THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION Nos.13469 and 13470 OF 2015

COMMON ORDER:

The allegations made and grounds urged in both the petitions are almost identical. Hence, they can be decided by passing a common order.

CRIMINAL PETITION NO.13469 OF 2015

This criminal petition is filed under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.121 of 2015 on the file of Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, registered for the offences punishable under Sections 447 and 448 of Companies Act, 2013 and under Section 120-B of Indian Penal Code (for short "I.P.C.").

CRIMINAL PETITION NO.13470 OF 2015

This criminal petition is filed under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the proceedings in C.C.No.122 of 2015 on the file of Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, registered for the offences punishable under Sections 447 and 448 of Companies Act, 2013 and under Section 120-B of Indian Penal Code (for short "I.P.C.").

CRIMINAL PETITION NO.13469 OF 2015

Respondent No.2 – Rachakonda Siva Kumar is the complainant before the Special Judge for Economic Offences. He filed private complaint under Section 200 of Cr.P.C. alleging that he is the Director of petitioner No.1's company since its incorporation on 16.10.2008 as “Gagan Aerospace Pvt. Ltd”, later it was converted into public limited company on 16.12.2011. The complainant is a shareholder of accused No.1’s company. Petitioner No.2 is director since its inception. The respondent No.2/complainant and his wife R.Rama Devi, his son Ravi Kumar and a company floated by complainant by name Zetatek Technologies Private Limited put together hold 24,20,000 shares. Petitioner No.2, his wife P.Anantha Lakshmi and the company floated by petitioner No.2 by name M/s Ananth Technologies Ltd., put together hold 24,20,000 shares. The total shares are 48,40,000. The complainant and his group hold 50% of shares and petitioner No.2 and his group hold 50% of shares. The shares held by complainant and petitioner No.2 groups are as follows:

Sl.No.	Name of the shareholder	No.of shares held
1)	Mr.R.Siva Kumar	4980
2)	Zetatak Technologies Pvt. Ltd.	2415000
3)	Mr.R.Ravi Kumar	10
4)	Mrs.R.Rama Devi	10
	Total No.of shares held by Sl.Nos.1 to 4	2420000
5)	Dr.Subba Rao Pavuluri	4990
6)	Ananth Technologies Ltd.	2415000
7)	Mrs.P.Anantha Lakshmi	10
	Total No.of shares held by Sl.Nos.5 to 7	2420000
	Total	48,40,000

It is the specific contention of the respondent No.2 that himself, his wife R.Rama Devei, petitioner No.2 and his wife Mrs.Anantha Lakshmi are the directors of the company. Mrs.Anantha Lakshmi, wife of the petitioner No.2, ceased to be a

Director by virtue of her retirement on 30.09.2014 and she was not re-elected, as the Annual General Meeting for the year ending 31.03.2014 was not held on or before 30.09.2014. In terms of article 51 (b) of Articles of Association of petitioner No.1- company, the complainant has issued notice on 01.05.2015 to the directors proposing to convene a meeting of board of directors on 09.05.2015. As a counter blast to the same, petitioner No.2 has also issued notice dated 02.05.2015 proposing to convene a meeting on 09.05.2015. In the said notice, petitioner No.2 stated that the meeting has been requisitioned by him as Chairman and the notice dated 01.05.2015 issued by the complainant is not valid. Accordingly, meeting was held on 09.05.2015 and petitioner No.2 came along with his wife Mrs.Anantha Lakshmi, who was no longer a Director and also brought one V.Sashi Kumar, who is not a Director of petitioner No.1- company, but he is the C.E.O. of M/s.Ananth Technologies Ltd., one of the shareholders of accused No.1 company. Mrs.Anantha Lakshmi would not have attended the meeting, as she ceased to be a Director, but she also participated in the meeting as one of the Directors, contrary to the retirement dated 30.09.2014.

In the meeting of the board of directors, when the election of Chairman of meeting was mooted by the Complainant as petitioner No.2 has been functioning continuously as Chairman for more than six years, petitioner No.2 and his group resisted the same. Hence, the meeting of board of directors could not be commenced and the complainant and his wife left the meeting. There was no scope for conducting the meeting for want of quorum, as the quorum for the meeting is two directors.

The Secretary of the Company/petitioner No.11 uploaded Form DIR – 12 on behalf of petitioner No.1 – company on 23.06.2015 describing petitioner Nos.3 to 10 - accused Nos.3 to 10 as additional directors of petitioner No.1 company as if they were attended as additional directors in the board meeting held on 09.05.2015. As no meeting was held, the question of their appointment as additional directors does not arise that apart Mrs.Anantha Lakshmi ceased to be a Director and petitioner No.2 alone could not have passed any such resolution appointing petitioner Nos.3 to 10 as additional directors.

