HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

CRIMINAL PETITION No.8439 of 2014

ORDER:

In this petition filed under Section 482 Cr.P.C., the petitioner/A1 seeks to quash the proceedings in C.C.No.874 of 2011 on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad.

2) The facts which lead to file the instant petition, are thus:

a) The complainant's case is that the first Accused Company which is dealing in the business of providing Cellular Mobile Telephone Services, operating in the name of Hutch Essar South Limited was a Hong Kong based Company and started its business in partnership with Essar Group of India. The Company started in the year 2002 and could not make any headway in Andhra Pradesh in Public Call Office (PCO). The complainant and other Distinct Contact Persons (DCPs.) were actively involved in PCO business conducted by BSNL. So first Accused Company approached the complainant and requested him to take up the business of first Accused Company by involving his unit and develop the PCO business of first Accused Company in Andhra Pradesh. Accordingly, after a series of negotiations, Memorandum of Understanding (MOU) was entered into between the complainant as State Contract Person (SCP) and District Contact Persons (DCPs) and the first Accused Company. The complainant as SCP along with DCPs. started business with first Accused Company w.e.f. 25.07.2004. While so, in the year 2007 major share in Hutch Company were acquired by Vodafone a UK based Company and renamed as Vodafone Essar Limited (VEL). With their efforts, the complainant and DCPs remarkably increased the PCO business of first Accused Company by introducing Hutch coin boxes. Due to this onslaught, the business of BSNL was severely affected and so, the BSNL brought it to the notice of Department of Telecommunications (DOT) and that first Accused Company operating PCO business without any permission from DOT. Therefore, the authorities of DOT directed that those who are unofficially operating PCO business shall pay penalty. Thereafter, the first Accused Company convened a meeting on 02.01.2005 and directed the complainant and DCPs. not to book fresh connections from January 2005. Not knowing the reason for stopping the business, the complainant and other DCPs. *enmass* questioned the first Accused. To divert the issue, the accused directed the complainant and other DCPs. to collect all post-paid PCO pending bills which are outside the MOU dated 17.05.2004, to enable the complainant and other DCPs to start new business of pre-paid PCOs. Thus, since then, post-paid PCOs were converted into pre-paid PCOs. Thereafter, accused without disclosing to the complainant and other DCPs. started distributing the re-charge coupons required, through retail distribution outlets and thereby the complainant and others agitated that by such a system, they would sustain the loss.

b) Further, though under MOU the accused had to do business with the complainant and other DCPs. the accused had deliberately appointed dealers contrary to the terms of MOU. Added to it, the Accused Company had shown the payments of various amounts to the credit of DCPs. but without actually paying the amounts. Basing on the book statements, Income Tax authorities issued notices to in charge DCPs of Visakhapatnam and Vizianagaram Districts for payment of tax. Thus, the accused fraudulently and dishonestly committed breach of trust to the detriment of the complainant.

3 a) With the above averments, the complainant filed a private complaint before XI Additional Chief Metropolitan Magistrate, Secunderabad which was forwarded to Station House officer, Begumpet PS, Secunderabad under Section 156(3) Cr.P.C. and a case in Cr.No.36 of 2009 was registered. Aggrieved by the inaction of police of Begumpet, complainant filed W.P.No.8473 of 2009. By order dated 09.03.2010 the High Court directed the Investigating Officer to complete the investigation and file charge sheet/report within a period of six weeks. Ultimately, the police filed report referring the case as '*civil in nature*'.

b) Aggrieved by the final report, the complainant had filed protest petition—Crl.M.P.No.5079 of 2010 on 30.09.2010. The learned Magistrate recorded sworn statements of witnesses, perused the documents and took cognizance of the case for the offences under Sections 418, 420, 467, 468, 471 and 120 IPC and issued summons to the accused.

c) At this stage, A1 and A2 filed Crl.M.P.Nos.9716 and 9805 of 2011 respectively in High Court of Andhra Pradesh seeking to quash the proceedings in C.C.No.874 of 2011. Those two Criminal Petitions were disposed of by order dated 02.12.2011 directing the trial Court to conduct enquiry under Section 202 Cr.P.C. and decide whether there was sufficient ground for proceeding with the case or not.

d) Thereafter, the trial Court conducted enquiry under Section 202 Cr.P.C. and opined that there is *prima facie* material for the offences under sections 418, 420, 467, 468, 471 and 120B IPC against A1 to A6 and held that there was no ground to postpone the issue of summons against A1 and A2 though they are residing outside the jurisdiction of the Court.

Hence, the instant petition by petitioner/A1.

