

CASE NO.:
Appeal (crl.) 182 of 2006

PETITIONER:
Shiva Nath Prasad

RESPONDENT:
State of West Bengal & Ors.

DATE OF JUDGMENT: 03/02/2006

BENCH:
B.P. SINGH & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
[Arising out of S.L.P.(Crl.)No.3987 of 2005]
W I T H
Criminal Appeal No. 183 of 2006
[Arising out of S.L.P.(Crl.) No.4655 of 2005]
Dr. V. Gauri Shanker \005.Appellant

Versus

State of West Bengal & Ors. \005Respondents

KAPADIA, J.

Leave granted.

These appeals are filed by accused nos.2 and 3 against the impugned judgment of the High Court of Calcutta refusing quashing of the process issued by the Chief Judicial Magistrate(CJM), Alipore in respect of alleged offences under sections 120-B/406/417/420 of the Indian Penal Code (IPC).

The undisputed facts are as follows:

Madhav Prasad Birla (MPB) and Smt.

Priyamvada Devi Birla (PDB) were one of the richest and the wealthiest couples who had no issues during their lifetime. MPB was one of the famous industrialists from the Birla family. The couple executed mutual wills in 1981. In 1982, the couple executed mutual wills revoking the earlier mutual wills. In 1988, during their lifetime, Smt. Birla formed four trusts and MPB formed the fifth trust. These trusts, 5 in number, covered corporate assets. On 30th July 1990 MPB died. On 10.9.1990, Smt. Birla gave directions in respect of MP Birla Trust under clause 6(b) and made nominations of beneficiaries in respect of her four trusts under clause 7(a) of the trust deeds in favour of three named public charitable institutions, viz., Hindustan Medical Institution (HMI), East India Education Institution (EIEI) and MP Birla Foundation. In terms of the said nominations made after the demise of MPB, the assets of the five trusts estimated at Rs.2400 crores stood settled for the benefit of HMI, EIEI and MP Birla Foundation. However, on 15th April 1999 PDB purported to revoke all the five trusts (stood dissolved). On 18th April 1999, Smt. Birla executed her will by which she bequeathed all her properties (including the estate of MPB) to accused no.1, R.S. Lodha and after him his son, the value of which is around

Rs.2400 crores. Smt. Birla died on 3rd July 2004. R.S. Lodha was a trustee of MP Birla Foundation (one of the three public charitable institutions). He was also a trustee of HMI and EIEI prior to the dissolution of the five trusts w.e.f. 15.4.1999. Appellant herein, Shiva Nath Prasad, accused no.2 was also a trustee in the five trusts. Accused no.3, Dr. V.Gauri Shanker was a trustee in HMI, EIEI and MP Birla Foundation. He was also a trustee in three out of five mutual trusts referred to above.

Respondent no.2 herein (complainant), a former employee working in MP Birla Group, claiming to be a close associate of late MPB and his wife, petitioned a complaint in the court of Chief Judicial Magistrate, Alipore in case no.C/4693 of 2004 alleging offences under the aforesaid sections, viz., 120-B read with 406, 420, 467, 417 and 204 of the IPC, inter alia, on the ground that he was a witness to the intention and the wishes of the couple during their lifetime to leave their estate to charity which decision was made known to everyone close to the couple including the other members of the Birla family. According to the complainant, the couple had accordingly executed mutual wills on two occasions, first in the year 1981 and subsequently in 1982. According to the complainant, when the mutual wills were executed in 1981 and 1982, he was consulted and he had taken part in the discussion with MPB. According to the complaint, the couple had decided to dispose of their assets to charity after their demise. Respondent no.2 herein has further alleged in the complaint that in 1988 the couple created five mutual and reciprocal trusts under which the estate went to charity as the remainder beneficiary. Respondent no.2 further alleged that he was involved in the discussion relating to formulation of the terms and conditions to be mentioned in the five trust deeds. He was consulted in the matter of drafting of the said deeds. He was also a witness to the mutual and reciprocal agreements between MPB and PDB in regard to the five trusts. He was also a formal witness to the deeds. He was also a witness to the instrument of nominations of the beneficiaries of the five trusts. He was also a witness to the deed of appointment of trustees of the five trusts. According to respondent no.2, the said five trusts were created by the couple as mutual and reciprocal trusts by which the couple had mutually agreed to leave their estate, after their death, to charity and pursuant to that decision they had nominated the charitable institutions in which the assets held by the five trusts worth Rs.2400 crores would vest. According to respondent no.2, the said five trusts were irrevocable and the three public charitable institutions nominated by the couple as beneficiaries were HMI, EIEI and MP Birla Foundation. Respondent no.2 was also, in turn, associated as honorary secretary of HMI, EIEI and MP Birla Foundation. Respondent no.2 herein has alleged in the complaint that he was stunned when he came to know, on the demise of PDB, that the first accused R.S. Lodha had claimed that the estate of PDB, which included the estate of MPB, belonged to him under the above will dated 18th