Petitioner Nos.3 to 10 by virtue of their alleged appointment as additional directors, fraudulently increased the strength of board of directors of the petitioner No.1 – company by fling DIR-12 on 23.06.2015 with an ante date and that they all played fraud on respondent No.2 to defeat the legitimate rights of the shareholders and directors representing the group of respondent No.2 – complainant, thus committed fraud against the shareholders and other directors of petitioner No.1 – company.

CRIMINAL PETITION NO.13470 OF 2015

Respondent No.2 – Rachakonda Siva Kumar is the complainant before the Special Judge for Economic Offences. He filed private complaint under Section 200 of Cr.P.C. alleging that he is the Director of petitioner No.1's company since its incorporation on 16.10.2008 as "Gagan Aerospace Pvt. Ltd", later it was converted into public limited company on 16.12.2011. The complainant is a shareholder of accused No.1's company. Petitioner No.2 is director since its inception. The respondent No.2/complainant and his wife R.Rama Devi, his son Ravi Kumar and a company floated by complainant by name Zetatek Technologies Private Limited put together hold 24,20,000 shares. Petitioner No.2, his wife P.Anantha Lakshmi and the company floated by petitioner No.2 by name M/s Ananth Technologies Ltd., put together hold 24,20,000 shares. The total shares are 48,40,000. The complainant and his group hold 50% of shares and petitioner No.2 and his group hold 50% of shares. The shares held by complainant and petitioner No.2 groups are as follows:

Sl.No.	Name of the shareholder	No.of shares held
1)	Mr.R.Siva Kumar	4980
2)	Zetatak Technologies Pvt. Ltd.	2415000
3)	Mr.R.Ravi Kumar	10
4)	Mrs.R.Rama Devi	10
	Sub Total (A)	2420000
5)	Dr.Subba Rao Pavuluri	4990
6)	Ananth Technologies Ltd.	2415000
7)	Mrs.P.Anantha Lakshmi	10
	Sub Total (B)	2420000
	Total (A + B)	48,40,000

It is the specific contention of the respondent No.2 that the petitioner No.2 was having complete control over the premises of registered office of accused No.1 company and was not conducting the board meetings and AGM regularly and fabricating fake and bogus documents, as if the board meetings are held and brought into existence purported minutes of board resolutions and submitted Form MGT – 14 to the Office of the Registrar of Companies and the same was uploaded on 01.12.2014 which is a false and fabricated document and by virtue of which transfer of 100 shares each were effected in favour of A4 and A5 in gross violation of law with a malafide intention to increase the number of members of shareholders and to usurp the management of accused No.1 company by accused Nos.2, 3 and 6 in connivance of accused Nos.4 and 5. The aforesaid act causes injury to the interest of shareholders of the complainant's group which amounts to an offence under Sections 447 and 448 of Companies Act and criminal conspiracy to commit the said offences.

It is further alleged that accused No.2 was allowed to act as a Chairman of accused No.1 – company by virtue of a board resolution held on 16.10.2008 and he was allowed to continue till otherwise decided by the board of directors. The accused No.2 was exclusively dealing with bankers, as he was also given single signature power to operate bank accounts. The accused No.2 failed to convene proper board meetings as prescribed under the law and moreover, indulged in fabrication of various fake and fabricated documents and resolutions as if they were passed in the board meetings, though no such board meetings were held.

In contravention of provisions of Companies Act, accused No.6 uploaded Form MGT-14 under the digital signature of accused No.2, as if the same was done under the authority of resolution of board of directors of accused No.1 Company as if a board meeting was held on 02.09.2014, though no such board meeting was held. The said Form MGT-14 is not only a false declaration which amounts to an offence under Section 448 of Companies Act, 2013 and the same was brought into existence through fraudulent means and amounts to fraud which is punishable under Section 447 of the Companies Act, 2013.

The complainant further alleged that the accused No.2 in order to gain undue advantage and in violation of Section 56 of Companies Act, 2013 regarding transfer of shares created two additional shareholders i.e. accused Nos.4 and 5 showing transfer of 100 equity shares to each of them from the shares held by accused No.2 and the same was done by the approval of the Board at its meeting dated 02.09.2014, which in fact, was never convened and no notices were issued for convening the said board meeting.

It is further alleged that it came to light from public records i.e. Form MGT – 14 filed with Registrar of Companies. Accused No.2 is holding a single share certificate for his entire holding of 4990 shares and there are no share certificates of 100 shares each and the minimum requirement for effecting transfer of shares should be single share certificate of accused No.2 should be split into 100 shares which has to be approved in a duly convened board meeting and thereafter the shares should be sent to accused No.2 by accused No.1 company and thereafter the accused No.2 can transfer his shares of 100 each in favour of accused Nos.4 and 5. But no such procedure was followed and they simply submitted MGT – 14 with false recitals and approved the transfer of shares and no such share certificate accompanied by transfer deed was placed before board of accused No.1 company which amounts to creation of fake and fabricated form and uploaded the same. The aforesaid acts of accused are in contravention of Section 56 of Companies Act, 2013 and Rule 6 of Companies (share capital and debentures) Rules, 2014 relating to issue of a renewed/duplicate share certificate.

