 180 odd hundis drawn by the firms only a very few were dishonoured and that this happened only in the month of December 1949. It was not shown, he proceeded, that Murarka Brothers on whom the hundis were drawn were not throughout the period of nine months when the transactions were entered into, in a position to meet the hundis. Out of hundis worth Rs 80 lakhs those worth Rs 74 lakhs were in fact honoured and even the remaining hundis would have been honoured but for the fact that there was slump in the market and cotton bales worth Rs 12 lakhs belonging to the appellants were lying pledged in the godowns of the Central Bank of India for securing an amount of Rs 9 lakhs. Had these bales been sold in the normal course there would have been no crisis in December of the kind which occurred and led to the dishonourment of certain hundis, in which the Bank of Bikaner and Matadin Bhagwandas were payees. Bearing in mind all these facts, learned counsel wants us to draw the inference that the obtaining of credit was not on the security of forged railway receipts but on the security of hundis themselves which were drawn by parties who had credit in the market and drawn on a party which has not been shown not to be possessed of adequate funds to meet the hundis throughout the period covered by the transaction. We do not think that the argument of learned counsel has much

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force. B.N. Kaul, (PW 32), the Manager of the Kanpur branch of the Bank of Bihar has said that he purchased hundis because the railway receipts showed that the consignments were large and their value was commensurate with the amount for which the bills had been drawn. He added that he would not have purchased these hundis if the consignments were for very small quantities, apparently meaning thereby that if the value of the consignments was not commensurate with the amount to be advanced he would not have purchased the hundis. Apart from the evidence of Kaul there is also other evidence to show that the real basis of discounting bills was not merely the credit of the appellant or the security afforded by these bills. This evidence is in consonance with the normal banking practice of discounting hundis only when they are supported by railway receipts of consignments despatched by the drawer to outside parties. No doubt, bills or hundis are themselves securities and taking into consideration the credit of the drawer of a hundi a bank may conceivably discount such hundis but where the hundis are themselves supported by railway receipts it would be futile to say that the railway receipts were not intended by the parties to be regarded as further security for discounting the bills. Where a consignor of goods draws a hundi for the price of the consignment on some firm and supports that hundi with the railway receipt obtained by him in respect of the consignment, the party in fact pledges the consignment to the bank discounting the hundi and, therefore, in such a transaction the railway receipt cannot be regarded as anything else than a security for that transaction. If that security turns out to be worthless or practically worthless because the value of the consignment is only a fraction of what it was represented to be, the discounting of the hundi by the party drawing it must necessarily be regarded as unlawful. It would thus follow that the firm in question made a gain by obtaining credits and that these credits were obtained by them by restoring to unlawful means. The gain they made was, therefore, unlawful. Mr Mulla contended that for an act to be regarded as dishonest it is not enough to show that one person deceived another and thereby made a wrongful gain but it is further necessary to show that as a result of the deception the other person sustained wrongful loss. In support of his contention he has relied upon the decision in Sanjiv

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Ratanappa Ronad v. Emperor [ILR (LVI Bom 488)] . That was a case where the first accused who was a Police Sub-Inspector was found to have made a false document by altering a certain entry made by him in his diary with a view to create evidence. It was argued before the court that in order to constitute an offence of forgery under Sections 463 and 464 the document must be made dishonestly or fraudulently and those words must be read in the sense in which they are defined in the Penal Code, 1860 and that it was not enough to show that the deception was intended to secure an advantage to the deceiver. Dealing with this argument Baker, J., who was one of the Judges constituting the Bench observed at p. 493.

“The definition of ‘dishonestly’ in Section 24 of the Penal Code, 1860 applies only to wrongful gain or wrongful loss and although there are conflicting rulings on the question of the definition of the word ‘fraudulently’ the consensus of opinion of this Court has been that there must be some advantage on the one side with a corresponding loss on the other.”

Section 463, which defines forgery, runs thus:

“Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.”

16. *The intention to cause damage or injury to the public or to any person is thus an element which has to be established before a fabricated document can be held to be a false document or a forgery. In view of the term of Section 463 what the learned Judge has observed is understandable and may be right. Here, however, we are concerned with the offence under Section 420 IPC which speaks of dishonest inducement as a necessary ingredient. As Baker, J., has rightly pointed out:*

“As dishonesty involves a wrongful gain or wrongful loss, obviously it does not apply to the present case where no pecuniary question arises.”

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69. For an offence of cheating, guilty intent, at the time of making the promise, is an essential ingredient. However, failure to fulfill the promise subsequently may not attract the provisions of Section 418 IPC or 420 IPC. The illustration 'g' of Section 415 IPC would indicate that mere failure to deliver in breach of an agreement would not amount to cheating but liable to a civil action for breach of contract. If a party, during the course of execution of the contract, develops guilty intent to deceive the other party and, induces the other party to deliver any property, it would attract the offence under Sections 418 and 420 IPC, as the case may be. In the present case, initially, the petitioners might not have *mens rea* to deceive the NCL at the time of entering into the FSA, but while subsequently taking delivery of coal on notified rates, as per the allegations, they submitted forged and fabricated documents in respect of status of the factory and its requirement as is evident from the charge-sheet and diverted the coal in black market.