April 1999 made by the deceased PDB. In his complaint, respondent no.2, has stated that when he came to know that R.S. Lodha had made a claim to the entire estate of the Birlas, he made enquiries which revealed to him that R.S. Lodha had criminally conspired with the other accused in criminally misappropriating assets worth Rs.2400 crores vested by the above five mutual trusts in the above three charitable institutions and that the accused had converted the charitable endowment for personal gain. Respondent no.2, in his complaint, has further stated that the accused had attempted to create false evidence to show that the five trusts stood revoked and dissolved on 15th April 1999 which is three days before the alleged will dated 18th April 1999 executed by PDB and thereby the assets which had vested in the charitable institutions had been criminally misappropriated by fraud and conspiracy in which the other accused had participated actively. Respondent no.2 herein has further stated in his complaint that the accused have conspired to create false evidence in support of their claim that the five trusts stood dissolved during the lifetime of PDB herself. In his complaint, respondent no.2 has further stated that R.K. Choudhury, one of the trustees in the three out of five trusts was not even aware of the alleged revocation/dissolution of the five trusts by Smt. Birla during her lifetime, as alleged by the accused. According to the complaint, there was no revocation of the five trusts, as claimed by the accused. Respondent no.2 is a chartered accountant. In his complaint, he has pointed out the reasons for the couple deciding to vest the shares of group holding companies of MPB in the above three public charitable institutions, namely, HMI, EIEI and MP Birla Foundation. Respondent no.2 has stated that it was tax planning advised by respondent no.2 and by R.K. Choudhury. The purpose of choosing the three institutions was to make them a vehicle to promote the charitable activities of MPB group. Respondent no.2, in his complaint, has categorically alleged that R.S. Lodha is a qualified chartered accountant, who had won the confidence of the couple and who solely planned his way and eliminated all those who had worked with the couple so as to make Smt. Birla hopelessly dependent on him. According to the complaint, R.S. Lodha was the exclusive advisor and consultant of Smt. Birla personally. He was a director, auditor and the trustee of different companies. According to the complaint, in the last couple of years prior to 1999, R.S. Lodha had come to occupy the central place in the scheme of things of MPB group of companies and charitable endowments. Respondent no.2 has further alleged that similarly Shiva Nath Prasad was a close confidante of late Smt. Birla, having completed 50 years of service with MPB group of companies. He dealt with all the tax matters of Smt. Birla. He filed her tax returns. He entered into correspondence on her behalf with Income Tax Department. He was given a power of attorney to sign, on her behalf, the tax returns. He was a trustee of all the above five mutual trusts. He was a trustee in the three public

charitable institutions. He was also a member of the managing committee of HMI and EIEI. Respondent no.2 has further alleged that Dr. Gauri Shanker was a trustee of all the above three public charitable institutions. He was also a trustee of three of the five mutual trusts, viz., M.P. Birla Trust, Priyamvada Birla Trust and Priyamvada Birla Kosh. Similarly, respondent no.2 has stated in his complaint that the fourth accused, Sushil Kumar Daga, was a long standing employee of the MP Birla Group. He was a member of the managing committee of HMI and EIEI. He was also a trustee of MP Birla Foundation. In his complaint, respondent no.2 herein, has alleged that Shiva Nath Prasad and S.K. Daga are the witnesses to the letter dated 15.4.2003 addressed by late Smt. Birla to R.S. Lodha which has been tendered as codicil in the probate proceedings pending before the High Court. Respondent no.2, in his complaint, has alleged that Shiva Nath Prasad and S.K. Daga are the witnesses to the said letter which was created in pursuance of the criminal conspiracy to misappropriate the property of the public charitable institutions. In his complaint, respondent no.2 herein, has relied upon one more circumstance in support of his contention that the couple had always desired to leave their estate, after their demise, to charity. In this connection, respondent no.2-complainant has placed reliance on the biography of MPB written by Dr. Gauri Shanker in which a graphic description of the visit by the couple to Tirupathi has been mentioned. In the said book, Dr. Gauri Shanker has mentioned how he had taken the draft trust deed of MP Birla Foundation to His Holiness the Sankaracharya and got it approved by him. In the said book, it is allegedly stated that in the last years of his life, MP Birla had desired that his entire estate should go to charity. In the said book, it is further recited that MP Birla Foundation was the foremost institution formed on 23rd January 1986, its trustees were the three daughters of K.K. Birla, brother-in-law of MP Birla, two professionals from the industrialist group etc. and later Smt. Birla also joined its board as the chairperson and as the trustee. According to the biography, the couple expressed their desire to give their wealth and properties to God and accordingly Dr. Gauri Shanker was requested to translate that idea into reality by drawing a deed of trust. The final draft was prepared. It was taken to Kanchipuram. It was placed before His Holiness Sankaracharya and accordingly the deed was sanctified. This book was published in 1993. This circumstance is relied upon in the complaint to show that Dr. Gauri Shanker was aware of the decision of MPB and PDB to dedicate their entire wealth to charity and yet he took part in the conspiracy to divert the endowment worth Rs.2400 crores from charity to the personal kitty of R.S. Lodha and after him, his son. According to the complaint, R.S. Lodha, alongwith Shiva Nath Prasad and Dr. Gauri Shanker were the trustees of the said three public charitable institutions whose property stands criminally misappropriated by the first accused pursuant to a criminal conspiracy by

