

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-2606 of 2016

Date of Decision: 02.07.2018

Yogesh Mittal

....Petitioner

Versus

State of Haryana and another

....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Vikas Bahl, Senior Advocate, with
Mr. Manbir Singh Batth, Advocate,
for the petitioner.

Mr. Baljinder Singh Virk, DAG, Haryana.

Mr. Mukesh Rao, Advocate,
for the applicant-respondent no.2.

Amol Rattan Singh, J.

By this petition, by which jurisdiction of this Court under Section 482 of the Code of Criminal Procedure is sought to be invoked, the petitioner seeks the quashing of complaint no.25-1 of 2010/12, instituted by respondent no.2 herein, Kesar Lal Bansal, before the learned Chief Judicial Magistrate, Sirsa, alleging therein the commission of offences punishable under Sections 420 and 120-B IPC. (A copy of the complaint is annexed as Annexure P-1 with the petition).

The petitioner further seeks the setting aside of the summoning order dated 15.09.2012 (copy Annexure P-5), by which he has been summoned by the learned Judicial Magistrate Ist Class, Sirsa, which order has been upheld in Criminal Revision no.180 of 2015 by the learned Additional

Sessions Judge, Sirsa, vide his order dated 16.11.2015 (copy Annexure P-14).

2. The allegation of the complainant is that the petitioner, Yogesh Mittal, as also his co-accused Mahender Sharma, and 4 other co-accused, who are shown to be the Directors/CEOs of M/s Katyayani Petroleum Limited, Pune (hereinafter to be referred to as the 'M/s Katyayani'), have cheated him.

As per the complaint, the present petitioner and Mahender Sharma approached the complainant in August 2007 and induced him to install an LPG Gas Filling Station at Sirsa, with him to obtain a dealership from M/s Katyayani, the total investment of the complainant being Rs.25,00,000/-.

3. A perusal of the complaint shows that the offer made to the complainant essentially was that he would arrange for land measuring 80' x 80' and obtain/"manage" No Objection Certificates (NOCs) from the departments of Food & Supply, Electricity and Fire Brigade, with all other formalities to be completed by the company, i.e. M/s Katyayani, at its expenses, including setting up of the office and workshop etc.

The sale price of the gas was also stated to have been explained to him.

In the aforesaid background, in a nutshell the case of the complainant is that though he had paid a sum of about Rs.29,00,000/- at various stages, which was also beyond the amount of Rs.25,00,000/- that he was initially asked to invest, no gas station had been installed and therefore he had been cheated of the aforesaid amount of Rs.29,00,000/- by all the accused.

4. Upon the complaint being filed, the learned trial Court (JMJC, Sirsa), after noticing the essential facts, further noticed that the complainant

had also taken a plea that he had come to know that the present petitioner (Yogesh Mittal) was the brother-in-law of a prominent doctor who was also close to the family of the complainant, with the petitioner running a firm known as M/s Shri Vishnu Eatables (India) Limited, Kaithal, dealing in the business of rice on a large scale in several State in the country and abroad.

Accused no.2 Mahender Sharma (not a petitioner in this petition), was also believed by the complainant, as he was a resident of Sirsa and therefore (as per the complainant) he had sent his consent to become a dealer for dispensing gas after installation of a gas pump, with a telephonic call also stated to have been received by him from the Chairman-cum-Director of M/s Katyayani, i.e. the 3rd accused before the trial Court.

5. It was also noticed by the trial Court that, as per the petitioner, he had initially paid a cheque of Rs.1000/-, then Rs.2,65,000/- in favour of the firm of the present petitioner (M/s Shri Vishnu Eatables), with the complainants' signature also having been taken on an application form, and that the petitioner and Mahender Sharma allegedly had assured the complainant that the gas pump would be installed early, upon which they obtained a demand draft for an amount of Rs.1,05,000/-, a press conference also having been organised and advertisements having been made through newspapers "for including the innocent people to become victims of their forgery".

Various communications having been established between the complainant and M/s Katyayani, it was also noticed by the trial Court in the impugned order, that an allotment letter of dealership was sent to the complainant on 19.12.2008, under the signatures of the 6th accused before that Court, i.e. S.M. Tuli, Chief Executive Officer of the said company.

