HON'BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO

CRIMINAL PETITION No.936 of 2016

ORDER:

The petitioner/A.2 is Mr. David Morrow, Head – Fraud Risk & Security, M/s. Hutchison Essar Limited now M/s. Vodafone Essar Limited, PC Park, Ganapath Rao Kadam Marg, Mumbai, as per the complaint and as per him his correct address is 47 Ramsbury Drive, Hugerford, Berkshire RG17 0SG, United Kingdom, sought for quashing proceedings in C.C.No.874 of 2011 pending on the file of XI Additional Chief Metropolitan Magistrate, Secunderabad. The 2nd respondent is the defacto complainant.

2. The private complaint of the 2nd respondent herein by name Dasari Nagendra Babu of Vijayawada on 29.01.2009 maintained is against 6 accused viz., M/s. Hutchison Essar Limited now M/s. Vodofone Essar Limited (A.1) represented by its Managing Director Mr. David Morrow-A.2, V. Avinash-A.3, Head AVP Sales & Marketing Operations of A.1 supra, Mr. K.K. Mohan Reddy-A.4, Manager PCO Division for State of A.P. of A.1 supra, Manoj Singh-A.5, Manager Finance of A.1 supra, Dinakar-A.6, Manager Finance of A.1 supra. The date of offences in the private complaint supra, were during 17.05.2004 to 07.11.2008 and onwards. The alleged offences for which the private complaint filed are under Sections 418, 420, 467, 468 & 471 r/w 120-B IPC and within the jurisdiction of P.S. Begumpet, Secunderbad, by citing besides the complainant, 8 more witnesses.

3. The complaint averments are that the complainant supra is the State Contact Person (SCP) of A.1 company for the State of

A.P. and also District Contact Person (DCP) for the Krishna and Guntur Districts, having been appointed as per MOU dated 17.05.2004. A.1 company did business in providing cellular mobile telephone services throughout India and its operations in the then Andhra Pradesh State (for short 'A.P.') being carried out through its Circle Office, Begumpet, Hyderabad, and the day to day affairs of A.1 company were managed and looked after by its Managing Director. Prior to the complainant becoming SCP of A.1 company, he was doing business with BSNL and is State General Secretary of STD, PCO Franchisee's Welfare Association, being a Civil Engineer and also a class-II contractor for A.P. State Police Housing Corporation and Proprietor of Maheswara Perfect Courier Service. The complainant shifted to Hutch company leaving his reputed on hand business activities supra. A.1 company did not succeed in developing and improving its PCO business in spite of efforts and thereby A.1 approached the complainant and requested to take up its business by involving his union members and develop PCO business in the Districts of A.P. and which request of them mobilized the complainant and his District union members and held business meet at Hotel Meghalaya, Visakhapatnam, on 02.04.2004 and on assurance by A.1 company, the complainant and his District union members agreed to become DCPs of A.1 in the State of A.P.

4. It is further averred in the complaint from Para 5 onwards that, initially Ms/ Hutchison Essar South Limited was having its Corporate Office at New Delhi and later shifted to Mumbai with Circle Office at Begumet, Hyderabad, (for short 'Hutch') in the business of providing cellular mobile telephone services in India,

including in A.P. and it was a Hongkong based entity which has started business with partnership with Essar group of India. It offered to give services of GSM PCO (public call office). It started in the year 2002 and could not make any head way in A.P. in PCO business till SCP and DCPs services availed. Thereafter in 2007 major share of Hutch company acquired by Vodafone and Vodafone taken over Hutch company and renamed as Vodafone Essar with international market and operations in India with hitherto Essar group as principal joint venture partner and the new venture started under Hutch company and slowly switched over itself to Vodafone, with Indian Corporate Office at Mumbai and circle office in all States and for A.P. at Begumpet headed by AVP Sales Marketing Operations through Circle Office at Hyderabad concerned by A.3 to A.6 supra. The services provided by A.1 company is through 3 different wings i.e., post-paid, pre-paid and PCO connections and started its GSM PCO division operations initially in A.P. from Vijayawada during 2004 and as failed to make any headway moved from Vijayawada to the main circle office at Begumpet, Hyderabad, and even could not make any progress in its PCO operations through its executives supra, thereby contacted STD PCO Franchisee's Welfare Association No.1827 of 2003 for advancing the PCO operations as referred supra with meeting taken place on 02.04.2004 at Hotel Meghalaya, Visakhapatnam.