The complainant further alleged that after coming to know about the same, he sent a notice on 09.02.2015 to the accused Nos.4 and 5, but accused Nos.4 and 5 failed to give any reply, hence the said transfer is a sham transaction. Further, the complainant got issued a legal notice dated 30.03.2015 to accused Nos.2,4 and 5 and issued another notice on 31.03.2015 to accused No.6, who is Company Secretary, who certified and uploaded the above Form MGT – 14. The accused Nos.4 and 5 did not give any reply, but accused No.2 gave his reply on 02.04.2015 with all denials. Accused No.6 also gave reply through electronic mail dated 10.04.2015. Complainant sent a rejoinder through his counsel dated 13.04.2015 to accused No.6 with copies to accused Nos.2, 3, 4 and 5. Further, on 14.04.2015 the Complainant has also sent a rejoinder to accused No.2 with para-wise denials through his statements contained in his reply dated 02.04.2015.

Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad recorded the sworn statement of the complainant – respondent No.2 and passed orders in both the cases, taking cognizance of the offence in relation to the petitioners/accused for the offences punishable under Section 447 and 448 of Companies Act, 2013 and under Section 120-B of I.P.C. and issued summons.

In the present petitions, the petitioners raised identical grounds. For convenience sake, I refer the following grounds urged in the petition No.13469 of 2015:

(1) Documents annexed to the complaint and allegations made in the private complaint does not disclose any offence against the petitioners, but the Special Court

took cognizance of the offences against the petitioners under various sections referred above by passing an order in C.C.No.121 of 2015, which is extracted hereunder for better appreciation:

> "Sworn statement of Complainant is recorded. Heard the counsel for complainant, perused the complaint and material papers on record. Taken of file U/sec. 447, 448 of Companies Act 2013 and 120-B IPC. Office is directed to register the case as CC.NO.121/2015. Issue summons to the accused. Call on 18/9/2015."

The order taking cognizance of the offence by the Special Judge for Economic Offences, does not disclose application of mind by the Special Judge and taking cognizance is wholly illegal, unsustainable and contrary to the law laid down in "***Pepsi Foods Limited v. Special Judicial Magistrate***[1]" "***Maksud Saied v. State of Gujarat***[2]" and "***M.N.Ojha v. Alok Kumar Srivastav***[3]". Thus, on this ground alone the proceedings in C.C. are liable to be quashed as the order taking cognizance of the offence in relation to the petitioners is contrary to the law and it shows non-application of mind by the Special Judge for Economic Offences, Nampally, Hyderabad.

(2) The Special Judge did not consider the allegations made in the complaint in proper perspective including the factum of issuing notice for convening meeting by the respondent No.2 dated 01.05.2015 to all the directors to convene a meeting on 09.05.2015, where Mrs.Anantha

[1] 1998 (5) SCC 749
[2] 2008 (5) SCC 668
[3] 2009 (9) SCC 682

Lakshmi was shown as one of the Directors of petitioner No.1 company and Mrs.Anantha Lakshmi acknowledged receipt of the same in the capacity of a Director. When she was continuing as a Director appointing petitioner Nos.3 to 10 as additional Directors in pursuance of the meeting held on 09.05.2015 is valid and it does not amount to fraud and it would not attract the offence punishable under Sections 447 and 448 of Companies Act, 2013.

(3) Uploading DIR-12 on 23.06.2015 does not attract any offence under Section 448 of the Companies Act punishable under Section 447 of the Companies Act. Section 448 of Companies Act, 2013 deals with filing of any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of he Act or the rules made thereunder, any person makes a statement, which is false in any material particulars, knowing it to be false, or which omits any material fact, knowing it to be material, he shall be liable under Section 447 of Companies Act. But here, no false statement was uploaded and thereby the petitioners are not liable to be proceeded in C.C.No.121 of 2015 as there exists no material to constitute an offence punishable under Section 447 of the Companies Act, 2013.

(4) It is specifically contended that unless and until a resolution is held to be invalid by a competent judicial forum, complaint for the offence punishable under

Section 447 of the Companies Act, 2013 is not maintainable. In fact pursuant to the resolution of board meeting held on 09.05.2015 petitioner Nos.3 to 10 were appointed as additional directors. Respondent No.2 – complainant filed a Company Petition before the Company Law Board, later it was not pressed, in such case unless the resolution appointing petitioner Nos.3 to 10 as additional directors is set aside on the ground that it is a false resolution, the petitioners cannot be proceeded for the offence under Section 447 of Companies Act, 2013.