Two cheques of Rs.4,00,000/- each are stated to have been sent by post to the aforesaid company, with the complainant allegedly having taken out the money from his existing business on the allurement of “a bright future”. A piece of land measuring 90' x 90' had also been taken by the complainant on lease for 30 years, with Rs.8100/- per month to be paid for the lease, he also contending that he had spent money for levelling the plot of land, installation of a tubewell and for getting an electricity connection.

It is also stated in the impugned order that as per the complainant he had suffered expenses for getting 'No Objection Certificates' from three departments and that after investing such a huge amount, the complainant came to know from “his sources of Bombay and Pune”, that the present petitioner and Mahender Sharma actually had no agreement with M/s Katyayani and no gas filling pump had earlier been got installed by them.

6. The complainant is stated to have then approached the petitioner and Mahender Sharma at Kaithal, accusing them of “fraudulent misrepresentation” with them having allegedly requested him (complainant) to “keep mum”, with them subsequently having told him that they had now obtained a distributorship from M/s Katyayani, vide an agreement executed in May 2008, with them having paid the said company Rs.2,00,00,000/- as security. A photostat copy of the agreement was also stated to have been given to the complainant, assuring him of “guarantee and responsibility”.

7. In the month of March 2009, all the accused before the trial Court are stated to have made a survey of the site at village Moriwali, District Sirsa, and after approving of the same, the complainant was again assured with promises by the present petitioner and Mahender Sharma that the gas filling station would start functioning by 30.09.2009.

Three cheques of amounts of Rs.2,35,000/-, Rs.7,00,000/- and Rs.9,50,000/- are stated to have been issued between the months of March and September, 2009 by the complainant in favour of M/s Katyayani, with the total amount paid by that time therefore being Rs.26,56,000/-, the 'extra' Rs.1,56,000/- alleged to have been taken for the supply of Gas Kits to be installed in a vehicle (the original amount to have been invested being Rs.25,00,000/- as per the complainant).

Thereafter, on 13.01.2010, accused Mahender Sharma again is stated to have obtained Rs.2,50,000/- from the complainant for supply of the goods, including a gas tank, with the total investment thereby made by the complainant alleged to be Rs.29,06,000/-.

8. The respondent-complainant, as stated in the impugned order, examined himself as PW1 and one Bhagwan Dass Mehta as PW2 by way of preliminary evidence, also tendering about 19 documents, including copies of cheques, postal receipts and legal notices etc.

9. Upon appraisal of the aforesaid preliminary evidence, the trial Court noticed as follows:-

“3. I have gone through the preliminary evidence on record and have duly heard the arguments led by the counsel for the complainant. On perusal of the facts of the complaint alongwith the preliminary evidence adduced, it is clearly made out that the various cheques of the alleged amount were issued by the complainant in favour of the defendants. He did so while acting in accordance with the terms of the proposal kept before him by the accused persons no.1 and 2. Further documentary evidence exhibited by the complainant, support the averments of the complainant.

It is appropriate to mention with regard to the present stage in this case that satisfaction of judicial consciousness is a sine

qua non before issuing process against the accused in a complaint case.”

Thus, finding sufficient ground to summon all the accused, including the present petitioner, the impugned order dated 15.09.2012 was passed.

10. Aggrieved of the aforesaid order, the petitioner filed a revision petition that came up for hearing before the learned Additional Sessions Judge, Sirsa, who again, after noticing the aforementioned facts, came to the conclusion that the learned trial Court had not erred in summoning the petitioner and the other accused, especially as, at the stage of issuing process, the Magistrate “is not to see whether there was any truth in allegations levelled by the complainant, but only has to see whether on the basis of allegations, a cognizable offence is to be made out or not”.

To hold as above, reliance was placed by the revisional Court on a judgment of the Supreme Court in **Ram Babu v. State of Madhya Pradesh and others** 2009 (4) RCR (Criminal) SC 204.

11. The revisional Court also duly noticed the arguments raised before it, especially pertaining to the fact that even in its reports submitted under Section 202 Cr. P.C., the police had not found any offence made out against the present petitioner and that, further, as per the petitioner, it was the complainant himself who was at fault, not having procured NOCs from various departments, thereby having violated the terms and conditions of the agreement.