5. It is averred further that in the said meeting A.1 officials explained the rates at which PCO will operate and how PCO owners get profits by booking connections and about commission that would be realized by DCPs and SCPs and assured the

complainant and other DCPs to carry out business without any hindrance by A.1 under terms of understanding and induced by their assurances to the complainant and others in taking up the business by assuring all permissions to the business in PCO operations in A.P. by furnished photostat copies of certain documents in that regard. The MOU entered with said SCPs and DCPs individually with modus operandi of the operation the DCPs to function under SCPs appointed by SCPs and individual contracts entered into by the company with DCPs and for all operations SCP is accountable to A.1 company for SCPs are over all in-charge for all PCO operations of all Districts in the State including to resolve any grievance as per the MOU dated 17.05.2004 supra and it is pursuant to which SCP and DCPs started operations of A.1 company with effect from 25.07.2004 and based on application form, verification team of the company used to visit the PCO operator to confirm the address given in the application form to give sim cards and after confirmation the sim cards were to be activated and DCP is paid Rs.400/- as acquisition commission and commission @ 3.5% on billing amount of PCO operator subject to PCO operator is making minimum billing of Rs.5000/- per month and owning to the number of installation beyond the expectation of A.1 company, the condition of PCO operator making minimum billing of Rs.5000/- per month for the DCPs installments of commission @ 3.5% on the billing amount is removed though one of the conditions in the MOU. The SCP and DCPs initially bring awareness of the operations of Hutch in public in general and PCO operators in particular having taken lot of efforts by individual contacts and even probed in to alternative avenues as good competitor from others to the BSNL including in the charges fixation and therefrom their suggestion and change brought in developing the business of A.1 company and also provided Hutch coin boxes making STD and local calls for Rs.2/- and local calls and cell calls at Rs.1/- instead of Rs.3.50/- STD and PCO booths even to the surprise of A.1 from the overwhelming business commanded by the complainant and other DCPs with above changes. Initially, PCO operations were offered to the public by providing FCT boxes installed with respective PCO operators acquired by PCOs by providing with sim card in advance to PCOs with postpaid connection and later put into use STD coin box system operated by drop of coins by activation of DCPs by installing sim cards by recording number of calls with billing amount.

6. It is further averred that aggrieved by overwhelming business commanded by Hutch coin box, the officials of BSNL who lost most of the business to Hutch and found that A.1 did not possess permission from Department of Telecommunications to operate PCO connections and brought the same to the notice of DOT and DOT authorities directed those who are unofficially operating PCO business shall pay penalty to carry on. Shocked by the sudden development without disclosing the information to the complainant and other DCPs and fearing penalty, A.1 called for meeting and directed the complainants and others not to book any fresh connections and they were also made to return few applications and surprised and alarmed by the sudden move of stopping business, the complainant and other DCPs demanded an explanation from the accused and finding no convincing reply, one