the other accused who committed criminal breach of trust. This was possible by virtue of the power and influence of R.S. Lodha and by reason of the long familiarity of the other accused with the couple. According to the complaint, MPB died on 30th July 1990. Upto the time of his death, he had done nothing to show the slightest inclination to change his charitable intentions or to put an end to the mutuality expressed wills of 1982 and the trust deeds of 1988 and on the contrary in January and February 1989, the couple had agreed on the final nominations in favour of three public charitable institutions in the presence of the complainant, Shiva Nath Prasad and R.K. Choudhury. Respondent no.2 has categorically stated that after the demise of MPB on 10th September 1990, Smt. Birla, in fact, executed the nominations in accordance with the pious wish of her husband and that the said nominations were mutually agreed nominations of the five trusts duly executed by her. The legal effect of the said nominations were explained by R.K. Choudhury in the presence of the complainant and in the presence of Shiva Nath Prasad to Smt. Birla. Respondent no.2 has further stated that Smt. Birla was told by R.K. Choudhury that the said nominations were irrevocable and that the said Shiva Nath Prasad was fully aware, along with Smt. Birla, that the five trusts along with the nominations were mutual and reciprocal and were irrevocable even by Smt. Birla (survivor) except in terms of clause 19 which provision was common in all the deeds. Respondent no.2 has alleged that in terms of the nominations agreed between MPB and PDB, during the lifetime of MPB and made after the demise of MPB, as explained above, the assets of the five trusts estimated at Rs.2400 crores stood finally settled in the three public charitable institutions as remainder beneficiaries. Respondent no.2, in his complaint, has stated that in the second week of April 1999, R.S. Lodha started misleading Smt. Birla. She was made to sign documents which had the effect of misappropriating the assets dedicated to and vested in the three public charitable institutions through the medium of the five trusts. Pursuant to the said conspiracy, on 18th April 1999 which was a Sunday, R.S. Lodha separately called three persons to Birla Park, residence of Smt. Birla and persuaded each one of them by false representations and fraud to attest a document signed by the deceased Smt. Birla. This document is the impugned will by which all the properties of the couple under the five trusts stood diverted from charity. They were converted to become the personal property of R.S. Lodha. The three persons were P.L. Agarwal, Dr. Madan S. Vaidya and Mahabir Prasad Sharma. Accordingly, respondent no.2 has complained that the above acts constituted massive fraud on Smt. Birla and on the five trusts; that, the said fraud constituted a criminal breach of trust on the three public charitable institutions which are deprived of endowments worth Rs.2400 crores and accordingly in the complaint respondent no.2 has alleged that R.S. Lodha had cheated and defrauded Smt. Birla into believing that she was making a document to

leave the property to charity as she and her husband had desired and declared from time to time since 1981-82. Respondent no.2 has lastly stated in his complaint that four years after the execution of the will dated 18th April 1999, a letter dated 15th April 2003 termed as codicil is brought into existence by R.S. Lodha in conspiracy with Shiva Nath Prasad and S.K. Daga to fortify the will. It contains a direction in respect of four residential properties which are now directed to R.S. Lodha and after him, his son. Respondent no.2 has alleged that this letter dated 15.4.2003 is created as a supporting evidence to the will of 1999. Respondent no.2, in his complaint, has stated that Shiva Nath Prasad prepared the balance sheets of the five trusts as on 15.4.1999 in June 2000 only to show that the five trusts stood dissolved through deeds prior to the making of the alleged will dated 18.4.1999. Respondent no.2 has pointed out that R.K. Choudhury was a trustee. He had never resigned from the trusts. He had never ceased to be a trustee. He is not even aware of the dissolution of the trusts on 15.4.1999. In the circumstances, in his complaint, respondent no.2 has alleged that there was no revocation, oral or in writing, on 15.4.1999 or at any time later on. Respondent no.2 has further pointed out in his complaint that the accused have communicated about the dissolution of the trusts to the Income Tax Department only on 27th June 2000 when a letter was addressed by Smt. Birla to the Joint Commissioner of Income Tax, Calcutta, stating that the five trusts have been dissolved on 15.4.1999 and that the assets have been transferred to her as the sole beneficiary. The balance sheets of the five trusts as on 15.4.1999 prepared by second accused in June 2000 only to show that the trusts stood dissolved w.e.f. 15.4.1999. Respondent no.2 has alleged that the accused have conspired to create records by entering into correspondence with Income Tax Department. Respondent no.2 has accordingly relied upon the aforesaid circumstance in support of his allegation of conspiracy to create ante-dated documents to show retro-active revocation of the five trusts. Relying upon the aforesaid circumstances, the complainant has alleged in his complaint that the accused had entered into a criminal conspiracy, the ultimate object of which was to misappropriate dishonestly the charitable estate and converting the said estate to their own use. Respondent no.2 has further alleged that the object of the alleged will of 1999 was to destroy the interest of the three public charitable institutions in which the estate had irrevocably vested; that, the purported dissolution of the trusts was a step in the execution of criminal conspiracy; that, the modus operandi of the accused was to attain this illegal object fraudulently by showing that the five trusts were dissolved during the lifetime of Smt. Birla who was fraudulently induced and cheated as she had no legal knowledge nor access to independent legal advice; that, Smt. Birla was a lay housewife who had no knowledge of legal intricacies; that, she was deceived into executing a fraudulent will on 18.4.1999. That the three attesting witnesses were