It had also been contended before that Court by the petitioner that a cancellation deed had been entered into between him (petitioner-accused) and M/s Katyayani, after which the complainant was contacted by M/s

Katyayani, without any involvement of the petitioner.

12. Having considered the aforesaid arguments, the revisional Court held that the Magistrate had the power to reject the report furnished by the police under Section 202 Cr.P.C. and still issue process and therefore, there being no legal infirmity in the summoning order, there was no ground to interfere with it, in exercise of revisional jurisdiction under Section 397 Cr.P.C.

Consequently, the revision petition filed by the present petitioner was dismissed vide the second order impugned in this petition, dated 16.11.2015 (Annexure P-14).

13. The petitioner having earlier approached this Court by way of CRM-M-40282 of 2014, which was dismissed as withdrawn on 17.12.2014 with liberty to file a fresh one, the present petition came to be instituted on 20.01.2016, (invoking jurisdiction under Section 482 of the Cr.P.C., as already stated earlier).

14. Extensive arguments have been addressed on both sides before this Court, with Mr. Vikas Bahl, learned Senior Counsel appearing for the petitioner, first submitting that only individuals have been made accused in the complaint, with neither the company “of the petitioner”, i.e. M/s Shri Vishnu Eatables (India) Limited, having been impleaded/arraigned as an accused, nor in fact, even M/s Katyayani so arraigned, with only its MDs, Directors and CEOs having been impleaded, by individual names.

He therefore submitted that most dealings having been made by the complainant with the companies, with cheques issued in favour of the said entities, the complaint itself is not maintainable, as there is no vicarious liability of the petitioner.

He pointed to Ex.C13 before the trial Court (Annexure P-6 with the present petition), which is a copy of the 'Distributor Agreement' between M/s Katyayani and the company of which the petitioner is the Director (M/s Shri Vishnu Eatables). Vide the said agreement, M/s Shri Vishnu Eatables was 'appointed' the distributor for M/s Katyayani, for the purpose of developing a retail dealership network of Auto LPG dispensing stations in the States of Haryana, Punjab, Rajasthan, Himachal Pradesh, Uttrankhand and the Union Territory of Chandigarh.

Thus Mr. Bahl contended that the 'petitioners' company' not having been arraigned as an accused in the impugned complaint, the petitioner personally could not be held liable for the commission of any offence. He cited the following judgments of the Supreme Court to support his argument:-

- (i) **R. Kalyani v. Janak C. Mehta (2009) 1 SCC 516;**
- (ii) **S.K. Alagh v. State of U.P. & Ors. 2008 (2) RCR (Criminal) 79.**

In *Kalyanis'* case, on the question of whether one of the Directors could be held to be vicariously liable, it was held that:-

“A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created.”

It was also further held as follows:-

“If a person, thus, has to be proceeded with as being vicariously liable for the acts of the company, the company must be made an accused. In any event, it would be a fair thing to do so, as legal fiction is raised both against the Company as well as the person responsible for the act of the Company.”

In *Alaghs'* case, a complaint was filed alleging therein the commission of an offence punishable under Section 406 IPC, with the company that the accused was a Managing Director of, not having been arraigned as an accused.

It was held as follows by the Supreme Court:-

“15. Appellant No.1 is the Managing Director of the Company. Respondent No.3 was its General Manager. Indisputably, the company is a juristic person. The demand drafts were issued in the name of the company. The company was not made an accused. The dealership agreement was by and between M/s Akash Traders and the company.

16. Mr. Pramod Swarup, learned counsel appearing on behalf of respondent no.2, in support of the order passed by the learned Chief Judicial Magistrate as also the High Court, submitted that as, *prima facie*, the appellant was in charge of and was in control of the business of the company, he would be deemed to be liable for the offence committed by the company.

17. Indian Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.”

Thereafter, upon reproducing Section 406 IPC, the Supreme Court held as follows:-

“20. As, admittedly, drafts were drawn in the name of the

company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself.{See *Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya, 2006 (4) RCR (Criminal) 296 : 2006 (3) Apex Criminal 282 : [(2006) 10 SCC 581]*}. ”

15. The next argument of Mr. Bahl, learned Senior Counsel for the petitioner, is that despite reports under Section 202 Cr.P.C. having been called for by the trial Court, on the asking of the complainant, the impugned order passed by the that Court does not even refer to the said reports and the order is consequently bad for that reason also.