month later complainant with other DCPs enemas went to A.1 company and demanded explanation and reason. To divert the issue, A.1 directed to collect the post-paid PCO pending bills which are outside the MOU dated 17.05.2004 to enable the complainant and others to start new basis for pre-paid PCO. In June,2005 the complainant and other DCPs are directed to change the post-paid PCO to prepaid PCO and further directed to collect PCO owner's give amount under the pending bills and account for by seeking a letter to that effect and believing the same, the complainant and others DCPs complied with and without disclosing by accused to the complainant and other DCPs started distributing recharge coupons through retail distribution outlet, for which complainant and others agitated which cause them loss and accused promised to pay the commission on said sales and promised to start new business through them, the above move by the accused is with ill-motive and jealousy including change of post-paid to prepaid by committing fraudulent omissions and commissions to the ignorance of SCPs and DCPs having charged rent under post-paid and prepaid operations and this systems discouraged many PCOs from continuing with A.1 company and A.1 also committed breach of trust started their own dealers town wise to distribute prepaid GSM PCOs at a subsidized rates by delivering instruments to franchise at subsidy price. Even if franchise had not so much business as target, he will recharge the instruments as per A.1 company norms and if franchise is not recharged the instruments it is responsibility of the distributor with adverse effects on the business of SCP and DCPs. The SCP and DCPs failed to convince the old PCO operators about A.1 company's policy, which is in fact fraudulent to cause wrongful loss to them to gain wrongfully by them, apart from said change brought lot of suspicion to PCO operators from which PCO owners demanded return of deposit amount of Rs.1500/-. When complainant approached the accused explaining the situation, the accused persons did not come to the rescue and did not take steps to ease out the situation. While so on 22.12.2006 all DCPs with complainant went to the office of A.1 and demanded the return on deposit amount with all amounts due under commission and about new business offer for which A.1 company did not respond. The Manager PCO KK Mohan Reddy representing A.1 then pressurized the DCPs to sign a document showing the settlement of amount in favour of PCO dealers under the caption "PCO dealer full and final settlements" and indemnity bond and left with no alternative, the DCP signed the letter and the bond and after getting deposit amount by way of DD, DCPs paid amounts to PCOs/franchise.

7. A.1 at that stage promised to start business in new prepaid PCO connections through the complainant and other DCPs and with that the accused were postponing much to the breach of trust and they introduced the PCO operations though promised to start said business through the complainant and other DCPs, without their knowledge A.1 company phase wise appointed leave distributors in all Districts and gave prepaid connections, contrary to subsisting agreements with the complainants and others DCPs, even though as per the MOU the accused has to do business with complainant and they deliberately not started the business through them, but appointed the dealers and continuing the PCO business contrary to it. Accused paid amounts due under

commission and business commission as per entitlement as on December 2006, and did not pay expenses incurred by the complainant and other DCPs for maintaining office and office staff since January 2005 to December 2006 and they also caused wrongful loss to the complainant and other DCPs by keeping them idle without giving any business for booking new PCO connections since January 2005 by which the complainant and the other DCPs sustained huge loss. A.1 shown payment of various amounts to the credit of DCPs and when asked by complainants and other about it, they refused to give any statements of account. One of the DCP in charge of Vishakapatanam and Vizianagaram districts by name Sri Seeli Raju received a notice from income tax authority questioning his returns and accused has shown in the account of Raju which was maintained by company showing wrong entries as if paid to him without payment actually and alarmed by a notice dated 14.10.2008 was issued by complainant and another notice dated 29.10.2008 issued by Lws.1 to 7 as DCPs and individual notice dated 01.11.2008 issued by Lw.8 and likewise by Lw.9 on 07.11.2008 to the Managing Director of A.1 company by marking copies to other accused seeking statement of account pertaining to the accounts of all DCPs with TDS certificates and in spite of it there is no response. Lakhs of rupees being withdrawn by officials of the company in the name of DCPs by forging their signature and another corporate fraud is that any company which wish to start a business in cellular mobile telephone services need to take permission of DOT and certain amount will be taken as deposit for operation like post-paid, prepaid and PCO operations and company having started business without obtaining any such permission of

DOT played fraud on the Government, only in December 2006, company obtained permission from DOT for PCO operations and till such time from May 2004, company taken up business with PCOs without such permission having played fraud.

8. Even complainant and other DCPs improved and developed business and made to realize maximum profits by their efforts and from the good will and public relation of them including by inventing new Rs.2/- STD coin system and accused fraudulently and dis-honestly committed breach of trust by not continuing the business with the complainant and other DCPs and by clandestinely doing business with newly appointed distributors much to the breach of MOU to cause wrongful loss to them and by cheating them and thereby committed offence and are liable for the offence of cheating, falsification of account and forgery for the purpose of cheating and using as genuine forged documents besides A.1, A.2 as Head-fraud Risk and Security fraudulently and dis-honestly suppressed in committing the offences liable so also the A.3 Head of AVP sales, marketing operations and in charge of operations of A.1 in AP, so also A.4-Manager PCO division for State of AP being overall in-charge, so also A.5-Manager finance and A.6 Manager Finance who succeeded A.5 and thereby for the offences committed within the jurisdiction of the learned Magistrate therefrom Circle Office at Begumpet, Hyderabad within Begumpet Police Station, the complainant filed to take cognizance of the offences along with complaint thereby 53 documents enclosed.