70. In view of the aforesaid facts, as stated above, the illustration 'g' to Section 415 IPC is not attracted in the present case. From the reading of the charge-sheet, it cannot be said that it does not disclose commission of an offence or ingredients of offence under Sections 415, 418 and 420 IPC are absent. It is also well settled that if there is civil remedy provided for breach of contract, that itself will not absolve any party from criminal action, if the offence has been committed in the course of execution of the contract. The criminal prosecution as well as civil remedy/action are to be pursued where the offence has been committed in breach of contract and it also discloses commission of an offence. The Supreme Court in the case of ***Pratibha Rani Vs. Suraj Kumar and another (1985) 2 SCC 370*** in paragraph-21 has held as under:

"21. After all how could any reasonable person expect a newly married woman living in the same house and under the same

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roof to keep her personal property or belongings like jewellery, clothing etc., under her own lock and key, thus showing a spirit of distrust to the husband at the very behest. We are surprised how could the High Court permit the husband to cast his covetous eyes on the absolute and personal property of his wife merely because it is kept in his custody, thereby reducing the custody to a legal farce. On the other hand, it seems to us that even if the personal property of the wife is jointly kept, it would be deemed to be expressly or impliedly kept in the custody of the husband and if he dishonestly misappropriates or refuses to return the same, he is certainly guilty of criminal breach of trust, and there can be no escape from this legal consequence. The observations of the High Court at other places regarding the inapplicability of Section 406 do not appeal to us and are in fact not in consonance with the spirit and trend of the criminal law. There are a large number of cases where criminal law and civil law can run side by side. The two remedies are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of the criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import. It is not at all intelligible to us to take the stand that if the husband dishonestly misappropriates the stridhan property of his wife, though kept in his custody, that would bar prosecution under Section 406 IPC or render the ingredients of Section 405 IPC nugatory or abortive. To say that because the stridhan of a married woman is kept in the custody of her husband, no action against him can be taken as no offence is committed is to override and distort the real intent of the law.

71. The Supreme Court in the case of **Medchl Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. and another**, (2000) 3 SCC 269 has held that agreement for referring the dispute to arbitration cannot be an affective substitute for criminal prosecution when the act of a party to the agreement constitutes an offence. The Supreme Court has also held that while exercising the inherent power under Section 482 CrPC, the High Court is only required to see that without continuation

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of proceedings would be totally an abuse of the process of the Court or not. If the allegations in the complainant/charge-sheet disclose commission of offence, the High Court has to keep its hands off and, allow the machinery of the Criminal Procedure Code to take its course. Paragraphs-14, 15, 16 and 17 of the aforesaid judgment read as under:-

"14. Needless to record however and it being a settled principle of law that to exercise powers under Section 482 of the Code, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint. The observations in Nagawwa v. Veeranna Shivalingappa Konjalgi [(1976) 3 SCC 736 : 1976 SCC (Cri) 507] lend support to the above statement of law: (SCC p. 741, para 5)

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

15. In the matter under consideration, if we try to analyse the guidelines as specified in Shivalingappa case [(1976) 3 SCC

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736 : 1976 SCC (Cri) 507] can it be said that the allegations in the complaint do not make out any case against the accused nor do they disclose the ingredients of an offence alleged against the accused or the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion that there is sufficient ground for proceeding against the accused? In the present case, the complaint as noticed above does not, however, lend credence to the questions posed. It is now well settled and one need not dilate on this score, neither do we intend to do so presently that the allegations in the complaint will have to be accepted on the face of it and the truth or falsity of which would not be gone into by the Court at this earliest stage as noticed above: whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial and the observations on this score in the case of Nagpur Steel & Alloys (P) Ltd. v. P. Radhakrishna [1997 SCC (Cri) 1073] ought to be noticed. In para 3 of the Report this Court observed: [SCC (Cri) p. 1074, para 3]

“3. We have perused the complaint carefully. In our opinion it cannot be said that the complaint did not disclose the commission of an offence. Merely because the offence was committed during the course of a commercial transaction, would not be sufficient to hold that the complaint did not warrant a trial. Whether or not the allegations in the complaint were true was to be decided on the basis of evidence to be led at the trial in the complaint case. It certainly was not a case in which the criminal trial should have been cut short. The quashing of the complaint has resulted in grave miscarriage of justice. We, therefore, without expressing any opinion on the merits of the case, allow this appeal and set aside the impugned order of the High Court and restore the complaint. The learned trial Magistrate shall proceed with the complaint and dispose of it in accordance with law expeditiously.”