also deceived and finally the accused have even deliberately suppressed the facts relating to the five trusts from the application for probate made to the High Court in respect of the alleged will dated 18.4.1999. Respondent no.2 has stated in his complaint that a trustee becoming a party to the dissolution of an irrevocable trust is dishonest and guilty of criminal breach of trust; that, there was nothing to show that Smt. Birla was advised to convert the properties dedicated to public charities to personal properties and on the contrary by filing and signing balance sheets of five trusts the accused have sought to create evidence of the dissolution of the trusts and thereby they have aided and abetted misappropriation of the properties belonging to public charitable institutions. The accused have used their dominant position in the five trusts and in the three public charitable institutions to illegally revoke the five trusts and thereby dishonestly misappropriated the properties of the three public charitable institutions which constituted offence punishable under section 120-B read with section 406 of IPC. In execution of the conspiracy, the accused, in fact, misappropriated the properties of the public charitable institutions by illegally showing that the five trusts stood revoked and by transferring the properties held by five trusts or the three public charitable institutions to Smt. Birla as her personal properties as is evidenced from the balance sheets filed on behalf of the five trusts by the second accused. Hence, respondent no.2 has alleged that the accused were also guilty of substantive offence of criminal breach of trust under section 406, IPC. Respondent no.2 has also alleged in his complaint that R.S. Lodha was liable for offence punishable under section 420, IPC inasmuch as he was the instrumentality of procuring the will dated 18.4.1999 by inducing Smt. Birla by false representation to sign the said will, divesting the properties from charity and converting it to the assets of the first accused. Lastly, respondent no.2 has alleged that accused nos.2, 3 and 4, all of whom were trustees and/or members of managing committee in one or more of the three public charitable institutions had connived both by positive acts of commission and omission to aid and abet accused no.1 R.S. Lodha in the offence of criminal breach of trust for which they are liable to be punished under section 109 read with section 406, IPC. Accordingly, respondent no.2 vide his aforestated complaint prayed for issuance of process under section 120-B read with sections 406, 420, 467, 417 and 204, IPC and also substantive offences under sections 120-B, 406, 420, 417 and 204 of IPC.

To complete the chronology of events, suffice it to state that vide order dated 05.10.2004, CJM Alipore held that a prima facie case for offence under sections 120-B/406/417/420 IPC was made out against the accused. Accordingly, cognizance was taken. Accordingly, accused were summoned on 29.11.2004.

Aggrieved by the said order dated 05.10.2004 of CJM Alipore, accused no.2-Shiva Nath Prasad

moved the High Court under section 482 of Code of Criminal Procedure (Cr.PC) for quashing the proceedings vide complaint case no.C4693/04 pending before CJM Alipore under sections 406/417/420/120-B, IPC. By the impugned judgment, the High Court has refused to intervene and set aside/quash the criminal proceedings. Hence, the accused have come in appeal to this court.

Shri Harish N. Salve, learned senior counsel appearing on behalf of Shiva Nath Prasad submitted that in 1983 G.D. Birla died. At that time, there was tension within the Birla family over division of assets. M.P. Birla and Smt. Birla were unhappy and hurt with the way they were treated during partition. Despite the couple being issueless, the couple did not take assistance from any member of the Birla family in the running of their business and in the running of M.P. Birla group of companies. R.S. Lodha was closely associated with the couple. Over the years, Smt. Birla came to repose a lot of faith, confidence and affection on R.S. Lodha. She openly declared that R.S. Lodha would be her successor. In this connection, learned counsel placed reliance on the minutes of the board meeting of Birla Corporation Ltd. held in September 2001 in which meeting nominees of financial institutions and banks were present. In their presence, Smt. Birla declared that R.S. Lodha was to be her successor. Learned counsel further submitted that R.S. Lodha was also made chairperson of four holding companies in M.P. Birla group in 1999 within one week from 18.4.1999. He was also made the co-chairman of the main manufacturing companies controlled by the group headed by Smt. Birla and all the key senior executives of the group were aware of her wishes. Learned counsel submitted that on the death of Smt. Birla, the other Birlas have come together to grab control of the M.P. Birla group for free under the facade of charity. It was pointed out that in August 2004 Birlas filed an application in the High Court for probate of two alleged wills allegedly made by the couple on 13th July 1982 claiming the same to be mutual wills. It is the case of the appellant herein that the said 1982 wills were revoked during the lifetime of M.P. Birla and Smt. Birla. Further, it is urged that no explanation has been given for not applying for probate of the said wills of M.P. Birla who died on 30th July 1990 for 14 long years. Learned counsel submitted that the Birlas have themselves signed documents showing Smt. Birla as the sole intestate heir of M.P. Birla which documents are totally contrary to the present case of mutual wills mentioned in the complaint. Learned counsel next contended that the criminal case filed by respondent no.2 herein, R.P. Pansari, is one such attempt on the part of the Birlas; that, the case has been instituted only to harass R.S. Lodha and other individuals who were close to Smt. Birla; that, the complainant has been set up by the Birlas to harass R.S. Lodha; that, the complainant is a disgruntled ex-employee of M.P. Birla group; that, the complainant had nothing to do with three charitable institutions after April 2000; that, he had

nothing to do with M.P. Birla group after December 2001; that, immediately after the filing of the complaint, R.P. Pansari was rewarded with a job at a basic salary of Rs.1,75,000/- per month by the grandson of B.K. Birla and accordingly it was submitted that the complaint constituted an abuse of the process of law.