4 a) The first and foremost ground on which learned senior counsel for petitioner/A1, Sri *Sidharth Luthra*, sought for quashment of the proceedings is that the complainant entered into MOU on 17.05.2004 with altogether a different Company than the one he prosecutes now. Expatiating, learned senior counsel submitted the complainant now seeks to prosecute A1, which is Vodafone India Limited (erstwhile Vodafone Essar Limited). This Company was registered under the Companies Act, 1956 having its registered office at Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai. This Company is in the business of providing telecom services in Mumbai only as per the licence issued by DOT. This Company has neither any operations nor a licence for telecommunication services in the circle of Andhra Pradesh. Most importantly, at no point of time has there been any transaction between the petitioner and the

complainant. Learned senior counsel submitted that Petitioner Company was originally known as Hutchison Essar Limited (HEL) which in the year 2007 became Vodafone Essar Limited (VEL) and finally in the year 2011 it became Vodafone India Limited (VIL). This Company never contracted with the complainant.

b) He further submitted that Vodafone South Limited (VSL) (erstwhile Vodafone Essar South Limited) was a registered Company under the Companies Act having its registered office at C-48, Okhla Industrial area, Phase-II, New Delhi and it got licence from DOT for providing telecom services in the telecom circles of Andhra Pradesh, Chennai, Karnataka, Uttar Pradesh (West), Punjab and West Bengal and it is a separate and distinct juristic entity. It was originally known as Hutchison Essar South Limited (HESL) with whom the complainant had entered into MOU. The said HESL was renamed as Vodafone Essar South Limited (VESL).

c) Learned senior counsel thus vehemently argued that VIL and VESL are two different and distinct entities and VIL had never had any business in the state of Andhra Pradesh nor did it enter into any agreement with the complainant. However, the complainant filed the present complaint mischievously against the present petitioner. Hence, continuation of criminal case will amount to abuse of process of law.

d) Secondly, learned senior counsel argued that apart from absence of privity of contract between the complainant and Accused Company, the complaint allegations clearly disclose a civil dispute for which the remedy lies elsewhere and hence continuation of criminal case will amount to sheer abuse of process of law.

e) Thirdly, learned senior counsel argued that the complainant mischievously amended the complaint and added the name of the petitioner i.e. Marten Pieters as Managing Director and Chief Executive Officer of A1 Company.

f) Finally, he argued that trial Court without conducting proper enquiry under Section 202 Cr.P.C. issued summons to the accused who are residing outside its jurisdiction and that causes any amount of hardship to the petitioner. He relied upon the following decision on the aspect that criminal law cannot be set into motion as a matter of course and before summoning the accused in criminal case, the Magistrate has to scrutinize the evidence on record and satisfy with truthfulness of allegations.

Pepsi Foods Ltd. v. Special Judicial Magistrate

5a) Opposing the petition, learned counsel for complainant firstly argued that when the protest petition of the complainant was accepted by learned Magistrate and case was registered as C.C.No.874 of 2011, the petitioner herein approached the High Court and filed Crl.P.No.9716 of 2011 to quash the proceedings initiated against him. In the said criminal petition, same grounds which are now raised were put-forth including the allegation that petitioner herein was erroneously added as a party and the said Company has a distinct juristic entity and nothing to do with the transactions alleged by the complainant. To disprove the said allegation the complainant filed voluminous documents showing that petitioner herein and A1 in C.C.No.874 of 2011 are one and the same and that the Vodafone is functioning throughout India headed by its Managing Director and Chief Executive Officer—Martin Pieters. Therefore, it is preposterous to allege that petitioner herein is erroneously added as A1 and he has nothing to do with the commercial transactions entered between VESL and the complainant.

b) Learned counsel further submitted that when a legal notice was issued to VEL, the 2nd accused i.e. David Maro, Head – Fraud, Risk and Security gave a reply admitting that he is responsible for fraud, security of VEL and he is going to review the allegations leveled in the letter. At that juncture, the 2nd accused did not contend VEL is a distinct corporate entity and they have nothing to do with fraud involved in the transactions between the complainant and A1. Having regard to all these, earlier this High Court did not incline to quash the proceedings but only directed the learned Magistrate to conduct an enquiry under Section 202 Cr.P.C. to decide whether there are sufficient grounds to proceed with the case or not. Pursuant to the said direction, the complainant filed a petition under Section 202 Cr.P.C. before the Magistrate and learned Magistrate again conducted an enquiry by recording the statements of complainant and other witnesses and upon perusing the oral and documentary evidence again came to the conclusion that there was '*prima facie material*' for the offence under Sections 418, 420, 467, 468, 471 and 120B against A1 to A6 and took cognizance of the offence and issued process to all the accused including A1 and A2 who are residing outside the jurisdiction of the trial Court.

6) Secondly, learned counsel argued that during the process of enquiry before the trial Court, A3 who is none other than Senior Vice-President – Distribution, Vodafone India Limited (VIL) did not raise any objection that VIL is a distinct entity and no way concerned with the allegations levelled against A1, but his only contention was that A1 alone is responsible for criminal acts and he can be exonerated and on that ground he sought for discharge from the case. Thus, his plea clearly demonstrates that petitioner/first Accused Company and VIL are one and the same.

7) Finally, it is argued that when once the quashment was not ordered but only enquiry under Section 202 Cr.P.C. alone was ordered and even after the said enquiry, the trial Court took cognizance and issued summons, petitioner/A1 has to face the trial but he is not entitled to challenge the proceedings of the trial Court under Section 482 Cr.P.C. In this regard, he relied upon the following decision.