Mr. Bahl referred to various interim orders passed by the trial Court (copies of which have been collectively annexed as Annexure P-2 with the petition), to point out that at first a report under Section 202 Cr.P.C. was called for by the learned Magistrate on 17.07.2010, received on 31.08.2010, with that report not having been accepted, as recorded in the order dated 15.11.2010, on the ground that the statements of some persons were not recorded, and therefore a complete report was sought by the Court, which was received on 25.01.2011.

Thereafter, after about 11 months, upon the complainant seeking a fresh report (under Section 202 Cr.P.C.), many dates having gone by prior to that, the said request was allowed and a 3rd report was received on 18.07.2012, the Court thereafter recording on 31.08.2012 that the complainant was not satisfied with the said report and consequently, arguments would be addressed

on merits on the next date of hearing.

16. Mr. Bahl, in the context of the report under Section 202 Cr.P.C., pointed to that part of the report dated 25.01.2011 (Annexure P-3), which states as follows:-

“As per agreement, No Objection Certificate was to be taken by complainant and as per statements of Shri S.M. Tuli, CEO, Katyani Petroleum and Mahender Sharma and as per record, it has been found that complainant did not obtain NOC and due to non receipt of NOC, the work of LPG filling station could not be started. During enquiry, no such proof has come to the light regarding issuance of threats. Complainant is certainly suffering financial loss. From the enquiry into complaint, no cognizable offence has been found. Matter has been found to be civil in nature.”

He next pointed to the report dated 18.07.2012 referring to the cancellation report between the petitioners' company and M/s Katyayani, with it being further observed as follows:-

“After the cancellation deed dated 06.10.2008, Vishnu Eatables (India) Ltd., Kaithal had no concern with Katyani Petroleum Limited, Pune, to whom there was a proposal to allot LPG Pump, nor any transaction had taken place in this regard. Vishnu Eatables (India) Ltd. Had transferred the share of deposit of Kesar Bansal to Katyani Company. So far as the question of payment of Rs.6,65,000/- of Kesar Lal Bansal is concerned, which Vishnu Eatables (India) Ltd., Kaithal had got through Mahender Sharma, same was transferred in Katyani Company, the proof of which Yogesh Mittal has given along with other documents and his statements were recorded during enquiry. Thereafter the payment which Kesar Lal Bansal had transferred to the company and the material was supplied by the Company to

Kesar Lal Bansal. After sending of the material, the pump was not installed due to the reason that Kesar Lal Bansal did not get NOC from concerned departments.”

17. Thus, learned Senior Counsel submitted that with such detailed findings coming in the reports sought by the Court, even on the asking of the complainant, the trial Court still did not actually apply its mind to the contents of the report before passing the impugned order summoning the petitioner and his co-accused.

18. On the issue of it being necessary for a report under Section 202 Cr.P.C. to be taken into consideration, he cited the following judgments (two of co-ordinate Benches of this Court and one of the Supreme Court):-

- (i) **Madhu Rani v. Prem Kumar and others** 2015 (3) RCR (Criminal) 889;
- (ii) **Kuldip Raj Mahajan v. Hukam Chand** 2008 (1) RCR (Criminal) 370; and
- (iii) **M/s Pepsi Foods Ltd. v. Special Judicial Magistrate** 1997 (4) RCR (Criminal) 761.

In *Madhu Ranis'* case, it was held by this Court that though a report under Section 202 (1) Cr.P.C. alone cannot be made the basis for disposal of a complaint, however, the “inquiry/investigation”, conducted is not of a futile exercise and has to be taken into consideration by the Magistrate while deciding as to whether process is to be issued or not.

In *Mahajans'* case, it was not a report under Section 202 Cr.P.C. that was under consideration, but a cancellation report filed by the police in respect of the FIR registered by the complainant, which cancellation report was stated to have been concealed from the Magistrate hearing the complaint

subsequently filed, and the summoning order consequently having been passed without referring to the cancellation report.