Learned counsel submitted that the foundation of the complaint is based on averments which are false in view of the documents annexed to the complaint. In this connection, learned counsel submitted that the five trust deeds clearly show on bare reading that the trusts were set up with a private object to provide benefit to individual beneficiaries with absolute power of alienation of the entire trust property and income without any compulsion for charity. It was urged that on a bare reading of the trust deeds it is clear that they were expressly made revocable and, therefore, it is not open to the complainant to claim that the said five private trusts were irrevocable when on the face of the documents, they are revocable. Learned counsel further submitted that the very fact that nominations were made on 10th September 1990 by Smt. Birla shows that nothing prevented her from making further nominations superseding the earlier nominations dated 10.9.1990. Learned counsel submitted that even the nominations dated 10.9.1990 were not entirely charitable. In fact, in value terms it was more in favour of private individual members of Birla family. Learned counsel submitted that the deceased Smt. Birla was in sound health and she actively looked after her business and had undertaken busy travel schedules as recently as February 2003.

Learned counsel submitted that even if all the allegations in the complaint supported by documents annexed thereto were believed to be true, the same did not disclose the ingredients of the offence of criminal breach of trust as there was no entrustment of property of one in the hands of another. Similarly, the ingredients of the offence of cheating are also not disclosed in the complaint. Learned counsel urged that the issues raised in the complaint are complicated issues of civil law relating to mutual wills and mutual trusts which cannot be decided by a criminal court and which issues should be relegated to regular civil proceedings before a court of competent jurisdiction. Learned counsel urged that the five trusts were expressly made revocable. In this connection, reliance was placed on clause 19 of the Trust Deed. Learned counsel urged that the complainant has relied upon, in the complaint, oral agreements for which oral evidence cannot be permitted to be adduced as such oral evidence was contrary to the terms of the written documents and was, therefore, barred under sections 91 and 92 of the Indian Evidence Act, 1872. Similarly, the allegations of the trust property having vested in three public charitable institutions, upon nomination, being made in their favour by Smt. Birla, have no substance because the properties mentioned in the nominations were only to be transferred to the nominees on the death of the

settlor/sole beneficiary, namely, Smt. Birla and, therefore, there was no basis for alleging that the assets had vested in the three charitable institutions upon nominations being made by Smt. Birla. In this connection, it was further pointed out that the nominations made by Smt. Birla were in supersession of her nominations made earlier. In the circumstances, there was no merit in the allegations made in the complaint that the assets covered by the trusts stood vested in the three public charitable institutions on issuance of nominations/directions in 1990. According to the learned counsel, the complaint made by respondent no.2 herein smacks of malafides particularly when he has been appointed at a salary of Rs.1.75 lacs per month in one of the rival Birla companies soon after his making the above complaint. As regards the scope of section 482, Cr.PC, learned counsel submitted that since the complaint was frivolous, vexatious, oppressive and malicious, the High Court should have exercised its powers under section 482, Cr.PC because such powers are required to be exercised ex debito justitiae or for the ends of justice. Learned counsel relied upon various cases in which criminal proceedings have been quashed at the initial stage to prevent abuse of process of court and for the ends of justice. In this connection, reliance was placed on several decisions of this court, more important being R.P. Kapur v. State of Punjab [AIR 1960 SC 866]; State of Haryana & Ors. v. Bhajan Lal & Ors. [1992 Suppl. 1 SCC 335]; Madhu Limaye v. The State of Maharashtra [1977 (4) SCC 551] and Madhavrao Jiwajirao Scindia & Ors. v. Sambhajirao Chandrojirao Angre & Ors. [1988 (1) SCC 692]. Learned counsel submitted that the power of the court to grant discharge under section 245(2), Cr.PC in a warrant case instituted otherwise than on a complaint did not impinge on the inherent power of the High Court under section 482 of Cr.PC to quash proceedings in appropriate cases. In this connection, reliance was placed on the judgment of this Court in the case of Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [1998 (5) SCC 749]. Learned counsel submitted that exercise of inherent power to quash the proceedings is called for in cases where the complaint did not disclose any offence or that the complaint was frivolous, vexatious or oppressive. Learned counsel submitted that in the present case the complainant has tried to distort the facts in order to give an impression of an offence. That the said attempt was grossly frivolous, vexatious and oppressive and, therefore, the High Court should have quashed the process issued by the CJM, Alipore. On the question of breach of trust, learned counsel submitted that there was no entrustment of property which is the main ingredient of the offence under section 405; there was no valid creation of trust under the five trust deeds; there was no creation of a beneficial interest in the three public charitable institutions; that Smt. Birla was the only beneficiary under the trust deeds till she died; that, there was no vested interest created in any beneficiary other than Smt. Birla under any of the