Fiona Shrikhande v. State of Maharashtra

He thus prayed to dismiss the petition.

8) In the light of above rival arguments, the point for determination is:

"Whether there are merits in this petition to allow?"

9 a) **<u>POINT</u>**: The main plank of argument on which petitioner/A1 seeks quashment of proceedings is that Vodafone India Limited (erstwhile Vodafone Essar Limited) whom the complainant seeks to prosecute now is not the Company with which the complainant entered into MOU on 17.05.2004. According to the petitioner/A1, Vodafone India Limited (VIL) (erstwhile Vodafone Essar Limited) is a Company having its registered office at Mumbai and doing business in providing telecom services in Mumbai only as per the licence issued by DOT and it has neither licence nor did business in the Andhra Pradesh and at no point of time it had any transaction with the complainant. It is the further case of the petitioner that originally Vodafone Essar Limited (VEL) was known as Hutchison Essar Limited (HEL) till 2007 and later it was taken over by *Vodafone* a U.K. based Company and therefore, nomenclature was changed as Vodafone Essar Limited and finally in 2011 it became Vodafone India Limited (VIL). The further contention of petitioner is that Vodafone South Limited (erstwhile Vodafone Essar Limited) is a separate registered Company having its registered office at New Delhi and it is doing telecom business in Andhra Pradesh, Chennai, Karnataka, Uttar Pradesh (West), Punjab and West Bengal and this VSL is a separate juristic entity and it was originally known as Hutchison Essar Limited (HEL) with whom the complainant entered into MOU dated 17.05.2004 but complainant did not file the case against the said Company. Be that it may, the contention of complainant is that with the same averments earlier the petitioner/A1 filed Crl.P.No.9716 of 2011 seeking quashment of the proceedings, but the High Court has not quashed the proceedings and only directed the trial Court to conduct enquiry under Section 202 Cr.P.C. and decide whether there was sufficient ground to proceed with the case or not and pursuant to this direction the complainant filed Crl.M.P.No.1647 of 2013 before the trial Court to conduct an enquiry under Section 202 Cr.P.C. and even after the said enquiry the trial Court came to the conclusion that there was '*prima facie material*' against the accused for proceeding

under Sections 418, 420, 467, 468, 471 and 120B IPC even though A1 and A2 are residing outside the territorial jurisdiction of the Court and in view of the said order this petition is not maintainable.

b) On a careful scrutiny of the entire material and upon hearing both sides, I find force in the submission of respondent/complainant. The record shows that earlier the petitioner/A1 filed Crl.P.No.9716 of 2011 seeking quashment of proceedings in C.C.No.874 of 2011 but this Court did not grant the said relief and instead, directed the trial Court to conduct enquiry under Section 202 Cr.P.C. and decide whether there was sufficient ground to proceed with the case or not. Pursuant to it, the trial Court conducted the enquiry by recording the statement of the complainant and other witnesses and came to an opinion that there is *prima facie* material to proceed further and issued summons even though A1 and A2 are residing outside territorial jurisdiction of the said Court. The trial Court at that stage was mainly concerned with the complaint and other material placed by the complainant and basing on the said material has come to a conclusion that there exists a *prima facie material* to proceed further.

c) In the case of ***Fiona Shrikhande*** (2 supra), the Honourable Apex Court observed thus:

> *"11. We are, in this case, concerned only with the question as to whether, on a reading of the complaint, a prima facie case has been made out or not to issue process by the Magistrate. The law as regards issuance of process in criminal cases is well settled. At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to prima facie satisfy whether there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of enquiry Under Section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations made in the complaint. Magistrate is not expected to embark upon a detailed discussion of the merits or demerits of the case, but only consider the inherent probabilities apparent on the statement made in the complaint. In* ***Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors.*** *(1976) 3 SCC 736, this Court held that once the Magistrate has exercised his discretion in forming an opinion that there is ground for proceeding, it is not for the Higher Courts to substitute its own discretion for that of the*

> *Magistrate. The Magistrate has to decide the question purely from the point of view of the complaint, without at all adverting to any defence that the accused may have."*

The above observation squarely applies to the case on hand since this is the second application filed by the petitioner/A1 for quashment subsequent to the issuance of summons. Therefore, in the considered view of this Court, it is not opposite to quash the proceedings at this stage. However, considering the submission on behalf of petitioner/A1, petitioner is at liberty to file a petition before the trial Court seeking discharge by taking all the pleas legally available to him, in which case the trial Court shall dispose of the said petition on merits expeditiously. Further, having regard to the fact that petitioner/A1 resides at a far off place outside territorial jurisdiction of the trial Court, his presence before the trial Court in C.C.No.874 of 2011 is dispensed with except on the occasions when the trial Courts requires his attendance.

10) This Criminal Petition is disposed of with the above observations.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 01.06.2015

Murthy