(5) The complaint is bereft of allegations to attract the offence punishable under Section 447 of the Companies Act, 2013, however Special Judge for Economic Offences took cognizance without there being any material or evidence.

(6) The petitioner Nos.3 to 10 were appointed as additional directors on 09.05.2015, they cannot be arrayed as accused since they are not parties to the alleged fraud or mis-statement or false statement uploaded in the web portal of Registrar of Companies by filing DIR – 12, but they were arrayed as accused and the Special Judge for Economic Offences, Nampally, Hyderabad took cognizance even against those persons erroneously.

(7) Petitioner No.11 is practicing Company Secretary, who uploaded DIR – 12 in the web portal of Registrar of Companies, he did it only while discharging his duties

prescribed under the Companies Act and rules framed thereunder and there is no truth in the allegations made against the petitioner No.11 and he cannot be proceeded for the said offence.

(8) Respondent No.2 – complainant suppressed the proceedings in O.S.No.633 of 2015 on the file of VII Additional District Judge, Ranga Reddy, L.B.Nagar, seeking perpetual injunction against the petitioner Nos.2 to 9 from interfering with the management and conduct of business of petitioner No.1 – company by representing as Additional Directors and he also filed I.A.No.1172 of 2015 seeking temporary injunction and the same was dismissed by order and decreetal order dated 19.08.2015 and the same is carried into C.M.A.No.682 of 2015 to this Court and this Court heard the arguments of both sides in the above matter and reserved for judgment. On the ground that suppression of those facts, the petitioners cannot be proceeded in the Criminal Court for the alleged offences punishable under Sections 447 and 448 of the Companies Act and under Section 120-B of I.P.C.

(9) Respondent No.2 filed Company Petition No.72 of 2015 before the Company Law Board, later he sought to withdraw the same by filing a memo dated 08.10.2015 with liberty to apply. Based on such memo, the Company Law Board by order dated 15.10.2015 dismissed the Company Petition as withdrawn with liberty to apply. Thereafter, the respondent No.2 –

complainant filed caveat petitions before the Courts entered into registered correspondence and also filed C.C.No.122 of 2015.

Basing on the above grounds, the petitioners contended that the present complaints are not maintainable and prayed to quash the proceedings in C.C.No.121 of 2015 and C.C.No.122 of 2015 on the file of Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad.

During hearing, Sri S.Satyanarayana Prasad, learned Senior Counsel for the petitioners, while reiterating the grounds urged in the petitions, he mainly questioned the very taking cognizance by exercising power under Section 200 of Cr.P.C. and issue of process under Section 204 of Cr.P.C. and placed reliance on "***Anil Kumar v. M.K.Aiyappa***[4]" and "***Sunil Bharti Mittal v. Central Bureau of Investigation***[5]" in support of his contentions that unless the Court records satisfaction to issue summons under Section 204 of Cr.P.C. the Court cannot issue summons or warrant depending upon the nature of the case. But here, the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, did not record his satisfaction as to existence of grounds to proceed against these petitioners as required under Section 204 of Cr.P.C. and committed an error in ordering notice. He also drawn the attention of this Court to the judgments rendered in "***Pepsi Foods Limited v. Special Judicial Magistrate***" and "***M.N.Ojha v. Alok Kumar Srivastav***" (referred supra).

---

[4] (2013) 10 SCC 705
[5] (2015) 4 SCC 609

Based on the principles laid down in the above judgments, learned Senior Counsel for the Petitioners argued that very issue of summons to the petitioners for their appearance before the Court is vitiated by irregularity and illegality, on this ground also the petitions are liable to be allowed quashing the proceedings.

Learned Senior Counsel appearing on behalf of the petitioners further contended that the directors are not at all liable for punishment when the company allegedly committed an offence and that apart the petitioner Nos.3 to 10 in Crl.P.No.13469 of 2015, who were allegedly appointed as additional directors are no way concerned with the offence and they were not the directors as on the date of passing such resolution since they came on record as additional directors only on the day when Dr.Subba Rao Pavuluri, petitioner No.2 herein and his wife P.Anantha Lakshmi passed a resolution and submitted the same to the Registrar of Companies. Therefore, issue of summons/notice to the petitioners to proceed against them is an illegality committed by the trial Court.