In such circumstances, this Court had quashed the complaint instituted before the Magistrate, holding it to be an abuse of the process of Court.

19. Learned Senior counsel referred to the aforesaid judgments also to submit that since the petitioner was at Kaithal, and the other accused at Pune, a report under Section 202 Cr.P.C. was in any case necessary to have been obtained by the Magistrate at Sirsa, and consequently, the significance of the said reports could not have been completely 'washed away' by the Magistrate, without even referring to them.

20. From the case of *M/s Pepsi Foods Ltd.*, learned Senior Counsel has pointed to the fact that it was held by the Supreme Court that summoning of an accused in a criminal case is a serious matter and such proceedings cannot be set into motion "as a matter of course", with the Magistrate required to carefully scrutinize the evidence brought on record, even by putting questions to the complainant and his witnesses, to elicit answers from them to determine the truth, or otherwise, of the allegations made.

21. Mr. Bahl next submitted on the merits of the complaint instituted by the respondent herein, to the effect that even as per the complainants' own version in the complaint, it was he who was to get the NOC from the departments of Food & Supplies, Electricity and the Fire Brigade, as is stated in paragraph 1(iii) of the complaint.

Learned Senior Counsel next again pointed to the inquiry reports (under Section 202 Cr.P.C.) wherein also the same finding was arrived at by the inquiry officer (the SHO, Police Station City Sirsa).

Mr. Bahl next, in that context, referred to a letter written by the CEO of M/s Katyayani, addressed to the complainant (stated to be Ex.C7 before the trial Court; - Annexure P-8 with the present petition). The said letter while stating that the site drawings and survey report provided by the complainant to that company, had been approved, further stated that the next step would be to obtain a No Objection Certificate from the District Magistrates' office.

Learned Senior Counsel submitted that the document having been exhibited by the complainant himself before the trial Court, obviously he was very well aware of the fact that the NOC was to be obtained from the office of the District Magistrate, with that letter also having been followed up vide a letter dated 05.01.2010 (Annexure P-11), stating that the NOC from the National Highway Authority was also very important, after which the installation of the plant and instruments would start.

In the context of NOCs, Mr. Bahl submitted that though a contention may be raised before this Court by learned counsel for the respondent that in fact NOCs were obtained by the complainant, it could be seen even from the reply to the present petition (on behalf of the respondent-complainant), that the three letters annexed collectively therewith as Annexure R-1, (one from the Superintending Engineering, PWD, B&R to the Engineer-in-chief, the next from the XEN of the Electricity Corporation to the Deputy Commissioner and the last from the District Town Planner to the District Magistrate), are not actually 'No Objection Certificates' issued but in fact are either recommendations for issuance of NOC/reports, or to the effect that no electric lines are passing over the proposed site, or (in the last case), a recommendation that permission would also be required from the Ministry of

Road Transport, GOI, New Delhi, as the site falls on a National Highway, and further, a fire safety certificate would also be required from the “concerned department”.

Mr.Bahl further submitted that therefore no NOC having been actually obtained by the respondent-complainant in setting up the gas filling station, with no response given even after this Court put it to learned counsel earlier that if NOCs are even now obtained, the response of M/s Katyayani to setting up of a gas filling station/refund of money could be obtained; very obviously the complainant is not able to obtain the NOCs, and therefore the petitioner could not be held responsible for any investments made by the respondent-complainant, he thereafter not having obtained the NOCs.

22. He further submitted that at best a civil dispute qua non-fulfilling of a contract (as alleged by the complainant), may be raised by the complainant, which of course would be defended on merits by the petitioner and any other person arrayed as a defendant in any such suit.

23. Lastly, Mr. Bahl pointed to paragraphs 3 and 8 of the complaint, to submit that eventually it is not the petitioner or his company who were to allot the gas filling station, and in fact it was M/s Katyayani to which the complainant paid Rs.2,35,000/-, Rs.7,00,000/- and Rs.9,50,000/-, thus totalling Rs.18,85,000/-, and therefore, the petitioner in any case was only a person who at best introduced the parties to each other, with his company having been paid only Rs.2,65,000/- plus Rs.1000/-, in toto.