9. The contentions in the quash petition filed by the petitioner/A.2 David Morrow supra in nutshell are that instead of

rejecting said private complaint, the learned Magistrate forwarded the said private complaint to the police under Section 156 (3) Cr.P.C. therefrom the police registered the crime No.36 of 2009 and after investigation filed final report treating the lis as Civil in nature and the complainant filed protest petition in Crl.M.P.No.5074 of 2010 on 10.02.2011 with amendment application dated 16.03.2011 naming the Managing Director of A.1 company since allowed on 18.04.2011 and after recording sworn statement of the complainant, S.Raju, P.Lazarus, P.Rajiv Gandhi, P.Srinivas Rao, by order dated 15.06.2011 the learned Magistrate has taken cognizance against A.1 to A.6 for the offences punishable under Sections 418, 420, 468, 471 r/w 120-B IPC in ordering to summon them in C.C.No.874 of 2011 though no offence is made out.

10. It is the further contest that the petitioner was an employee of Vodafone Group Services Limited, UK company and a subsidiary company of a PLC and another UK company and had been posted for a short term international assignment at Mumbai during 02.03.2008 and 26.09.2008 as Head fraud risk and security in view to change control of HEL to Vodafone only to assess the anti-fraud and security requirements of Vodafone India Limited as it transitioned to Vodafone Group PLC policy and practices as Vodafone is a listed company in UK. The petitioner/A.2 alleges that he had nothing to do with the alleged inducement of the complainant or other persons including in entering of MOU, and cessation of business relations between and alleged forgery and withdrawal of money by officials of VSL and there is no any allegations of cheating or forgery or using as

genuine any forged document committed by the petitioner/A.2 from the complaint averments and he is nothing to do with any of the alleged transactions or offences which in any event pertain to the year period 2007-08 and by then he had no connection with HESL, now VSL.

11. The further contest is that the petitioner-A.2 received only one letter dated 17.03.2008 from complainant and he responded to it on 04.06.2008 seeking further information however there is no response from complainant to it and no offence made out against the petitioner by any imagination even and the taking of cognizance and summoning him as co-accused along with others is unsustainable and erroneous and even the summons were wrongly served upon him of VSL in September 2011, who mistakenly accepted as passed on the information by VIL to petitioner through Vodafone Limited and proceedings are thereby liable to quash.

12. The other contest is that the order of the learned Magistrate dated 06.06.2014 allowing the Crl.M.P.No.1647 of 2013 is erroneous as if the petitioner is the Managing Director of A.1 company and resident of Mumbai, though resident of England, however wrongly taken summons to an incorrect address of Mumbai. It is the further contest that A.1 filed memo before the learned Magistrate dated 25.07.2014 returning original summon to petitioner received at A.1 address and appraised the matter as the petitioner-A.2 is not even an employee of A.1 and the complainant also filed memo dated 25.07.2014 stating that the petitioner/A.2 is working as Global Head of Customer Management Program of

Vodafone and his place of working is Newbury, Burghshire, England and the authorized signatory of A.1 company addressed to the counsel for complainant by informed that the petitioner-A.2 is not in employment with VIL and returned the original summons by mentioning the summons are to be issued under Section 62 Cr.P.C. to the petitioner-A.2's address in England. The learned Magistrate however issued NBW on 25.07.2014 against A.2. In fact petitioner/A.2 resigned from Vodafone on 31.10.2015 and no longer associated with that and same was also informed by Mumbai Office and learned Magistrate however passed orders waiting report of execution of NBW against the petitioner/A.2. When the petitioner-A.2 contacted his counsel who cause downloaded the docket proceedings of the case from e-courts website, he came to know all these and thereby questioning the same in seeking to quash the proceeding pending against him for all these grounds.