five trust deeds and lastly the revocation of the four trusts did not amount to the extinguishment of vested or beneficial interest of any other person under the trust deed so as to constitute an act of conversion. Learned counsel submitted that on reading the five trust deeds in the light of the aforesaid proposition of law it would become clear that, in the present case, there was no trust because the settlor, the trustee and the beneficiary in all the five trusts was one and the same person, viz., M.P. Birla in M.P. Birla Trust and Priyamvada Devi Birla in the other four trusts. As sole beneficiary, both M.P. Birla in M.P. Birla Trust and Priyamvada Devi Birla in other four trusts, had absolute power of disposition of the trust property and also over the trust income including the power of bequest by nomination. The beneficial interest of M.P. Birla in the trust property was the same as the legal ownership which vested in him as a trustee and if the beneficiary and the trustee were the same person and if the beneficiary has the same right as the trustee, then there can be no beneficial interest under section 3 of the Indian Trusts Act, 1882 and, therefore, it was urged that, in the present case, there was no valid creation of a trust, as alleged. Learned counsel submitted that in any event the said five trusts were private in nature and a mere contingency in charity would not make such trusts public and thereby bring them out of the provisions of Indian Trusts Act. In this connection, it was urged that the sole beneficiaries of the trusts were M.P. Birla and Smt. Birla and that reference to charity in clause 8 was a mere contingent interest and, therefore, such provision cannot transform the nature and character of the private trust into a public or charitable trust. Learned counsel urged that the primary purpose of the settlor was to benefit the members of his family and, therefore, the trusts in the present case were private trusts and not public trusts, as alleged by the complainant. Learned counsel urged that, in the present case, there was no complete dedication to charity under these five private trusts even according to the intention of the settlor or in terms of the trust deed. Further, learned counsel submitted that since there was an express clause of revocation, one cannot say, as sought to be contended, that a public trust came into existence for charitable purposes. Learned counsel urged that there was no vesting on any point of time in three public charitable institutions as on 10.9.1990 or in any charity under clause 8 of the trust deed, as submitted by the complainant; that, the proviso to clause 6 (b) in Smt. Birla's four trust deeds excluded the right of her husband to sell the trust property and consequently Smt. Birla had a right to sell/alienate the trust property without any restrictions; that, this provision further indicates that the trust property was or could be completely extinguished by Smt. Birla by operation of all or any of her powers as the trustee/settlor. Learned counsel urged that by clause 5 of the trust deed Smt. Birla was vested with the power of alienation of the corpus of the trust and the income therefrom. In this connection, reliance was placed on clauses

5, 10, 11(iii), 11(iv) and 11(xxi) of the trust deeds. In the circumstances, learned counsel submitted that the powers of Smt. Birla under the trust deeds were similar to the powers of a testator under a will; that, just as a testator could deal with his property covered in the will during his lifetime and just as under the will the legatee/beneficiary had no vested interest in the bequest under the will which is merely contingent upon the acts of the testator during his lifetime so also Smt. Birla under the five trust deeds was a testator of a will and she had full authority to deal with the property covered by the will/trust during her lifetime, the beneficiary having no vested interest in the bequest. Learned counsel further urged that even as far as property of M.P. Birla Trust was concerned, the deceased had full beneficial interest in the corpus during her lifetime; that, there was nothing in the deed of trust that made her directions given under clause 6(b) irrevocable; that, Smt. Birla could have nominated a member of the family even after the nominations/directions of September 1990 without committing breach of trust; that, even if Smt. Birla had named a charitable trust during her lifetime, she could have changed the direction and given it to any other trust whether charitable or non-charitable. In any event, the directions were to operate only upon her death. In this connection, reliance was placed on the letter dated 12th September 1990 addressed by Smt. Birla to East India Investment Company Pvt. Ltd. requesting that the shares in the trust property may be transmitted to her name as she was the sole survivor of her late husband. Learned counsel submitted that even the letter which Smt. Birla wrote to Income Tax Department intimating dissolution of the private trusts on 15.4.1999 with the enclosed balance sheets showed that the assets and the income of the trusts was all along included in the personal Income Tax returns of Smt. Birla. In conclusion, learned counsel urged that M.P. Birla and Smt. Birla had granted absolute right in the trust property unto themselves, and the second bequest, if any, under clause 8 was in favour of charity which had failed and, therefore, there was no entrustment of property as contemplated by section 405, IPC. The sole beneficiary of all the five trusts was Smt. Birla who had revoked the trusts in the year 1999 and, therefore, the appellant cannot be accused of committing breach of trust, as alleged in the complaint. Any disposal by Smt. Birla in her own favour or to those claiming under her can never fall within the meaning of section 405, IPC. The act of the deceased in revoking the trusts and/or treating the property as her own and disposing of the same by will cannot constitute breach of trust under section 405, IPC.

Shri R.F. Nariman, learned senior counsel appearing on behalf of Dr. Gauri Shanker-accused no.3 submitted that Dr. Gauri Shanker is 83 years old. He is the senior advocate of this court. He joined Indian Revenue Service in 1948 and held, during his tenure, senior positions. He was appointed an advisor to L.K. Jha Commission. He was personally known to late M.P. Birla and

through M.P. Birla, he came to know Smt. Birla. He was close to the couple. He used to advise them on personal and corporate matters. He came to know R.S. Lodha through M.P. Birla. He had seen the couple placing reliance on R.S. Lodha. He had seen the couple giving responsibility to R.S. Lodha from time to time. He was consulted by the couple in matters of religion, philosophy, charity, business and taxation. According to Dr. Gauri Shanker, Smt. Birla was a wise lady, well read and proficient in several languages. According to Dr. Gauri Shanker, on the demise of G.D. Birla, M.P. Birla had conveyed his dissatisfaction over the division of management of Birla companies. In the last few years of his life, M.P. Birla had gradually handed over the charge of M.P. Birla group of companies to Smt. Birla. After the demise of M.P. Birla, Dr. Gauri Shanker remained close to Smt. Birla. He advised her on personal and corporate matters. Towards the end of 1990 Smt. Birla had told Dr. Gauri Shanker that she had decided on R.S. Lodha as her successor and she was desirous of making a will for this purpose. According to Dr. Gauri Shanker, Smt. Birla had told him that she would revoke five private trust deeds before making her will. It was further submitted that even according to Dr. Gauri Shanker although he was a trustee of three trusts out of five private trusts created in 1988 none of the properties settled in the trusts had been transferred/recorded in the names of the trustees and that all the five private trusts were revocable. Further, Smt. Birla had asked Dr. Gauri Shanker to prepare a will by which she would bequeath the right, title and interest of all that she owned to R.S. Lodha whom she used to treat like her son and in consonance of the detailed instructions of Smt. Birla, Dr. Gauri Shanker had drawn up a will dated 18.4.1999 which was duly registered and which is annexed to the criminal complaint. Learned counsel submitted that in fact Dr. Gauri Shanker was told by Smt. Birla that she had dissolved the five private trusts before executing the will. After four years Smt. Birla had expressed her desire to give further directions regarding her properties and consequently a letter, based on her instructions, was drafted by Dr. Gauri Shanker which was signed by Smt. Birla on 15.4.2003 in the presence of Shiva Nath and S.K. Daga.