16. Be it noted that in the matter of exercise of the High Court's inherent power, the only requirement is to see whether continuance of the proceeding would be a total abuse of the process of court. The Criminal Procedure Code contains a detailed procedure for investigation, charge and trial, and in the event, the High Court is desirous of putting a stop to the known procedure of law, the High Court must use a proper circumspection and as noticed above, very great care and caution to quash the complaint in exercise of its inherent

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jurisdiction. Recently, this Court in *Trisuns Chemical Industry v. Rajesh Agarwal* [(1999) 8 SCC 686 : 2000 SCC (Cri) 47 : (1999) 5 Scale 609] observed: (SCC pp. 689-90, paras 5-9)

“5. The respondent's counsel in the High Court put forward mainly two contentions. The first was that the dispute is purely of a civil nature and hence no prosecution should have been permitted, and the second was that the Judicial Magistrate of the First Class, Gandhidham has no jurisdiction to entertain the complaint. Learned Single Judge has approved both the contentions and quashed the complaint and the order passed by the Magistrate thereon.

6. On the first count learned Single Judge pointed out that there was a specific clause in the memorandum of understanding arrived at between the parties that disputes, if any, arising between them in respect of any transaction can be resolved through arbitration. The High Court made the following observations:

‘Besides supplies of processed soyabean were received by the complainant Company without any objection and the same have been exported by the complainant Company. The question whether the complainant Company did suffer the loss as alleged by it are matters to be adjudicated by the civil court and cannot be the subject-matter of criminal prosecution.’

7. Time and again this Court has been pointing out that quashing of FIR or a complaint in exercise of the inherent powers of the High Court should be limited to very extreme exceptions (vide *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] and *Rajesh Bajaj v. State NCT of Delhi* [(1999) 3 SCC 259 : 1999 SCC (Cri) 401]).

8. In the last referred case this Court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations: (SCC p. 263, para 10)

‘10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions.’

9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for

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affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426].”

17. On a careful reading of the complaint, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. We, however, hasten to add that whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy available to the appellant herein. Both criminal law and civil law remedy can be pursued in diverse situations. As a matter of fact they

“are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import”. (vide Pratibha Rani v. Suraj Kumar [(1985) 2 SCC 370 : 1985 SCC (Cri) 180]) (SCC p. 383, para 21)”

72. While exercising inherent jurisdiction under Section 482 CrPC, the High Court has to determine whether continuation of the proceedings would be an abuse of process of the Court or the order passed by it would be to secure the ends of justice. At the stage of exercising the jurisdiction under Section 482 CrPC, High Court is not

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required to evaluate the correctness or otherwise of the allegation leveled against the accused in the complaint/charge-sheet. The prosecution cannot be quashed by the High Court, even if the accused is able to raise some suspicion or doubt regarding truthfulness of the allegations. The Supreme Court in the case of **Rajiv Thapar and others Vs. Madan Lal Kapoor (2013) 3 SCC 330** has laid down the steps which if found in affirmative that would be justified for quashing the criminal proceedings in exercise of the powers vested under Section 482 CrPC. Paragraphs 28, 29 and 30 of the aforesaid judgment read as under:-

"28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages

as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

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

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

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

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

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

73. So far as Question No. 3 is concerned, there is no parity in a closure report filed by the CBI in respect of some cases in Jharkhand and, in the case against the petitioners herein, the CBI has collected sufficient evidence, which would clearly disclose that *prima facie*, offences have been committed by the accused-petitioners in the present case. In Jharkhand, the CBI did not find sufficient evidence for committing an offence by the accused. In view thereof, the Question No. 3 has no relevance as the facts are different. The evidence collected by the CBI regarding accused in Jharkhand was not sufficient whereas, as discussed above, there is sufficient evidence available against the accused-petitioners, which would clearly constitute *prima facie*, offences committed by them. So far as the Question No. 4 is concerned, the CBI has not found involvement of the officials of the NCL in commission of the offence with the petitioners. The offence of criminal conspiracy under Section 120-B IPC is against the petitioners and DIC officials, who issued forged and fabricated certificates regarding status of the factory requirement of coal by the petitioners. Therefore, there is no substance in the

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submission of the counsel for the petitioners that offence of criminal conspiracy between the petitioners and officials of the NCL is not made out.

74. In view of the aforesaid discussions, I do not find any merit and substance in these petitions filed under Section 482 CrPC and, therefore, they are **dismissed**. Interim order, if any, stands vacated. The learned trial Court concerned is directed to proceed with the trial and, conclude the same expeditiously, preferably within one year from today.

75. Let a copy of this order be transmitted to the learned trial Court concerned forthwith for compliance.

[D.K. Singh, J.]

Order Date:-17th March, 2021

MVS/-