13. The learned counsel for the petitioner/A.2 reiterated the above in the course of hearing and placed reliance upon several expressions. The learned counsel for the 2nd respondent-complainant by placing reliance on certain expressions contended that there is a clear role of petitioner/A.2 and there is nothing to quash the proceedings and he is intentionally avoiding attendance before the Court even very well knew the pending NBW against him for there is basis for protest petition taken cognizance from recording of the statements of witnesses.

14. Heard both sides at length and perused the decisions placed reliance and the material on record in relation to the facts supra.

15. As held by the Apex Court in **Suryalakshmi Cotton Mills Limited Vs. Rajvir Industries Limited and Others**[1] at Para 20 and **Rukmini Narvekar Vs. Vijay Sataredkar**[2]**,** apart from subsequent other expressions in a quash petition even in relation to any disputed fact any material placed reliance by accused on unimpeachable credibility can be placed reliance by the Court to prevent any abuse of process or to sub serve the ends of justice if at all by quashing the proceedings if so required.

16. From the above, the petitioner-A.2 placed reliance on the particulars of his employment, that could not be disputed, which is covered by the proceedings dated 11.02.2008, showing commencement of his assignment from 18.02.2008 for 5 months as an international assignment in Vodafone Essar in India in the position of Head, Group Risk Fraud and Security reporting to Chief Finance Officer and the assignment terms show in specific terms with benefits to be provided during the assignment and the contact sheet includes Vodafone and external service providers contacts. The complainant could not show that the petitioner/A.2 was ever connected with Hutchison Essar Limited, but for of Vodafone that too from February 2008. As per the complaint averments referred supra in detail, the so called doing of the complainant and other persons for the PCO business of State Level and District Level including STD facilities and coin box facilities etc., was

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[1] (2008) 13 SCC 678
[2] 2008 (4) JCC 2879

commencing from 2005. Even from the complaint dated 29.01.2009 referred to the police for investigation by learned Magistrate in registering the FIR with crime No.36 of 2009 on 07.02.2009 particularly from Para 5 the Hutchison Essar South Limited even originally with Corporate Officer at Dehli shifted to Mumbai with activities all over India including in AP with Circle Office mainly at Hyderabad, earlier even at Vijayawada for sometime and the company started the services of GSM PCO in the year 2002 and could not progress till the services of SCP and DCPs availed later, right from the meeting held at Hotel Meghalaya of Visakhapatnam on 02.04.2004 and pursuant thereto from the offers luring them as the case may be. What Para 53 of the complaint further reads is that thereafter in 2007 major share in the Hutch company was acquired by his UK Vodafone and Hutch company was taken over by Vodafone and renamed as Vodafone Essar.

17. In the background of facts supra, A.2 was not there in the affairs of the A.1 entity prior to February 2008, apart from nothing to do with Hutch company, but for the short term international assignment, subsequent to the Hutch company was taken over by the Vodafone in later part of the year 2007, for his assignment of 5 to 6 months started in February 2008. Thereby in the absence of showing any specific over tacts of he is any way connected with the affairs of the Hutch company much less to day to day business in A.P. in relation to MOU between the complainant and other DCPs or PCOs etc., for the alleged offence of cheating or forgery purpose of cheating or using any forged document as if genuine or any breach of trust or misappropriation,

sufficient to say without need of discussing the several decisions placed reliance on both sides, the taking cognizance by the learned Magistrate on a protest petition from the sworn statements after police final report filed from the investigation with conclusion of civil in nature, without even referring to and without considering the earlier police investigation material on correctness or otherwise of the conclusions, to consider if at all only therefrom the protest against the referred report to go into for the Court cannot ignore the earlier investigation material, but for the protest to consider is with reference to that earlier investigation material as to how faulty and how from the subsequent sworn statements of any witness to what extent they differed and explained from the protest to the original investigation statements before the police officer, thus particularly in relation to A.2/petitioner herein concerned for nothing to take cognizance, the taking of cognizance for the offences supra against the petitioner is unsustainable and liable to be quashed.

18. Accordingly and in the result, the Criminal Petition is allowed by quashing the proceedings against the petitioner/A.2.

Consequently, miscellaneous petitions, if any shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 27.10.2017
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