24. On the aforesaid contentions, learned Senior Counsel for the petitioner sought that the petition be allowed and the complaint itself, and the order summoning the petitioner to face trial, be quashed.

25. Refuting the aforesaid arguments, Mr. Mukesh Rao, learned

counsel for the respondent-complainant, first pointed to the fact that admittedly Rs.2,65,000/- had been received by cheque by the petitioner in favour of his company, after which again Rs.4,00,000/- were handed over to the petitioner and accused Mahender Sharma by way of a cheque.

He submitted that at the time when these cheques were handed over, i.e. on 13.08.2007 and 28.02.2008/12.04.2008, in fact there was no agreement between the petitioner and the M/s Katyayani, such agreement having taken place only on 27.05.2008, a copy of which is annexed with the petition, it having been cancelled within five months on 06.10.2008, thereby making it obvious that there was never any intention to actually ensure that a gas filling station was installed.

Mr. Rao next submitted that in fact M/s Katyayani had first approached this Court by filing CRM-M no.40720 of 2013, also seeking quashing of the complaint and the summoning orders, which petition was dismissed as withdrawn before a co-ordinate Bench of this Court on August 14, 2015 (a copy of the said order being annexed as part of the Annexure R-8 collectively, with the reply of the respondent herein).

A perusal of the said order also shows that at the time that the said petition was withdrawn, personal appearance of the petitioners therein before the trial Court was exempted by this Court, subject to the condition that they would always be represented through counsel, would not delay proceedings, would not dispute their identity as accused, would have no objection to recording of prosecution evidence in the presence of their counsel, and would appear before the trial Court as and when required by that Court.

Mr. Raos' contention is that, in fact, the petitioner and Mahender

Sharma having approached the complainant, their culpability in the cheating/fraud, was more than that of the Directors of M/s Katyayani and consequently, this petition in any case deserves to be dismissed.

26. Learned counsel next referred to the order of the trial Court dated 17.03.2015, recording therein that the petitioner, Yogesh Mittal, had even agreed to compromise the matter with the complainant, which as per learned counsel, would only be subject to Rs.47,00,000/- being paid to the complainant.

He submitted that unless the accused were actually guilty of having defrauded the complainant, they would not have agreed to pay such a large amount and therefore the compromise not having gone through because of the payment not having been made, this petition does not deserve to be allowed.

27. He next argued that as a matter of fact the revision petition against the impugned order of the trial Court dated 15.09.2012, having been dismissed in 2015, this petition filed invoking jurisdiction under Section 482 Cr.P.C, in the year 2016, is only by-passing limitation, with even the revisional Court having observed in its (now impugned) order dated 16.11.2015, that the revision petition (under Section 379 Cr.P.C.), was also filed beyond limitation.

28. On the issue of the report under Section 202 Cr.P.C. not having been referred to by the trial Court, Mr.Rao submitted that the said reports lose meaning once the entire case comes before the Magistrate after preliminary evidence had been led, and therefore this Court would not set aside the impugned summoning order on that ground.

In this context, learned counsel referred to the following

judgments:-

- (i) **Rahul Gandhi and others v. Dr. Subramanian Swamy and another** 2015 (225) DLT 196;
- (ii) **Nupur Talwar v. Central Bureau of Investigation and another** (2013) 1 SCC (Cri) 689; and
- (iii) **Sonu Gupta v. Deepak Gupta and others** (2015) 2 SCC (Cri) 265.

From the judgment in *Rahul Gandhis'* case, learned counsel referred to paragraph 34 (of the Law Finder Edition), wherein a learned Single Judge of the Delhi High Court held that “hyper technical objections” on the summoning of the two petitioners in that petition, on the ground that they resided outside the tutorial jurisdiction of the trial Court, did not carry much substance.

From *Nupur Talwars'* case, Mr. Rao pointed to paragraph 12 thereof, wherein the judgment in **Bhushan Kumar and another v. State (NCT of Delhi)** 2012 (2) RCR (Criminal) 794 has been cited, holding therein that “time and again it has been stated by this Court that the summoning order under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith”.

Thus, the contention is that though the aforesaid observation is in the context of a report submitted under Section 173 Cr.P.C., however, even a report submitted in terms of Section 202 need not be referred to by the trial Court, if it is otherwise convinced that, *prima facie*, a case is made out against those arraigned as accused in a complaint.