Learned counsel submitted that from the plain reading of the complaint and the documents appended thereto, it was clear that there is no allegation at all regarding the offences of cheating under section 417/420, IPC; no allegation is found in the pre-summoning evidence of respondent no.2 or M.P. Sharma and, therefore, no process could have been issued under section 417/420, IPC and, therefore, it was submitted that the impugned order of CJM dated 5.10.2004 suffered from the vice of non-application of mind. Learned counsel submitted that summoning of the accused in a criminal case was a serious matter. In the present case, according to learned counsel, the impugned order of the magistrate summoning the accused does not indicate application of mind to the facts of the case. That, in the present case, there is no

allegation against Dr. Gauri Shanker regarding creation of letter/codicil dated 15.4.2003; that, the allegations are directed only against R.S. Lodha, Shiva Nath Prasad and S.K. Daga. No allegations whatsoever have been made against Dr. Gauri Shanker even in relation to the revocation of five private trusts and, therefore, the complaint does not make out a case of any overt act being committed by Dr. Gauri Shanker in relation to the revocation of the five private trusts and hence, there is no reason for issuing summons to Dr. Gauri Shanker. Learned counsel urged that the case against Dr. Gauri Shanker on the point of conspiracy was at the highest that he was a trustee of three public charitable institutions and that he was also a trustee of the three out of five private trusts; that, he remained a silent spectator to the alleged acts of other accused in criminally misappropriating the properties of three public charitable institutions pursuant to a criminal conspiracy to commit criminal breach of trust with the common intention to destroy charitable trusts. That, in any event, the allegations of conspiracy against Dr. Gauri Shanker were vague, general and completely lacking in factual particulars and, therefore, according to the learned counsel there was no reason for the magistrate to issue process against Dr. Gauri Shanker.

Learned counsel lastly submitted that the complaint needs to be quashed for the simple reason that it suffers from malafides; that, the complaint is harrasive, attended with malafides and is a tool of oppression adopted by the Birlas to terrorise Shiva Nath Prasad, S.K. Daga and Dr. Gauri Shanker into succumbing to the pressure and thereby making difficult for R.S. Lodha to have the last will of Smt. Birla probated. Learned counsel urged that the entire complaint is brought about by Birlas who are working behind the scene. That the choice of four accused is made on selective basis; that the four accused were close to Smt. Birla; that, although the position of Dr. Gauri Shanker was identical with the other trustees, viz., R.K. Choudhury and Kashinath Tapuria, the latter have been left out of the complaint which unequivocally demonstrates that the criminal complaint constitutes a gross abuse of the process of law attended with malafide and, therefore, the High Court ought to have quashed the criminal complaint under section 482 of the Cr. PC.

To understand the basis of the complaint we need to understand the concept of mutual wills, mutual and reciprocal trusts and secret trusts. A will on its own terms is inherently revocable during the lifetime of the testator. However, "mutual wills" and "secret trusts" are doctrines evolved in equity to overcome the problems of revocability of wills and to prevent frauds. Mutual wills and secret trusts belong to the same category of cases. The doctrine of mutual wills is to the effect that where two individuals agree as to the disposal of their assets and execute mutual wills in pursuance of the agreement, on the death of the first testator (T1), the property of the survivor testator (T2), the subject matter of the agreement, is held on an

implied trust for the beneficiary named in the wills. T2 may alter his/her will because a will is inherently revocable, but if he/she does so, his/her representative will take the assets subject to the trust. The rationale for imposing a "constructive trust" in such circumstances is that equity will not allow T2 to commit a fraud by going back on her agreement with T1. Since the assets received by T2, on the death of T1, were bequeathed to T2 on the basis of the agreement not to revoke the will of T1 it would be a fraud for T2 to take the benefit, while failing to observe the agreement and equity intervenes to prevent this fraud. In such cases, the Instrument itself is the evidence of the agreement and he, that dies first, does by his act carry the agreement on his part into execution. If T2 then refuses, he/she is guilty of fraud, can never unbind himself/herself and becomes a trustee, of course. For no man shall deceive another to his prejudice. Such a contract to make corresponding wills in many cases get established by the Instrument itself as the evidence of the agreement [See: Law of Trusts and Equitable Obligations by Robert Pearce and John Stevens pages 320 and 321]; See also : Re Dale (Deceased) reported in 1993(4) All.ER page 129]. In the case of mutual wills generally we have an agreement between the two testators concerning disposal of their respective properties. Their mutuality and reciprocity depends on several factors. Mutual wills and trusts are evidenced by the Deeds themselves (the recitals, terms and conditions mentioned therein) as also by the surrounding circumstances, namely, the simultaneity and the similarity of the terms of the wills/trusts, the pattern of successive wills, the reciprocity of one to the other, the age of the settlors, the value of the estates, dying of the settlors without any issues, making of the last will without reference to the revocation of previous wills. Lastly, in law we have the concept of accessory liability for having assisted in a breach of trust. In such a case the accused is not charged for having received trust income or assets for his own benefit but for having acted as an accessory to a breach of trust.