Wife of petitioner No.2 Dr.P.Subba Rao though due for retirement by 30.09.2014 she did not retire as one of the directors of the company, for the reason that no Annual General Meeting was held to retire her from company as a director. Therefore, she deemed to have been continued as director by virtue of provisions of Companies Act, 2013 and thereby passing resolution in the Annual General Meeting and submitting the same to Registrar of Companies in DIR-12 is not an illegality and it would not amount to any offence punishable under the Companies Act. Therefore, taking cognizance and issuing summons against these petitioners is grave illegality committed by the trial Court.

The other ground urged before this Court is that the directors/petitioner Nos.3 to 10, who were elected as additional directors in the Board meeting held on 09.05.2015, cannot be made liable for punishment in view of the settled law in "***Sunil Bharti Mittal v. Central Bureau of Investigation***" (referred supra) and other judgment and prayed to quash the proceedings.

Learned Senior Counsel for the petitioners also relied on the judgments rendered in "***G.Sagar Suri v. State of U.P.***[6]", "***Ram Biraji Devi v. Umesh Kumar Singh***[7]", "***Suryalakshmi Cotton Mills Limited v. Rajvir Industries Limited***[8]", "***Paramjeet Batra v. State of Uttarakhand***[9]", "***Rishipal Singh v. State of Uttar Pradesh***[10]" "***Rashmi Jain v. State of Uttar Pradesh***[11]", "***Gold Quest International Private Limited v. State of Tamil Nadu***[12]", "***Pooja Ravinder Devidasani v. State of Maharashtra***[13]", "***Rajib Ranjan v. R.Vijaykumar***[14]", "***M.Mahendar Kumar v. M.Mani***[15]" "***HMT Watches Ltd. v. M.A.Abida***[16]" "***K.K.Kuda v. Chief Enforcement Officer, Enforcement Directorate***[17]" "***Sharad Kumar Sanghi v. Sangita Rane***[18]" "***M.Pitchaiah and others v. K.S.Periyaswamy***[19]"

---

[6] (2000) 2 SCC 636
[7] (2006) 6 SCC 669
[8] (2008) 13 SCC 678
[9] (2013) 11 SCC 673
[10] (2014) 7 SCC 215
[11] (2014) 13 SCC 553
[12] (2014) 15 SCC 235
[13] (2014) 16 SCC 1
[14] (2015) 1 SCC 513
[15] (2015) 11 SCC 519
[16] (2015) 11 SCC 776
[17] (2015) 12 SCC 298
[18] (2015) 12 SCC 781
[19] ILR 2016 KAR 2437

Whereas Sri S.Ravi, learned Senior Counsel for the respondents, would contend that when Mrs.Anantha Lakshmi was due for retirement by 30.09.2014, failure to conduct Annual General Meeting to retire Mrs.Anantha Lakshmi is not a ground to quash the proceedings and her continuation as one of the directors of the company and passing resolution is nothing but fraud played by the petitioners on the company so as to defeat the rights of the respondent No.2 herein and when she was due for retirement, merely because no resolution was passed in Annual General Meeting, she is not entitled to continue as a director of the company and in support of his contentions he relied on "***A.Ananthalakshmi Ammal v. The Indian Trades and Investments Ltd.***[20]" and "***B.R.Kundra, Proprietor, Film Exploiters, Chandni Chowk, Delhi v. Motion Pictures Association, Film Colony, Chandni Chowk, Delhi***[21]"

He further contended that there is no illegality in the order passed by the trial Court in issuing summons under Section 204 of Cr.P.C. and that itself not a ground to quash the entire proceedings.

He further contended that the Company has inherent power to take all steps to ensure its proper working and that, of course, includes the power to appoint directors. It can delegate this power to appoint directors to the board of directors and such delegation will be binding upon it. If there is no legally constituted board which could function or if there is a board but that is unable or unwilling to act, then the authority delegated to the board lapses

[20] AIR 1953 Madras 467
[21] Laws (DLH)-1975-1-8

and the members can exercise the right inherent in them of appointing directors.

In the present case, the petitioner No.2 and his wife P.Anantha Lakshmi, one of the directors, passed resolution ignoring the requisition given by the respondent No.2 transferred shares in favour of newly appointed directors to defeat the rights of respondent No.2, thereby the respondent No.2 can exercise his right in the administration of the company as the petitioner Nos.3 to 10 are not the members of legally constituted board and placed reliance on "***B.N.Viswanathan and another v. Tiffin's Baryt Asbestos and Paints Limited by their Agents and Secretaries, The Indian Trades and Investments Ltd. and Others***[22]".

Learned Senior Counsel for the respondents further contended that when the petitioners played fraud on the company including the Directors and Additional Directors, they are liable for such offence and the Court cannot quash the proceedings by exercising inherent jurisdiction under Section 482 of Cr.P.C. at this stage and placed reliance on a judgment of Apex Court rendered in "***Ganga Dhar Kalita v. The State of Assam***[23]".

He further contended that the Company cannot claim any immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offences. In other words, the criminal intent of the "alter ego" of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the Corporation since they are the persons, who are

---

[22] AIR 1953 Mad 520
[23] (2015) 9 SCC 647

managing the affairs of the Company and placed reliance on "***Iridium India Telecom Limited v. Motorola Incorporated and others***[24]"

On considering the rival submissions and perusing the material available on record, the points that arise for consideration are as follows:

(1) Whether Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, exercised his power in accordance with Sections 190, 200 and 204 of Cr.P.C. while issuing summons to the petitioners, if not, whether entire proceedings are vitiated and thereby the proceedings in C.C.No.121 of 2015 and C.C.No.122 of 2015 are liable to be quashed?

(2) Whether the petitioner Nos.3 to 10 in Criminal Petition No.13469 of 2015, who are claiming to be additional directors, are liable for any of the offences as they were inducted as additional directors by passing a resolution dated 09.05.2015 and filed DIR-12 with Registrar of Companies on 23.06.2015, so also petitioner Nos.4 and 5 in Criminal Petition No.13470 of 2015, if not the proceedings against them are liable to be quashed?

(3) Whether the resolution passed by the directors i.e. Dr.Subba Rao Pavuluri, petitioner No.2 and his wife Mrs.Anantha Lakshmi would amount to defeating the rights of the respondent No.2 by fraudulent acts, if so, are the petitioners are liable for the offences punishable under Sections 447 and 448 of the Companies Act and under Section 120-B of I.P.C.?

---

[24] (2011) 1 SCC 74

P O I N T Nos.1 to 3:

The first and foremost contention raised in Ground (C) of both the petition Nos.13469 of 2015 and 13470 of 2015 is that the order of taking cognizance is wholly illegal, unsustainable and contrary to law laid down by the Supreme Court in "***Pepsi Foods Limited v. Special Judicial Magistrate"*** (referred supra) and in "***M.N.Ojha v. Alok Kumar Srivastav"*** (referred supra).

During hearing learned senior counsel appearing for the petitioners contended that very taking cognizance by issuing summons under Section 204 of Cr.P.C. is grave illegality committed by the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad and the order was passed mechanically without applying his mind and thereby entire proceedings are liable to be quashed.

The Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad received complaint and recorded the statement of defacto complainant/ respondent No.2 herein and thereafter passed the following order:

> ***"Sworn statement of Complainant is recorded. Heard the counsel for complainant, perused the complaint and material papers on record. Taken of file U/sec. 447, 448 of Companies Act 2013 and 120-B IPC. Office is directed to register the case as CC.NO.121/2015. Issue summons to the accused. Call on 18/9/2015."***

Based on the order extracted above, Sri S.Satyanarayana Prasad, learned Senior Counsel for the petitioners would contend that the order passed by the trial Court, which took cognizance of the offences in relation to the petitioners must disclose that the Special Judge for Economic Offences has applied his mind and only after recording satisfaction as to existence of grounds to proceed against the petitioners issued summons/warrant, as the case may be, under Section 204 Cr.P.C. Thus, recording of satisfaction about existence of sufficient grounds to proceed against the petitioners is *sine qua non* and in the absence of such recording the entire proceedings taking cognizance and issue of process vitiates. The order under challenge extracted above is bereft of such requirement and in such case very taking of cognizance is vitiated.

Chapter XIV of Cr.P.C. deals with conditions requisite for initiation of proceedings. Section 190 of Cr.P.C. deals with the power of the Magistrate to take cognizance of the offence; subject to the provisions contained under Chapter XIV of Cr.P.C. any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered on his behalf under sub-section (2), may take cognizance of any offence upon receiving a complaint of facts which constitute such offence; upon a police report of such facts; upon information received from any person other than police officer, or upon his own knowledge, that such offence has been commited. Here, the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad is the officer, who is competent by virtue of his office. Section 190 of Cr.P.C. is the first Section of the Sections laying requisites for initiation of the criminal proceedings. Criminal proceedings, if initiated before the Magistrate and the Magistrate may take cognizance of the offences or offences alleged only by applying his/her mind to the facts. Mere presentation of the complaint is not sufficient to proceed against the accused as issuing summons will have serious consequences. The word "cognizance" is not defined anywhere in the Cr.P.C. But the meaning of taking cognizance is "applying mind of the Presiding Officer to the facts of the case and arriving at a conclusion that there is material to proceed against the accused". Taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as the Magistrate applies his mind to the suspected commission of an offence. Magistrate can be said to have taken cognizance of any offence when he applies his mind to the offence for the purpose of proceeding in a particular way as indicated in Chapter XVI of the Code, proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202 of the Code. Taking cognizance is a judicial act. By mere presentation of challan, the Court does not take cognizance of the offence. Where the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of Chapter XVI but for taking action of some other kind i.e. ordering investigation under Section 156 (3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence.