We have referred to the doctrine of mutual and reciprocal wills and trusts only to understand the basis of the complaint. At this stage we are required to read the complaint as it is. Suffice it to state at this stage of the matter that the couple had executed mutual wills in 1981 and 1982; followed by reciprocal trusts in 1988 which are in almost identical words. The scheme of the mutual deeds read together is almost identical. It is not disputed that a mere declaration can create a trust obligation, particularly when the settlor is the sole trustee under the trust. Before us what is argued by the appellants is that there is no valid creation of trust; that, there was no "vesting" of the assets in the three public charitable institutions; that, the act of Smt. Birla in revoking the trusts and/or treating them as her own property was within her competence; that, the trusts were revocable; that, at the highest it is case of failure of the second charity and that predominantly the dispute is a civil

dispute. At this stage, we may point out that what is complained of in the complaint filed by respondent no.2 herein is regarding the acts of management including dissolution of the trusts and making of the will by which trust properties have been allegedly converted dishonestly into personal properties of R.S. Lodha constituting an offence of criminal misappropriation under sections 405 and 406 and cheating under section 420, IPC. Here we may add that question as to whether Smt. Birla had the authority to revoke is different from the allegation that the acts of setting up personal title to the trust property constituted criminal breach of trust and that, the act was performed with the intent of converting trust property into private property pursuant to a conspiracy by the accused. In the complaint, respondent no.2 herein has averred that he was present and consulted when the couple opted for mutual wills in 1981, 1982 and even in 1988 when mutual and reciprocal trusts were executed. The complaint is based on the alleged oral agreement and understanding between the husband and wife regarding disposal of properties on their demise. Suffice it to say that these facts in issue are matters of evidence. The question as to whether there existed a valid trust or that Smt. Birla was entitled to dissolve the trust even during her lifetime are defences which can be taken at the appropriate time.

As stated above, in this case we have mutual wills and mutual and reciprocal trusts in 1981, 1982 and 1988; clauses 7(b) and 8 of the trust deed reflect charitable intention coupled with nominations of 1990. What we would like to stress is that the complaint is based on an important aspect of mutual trust. The allegation is that the beneficial interest (enforceable not against the assets but against the trustees) is dishonestly misappropriated by the accused. The complaint is about dishonestly setting up personal title to the trust property. The complaint is based on mutual and oral agreements imposing secret trust obligations as evidenced by the trust deeds. In this connection we may reiterate that "secret trust" is a doctrine evolved to prevent fraud; that, fraud is not an ingredient for the application of the said doctrine. However, the substance of the complaint here is that the secret trust has become the reason for fraud because the legatee under the secret trust is made to believe by the accused that she was the beneficial owner, free from any trust [See: Re Cleaver (Deceased) reported in 1981 (2) All.ER 1018]. Lastly, we may point out that in a matter of this type, oral evidence was admissible to prove what is called "fraud" [See: Ottaway v. Norman reported in 1971 (3) All.ER 1325].

We have entered into the above discussion, not to express any opinion, but to answer the main plank of the argument advanced on behalf of the appellant that this case basically involves a civil dispute. None of our observations be treated as expression of our opinion on the rightfulness of the claim made in the complaint.

In conclusion, we may quote Law of Crimes by

Ratanlal and Dhirajlal page 2069 :

"In a case under section 406 the question of trust must be fully inquired into. For this purpose it is essential that the whole prosecution evidence should be recorded. It is impossible to guess at an interim stage, what will be the result of the inquiry. Consequently, when only a few of the prosecution witnesses have been examined, it is too premature to decline to examine any more witnesses for the prosecution and discharge the accused on the ground that the case is of a civil nature."

Before us, number of judgments have been cited in support of the case that respondent no.2 (complainant) is the disgruntled employee of the MP Birla Group of Companies and that he has been put up by the Birlas, hence, the complaint is based on malafides and should, therefore, be dismissed. We need not go into the said judgments as the basic principle settled in the citations is that the question of malafides has to be decided on the facts of each case. At the outset, we reiterate that credentiality of the complainant at this stage is not relevant. As stated above, in this case, what is alleged by the complaint, *inter alia*, is that he was a privy to the discussions and consultations and thinking which went into making of the mutual wills and the mutual trusts; that, he was a formal witness to some of these deeds and that he was aware that the couple had mutually agreed to the disposal of the property to charity after their demise. In the facts and circumstances of this case, at this stage, we are not inclined to accept the argument that the complaint should be dismissed at the initial stage on the ground of alleged malafides of the complainant.

We reiterate that our observations in the judgment should not be read as our opinion on the merits of the matter. Similarly, the applicability of the relevant section to the facts of the present case does not arise at this stage.

For the above reasons, we find no merit in these appeals and the same are accordingly dismissed.