The word "cognizance" with reference to a Court or Judge means to ***"take notice of judicially"***. Cognizance occurs as soon as Magistrate as such applies his mind to the suspected commission of an offence and the cognizance ends when the Magistrate ceases to have seisin of the case.

Thus, the pre-requisite for taking cognizance is application of mind by the Magistrate judicially. It is a judicial order. But here the Magistrate passed the order, extracted above, only based on the arguments advanced by the counsel and perusing the material papers available on record, issued summons, without recording his/her satisfaction as to the existence of sufficient grounds to proceed against the accused.

What the material papers contain and whether there are grounds to proceed against the petitioners for the offences punishable under Sections 447 and 448 of Companies Act and under Section 120-B of I.P.C. was not recorded by the trial Court.

There is no mention in the impugned order that the allegations made in the complaint *prima facie* constitute the offences punishable under Sections 447 and 448 of Companies Act, 2013 and Section 120-B of I.P.C which requires a thorough investigation and report. Mere using of words " *Heard the counsel for complainant, perused the complaint and material papers on record.*" does not denote or connote application of mind. Application of mind is some thing more than the perusal of the record.

After taking cognizance under Section 190 of Cr.P.C. the procedure to be followed by the Court is to issue summons/process under Section 204 of Cr.P.C.

According to Section 204 of Cr.P.C. If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

The process of securing the presence of the accused is mentioned in Section 204 of Cr.P.C. and where the evidence on record makes a prima facie case against the accused, the Magistrate issues summons to secure the attendance of the accused. In determining whether the accused should be summoned or not the Magistrate should simply see if there is *prima facie* evidence in support of the complaint allegations and not whether there is sufficient ground for conviction. Where a *prima facie* case is made out against the accused the Magistrate has no option but to summon the accused and the Magistrate cannot refuse to summon the accused on the ground that it is likely to result in acquittal of the accused. When summoning the accused the Magistrate should specify the section of the Act under which the accused is being summoned.

What is sufficient ground to proceed varies from case to case. When the Magistrate decided to issue process against the accused, the Magistrate must apply his judicial mind to the material before him and ascertain not only that there is sufficient ground for proceeding further in the complaint but also the nature of the offence for which the accused need be summoned. The Magistrate does not enjoy an unrestricted power to summon a person at his whim, fancy or caprice simply because indicates that there is no *prima facie* case against some of the accused persons and the Magistrate without applying his judicial mind summon all the accused persons, the order summoning all the accused persons is liable to be set aside as held in "***Nirod Chandra v. Dijabara***[25]"

The issuance of the process is not a mechanical matter, the Magistrate must bestow upon the case before him his deliberate and thoughtful consideration whether it discloses sufficient ground for proceeding as held in "***Swami Mick Monassan v. Papatlal***[26]". The expression "there is sufficient ground for proceeding" appearing in Section 204 must be distinguished from expressions like "there is ground for presuming that the accused has committed an offence" used in Sections 240, 246 and 228 of the Code. While the stage at which the Magistrate decides to summon an accused is, no doubt an important stage in the proceedings, and must be preceded by an application of judicial mind to material before the Court to determine if "there is ground for proceeding", the stage nevertheless, does not call for any indepth examination of other material or possible defence of an accused. Thus, before issuing summons by exercising power under Section 204 of Cr.P.C. the Magistrate has to apply his mind to the facts of the case and unless the Magistrate concludes that there are sufficient grounds to proceed, issuance of summons itself is an illegality.

When an identical question came up before the Supreme Court in "***Pepsi Foods Limited v. Special Judicial Magistrate"***, the Supreme Court held that "Summoning of an accused in a

---

[25] 1984 Cr L J (NOC) 42 (Ori.)
[26] (1983) 1 GLR 185

criminal cases is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

In "***M.N.Ojha v. Alok Kumar Srivastav***" the Apex Court held that "it is well settled and needs no restatement that the saving of inherent power of the High Court in criminal matters is intended to achieve a salutary public purpose "which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. If such power is not conceded, it may even lead to injustice". [Vide: State of **Karnataka** v. **L. Muniswamy** : (1977) 2 SCC 699)]"

In a recent judgment "***HDFC Securities Ltd. v. State of Maharashtra***[27]" the Apex Court relying on "Maksud Saiyed v. State of Gujarat[28]" observed that Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156 (3) or Section 200 of Cr.P.C., the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents therein were personally liable for any offence.

The Apex Court also referred to a judgment rendered in "***Thermax Limited and Others v. K.M.Johny and others***[29]" and "***Sunil Bharti Mittal v. Central Bureau of Investigation***" (referred supra). In those two judgments, the Apex Court discussed about vicarious liability of Directors of a company. However, a similar question is also required to be decided in the present petition as the petitioner Nos.3 to 10 are the additional directors, who were appointed in the Board Meeting held on 09.05.2015, which was submitted to the Registrar of Companies in DIR -12 on 23.06.2015. But the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, did not consider this aspect in proper perspective and mechanically took cognizance of the offences against the petitioners in both the petitions and ordered summons to them,

---

[27] AIR 2017 SC 61
[28] (2008) 5 SCC 668
[29] (2011) 13 SCC 412

simply directed to register the case for different offences against the petitioners, issued process even without finding ***prima facie*** case against the petitioners for various offences. Therefore, passing such order without applying his/her mind and taking cognizance of the offences against the petitioners, issuing summons exercising power under Section 204 of Cr.P.C. is an illegality, in such case the Court can exercise its inherent jurisdiction under Section 482 of Cr.P.C. in view of the principle laid down in "***M.N.Ojha v. Alok Kumar Srivastav***" (referred supra) and "***State of Haryana v. Ch.Bhajan Lal***[30]"

In the earlier judgment rendered in "**Ramdev Food Products Private Limited v State of Gujarat**[31]", the Apex Court discussed about the powers of the Court under Section 156(3) of Cr.P.C. and held as follows:

> "Thus, we answer the first question by holding that the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed".

Thus, the order whatever passed by the Magistrate while taking cognizance and issue of summons exercising power under Section 204 of Cr.P.C. must disclose that he/she has applied his/her mind to the facts of the case and found that there are sufficient grounds to proceed against the petitioners. But the order in question is bereft of any such conclusion or satisfaction

---

[30] AIR 1992 SC 604
[31] (2015) 6 SCC 439

recorded by the Court, in such case the order taking cognizance against the petitioners and issuing process under Section 204 of Cr.P.C. is an error apparent on the face of the record.

In Crl.P.No.13470 of 2015 the complainant specifically alleged that the accused No.2 in order to gain undue advantage and in violation of Section 56 of Companies Act, 2013 regarding transfer of shares created two additional shareholders i.e. accused Nos.4 and 5 showing transfer of 100 equity shares to each of them from the shares held by accused No.2 and the same was done by the approval of the Board at its meeting dated 02.09.2014, which in fact, was never convened and no notices were issued for convening the said board meeting and filed Form MGT – 14 with Registrar of Companies.

In the present petitions, the petitioners raised several contentions, more particularly about the cause of action for filing complaint for the offences punishable under Sections 447 and 448 of Companies Act. The petitioner Nos.3 to 10 in Crl.P.No.13469 of 2015 joined as additional directors in pursuance of the resolution dated 09.05.2015 and DIR – 12 was submitted to the Registrar of Companies on 23.06.2015, but the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, did not apply his mind to any of these legal issues and the question of raising such contention before the Special Court for trial of Economic Offences by the petitioners does not arise in normal course of events as it is pre-cognizance stage. But still it is the duty of the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, to apply his/her mind and satisfy himself/herself whether the Court can proceed further against all or any one of the accused based on the settled principles of vicarious liability and take cognizance, issue process by exercising power under Section 204 of Cr.P.C., But the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad, did not apply his/her mind to the various aspects referred above, mechanically took cognizance of the offences based on the statement of the complainant, arguments of the counsel for the complainant and documents produced before the Court i.e. without recording any satisfaction as to the existence of grounds to proceed further, which is *sine qua non* under Section 204 (1) of Cr.P.C. but issued summons or warrant, as the case may be, against the accused. Therefore, the order taking cognizance of the offences and issue of summons under Section 204 of Cr.P.C. is erroneous, on this ground the order passed by the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad in C.C.No.121 of 2015 and in C.C.No.122 of 2015 are liable to be set aside. However, the learned Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad is directed to follow the prescribed procedure for taking cognizance and issue of process under Section 204 of Cr.P.C. considering the questions mentioned in the earlier paragraphs and proceed further, if the Court finds that there are sufficient grounds to proceed against the petitioners herein for all or any of the offences allegedly committed by them.

In the result, the petitions are disposed of setting aside the order dated 14.08.2015 passed in C.C.No.121 of 2015 and

C.C.No.122 of 2015 by the Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad. The Special Judge for Economic Offences – cum – VIII Additional Metropolitan Sessions Judge, Nampally, Hyderabad is directed to apply his/her mind to the facts of the case and record his/her satisfaction about the existence of grounds to proceed further keeping in mind various questions regarding vicarious liability of the directors etc., referred in the earlier paragraphs and pass a reasoned order afresh within one month from the date of receipt of a copy of this order.

Consequently, miscellaneous applications pending if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

20.04.2017
Ksp