From *Sonu Guptas'* case, Mr. Rao pointed to paragraphs 7 and 8

of the judgment, which essentially hold to the same effect.

Learned counsel for the respondent-complainant therefore submitted that in view of what has been held by the Supreme Court, the judgment of this Court in *Madhu Ranis'* case (supra), cannot be said to be laying down good law.

29. Next on the same issue, Mr. Rao submitted that in any case the result of an inquiry report, whether under Section 173 Cr.P.C. or under Section 202 thereof, naturally cannot be taken as final evidence in any case and only actual evidence led before the Court, is legally admissible, and consequently, the contention that the report under Section 202 not having been referred to by the Magistrate, renders the summoning order to be bad in law, is a misconceived contention on behalf of the petitioner.

He further submitted that at this stage in any case this Court would also see whether the case set out by the respondent-complainant in his complaint before the Magistrate, justifies dismissal of such complaint.

On the aforesaid contention, Mr. Rao cited a judgment of the Supreme Court in **Kaptan Singh v. State of M.P.** 1997 (3) RCR (Criminal) 135.

30. Last on the aspect of the report under Section 202 Cr.P.C. not having been referred to, Mr. Rao referred to Section 465 of the Cr.P.C., to submit that simply an error or omission, either in a complaint, a summon, a warrant or a judgment, or other proceedings, during trial, would not lead to reversal of such summons/judgment etc., unless in the opinion of the Court reversing such order, a failure of justice is occasioned.

Learned counsel submitted that in fact failure of justice would be if the complaint were to be quashed, and on the other hand, continuance of the

complaint in view of the allegations made therein, substantiated by preliminary evidence led on complainants' behalf, would not prejudice the petitioner/other accused in any case, because precharge evidence was still to be led, after which the trial court would make up its mind as to whether the accused are to be discharged or the trial is still to proceed further.

31. On the issue of the company of the petitioner not having been arraigned as an accused in the complaint, learned counsel submitted that the allegation against the petitioner being that he had approached the complainant alongwith Mahender Sharma, and had enticed him into believing that a gas filling station would be set up by M/s Katyayani, and on that ground he had extracted money from the complainant, whether such money was paid in the name of the company of the petitioner or in the name of M/s Katyayani, it was not actually on behalf of the company that the petitioner had approached the complainant but on his own behalf, his company not having entered into any agreement at that point of time with M/s Katyayani.

32. Mr. Rao next submitted that the complainant had actually obtained NOCs and even if it is presumed that the documents referred to alongwith the reply of the complainant to the present petition are not NOCs, even in other parts of Haryana where NOCs were obtained by various parties, no connections were provided by the petitioner or M/s. Katyayani.

He submitted that the petitioner in fact is also facing criminal proceedings for having duped the Warehousing Corporation (in an unrelated matter), which 'showed his character' and therefore this Court would not set aside either the summoning order or quash the complaint.

33. In rebuttal to the aforesaid arguments, Mr. Vikas Bahl again reiterated that there is no NOC whatsoever obtained by the complainant, even

though the method of obtaining such NOCs was explained in the letter Ex.P7 (Annexure P-8 with the present petition), and consequently, the complainant is simply taking advantage of his own fault to put pressure on the petitioner and other co-accused for refund of any money spent by him, with even M/s Katyayani having spent large sums of money which bore 'no fruit', as the NOCs were not obtained.

34. As regards the compromise shown to be entered into between the parties, as reflected in the order of the trial Court dated 17.03.2015, learned Senior Counsel submitted that the petitioner himself was only to pay Rs.7,50,000/-, his company having been advanced only a sum of Rs.6,60,000/. He submitted that even that amount (Rs.7,50,000/-), was agreed to be paid by the petitioner simply to 'buy peace', instead of facing a prolonged trial and criminal proceedings.

Thus, Mr. Bahls' contention is that simply because the petitioner decided to compromise the matter to end criminal proceedings, that does not in any way point to his guilt in actually having duped the complainant, in the circumstances enumerated in detail hereinabove.

35. Next, learned senior counsel submitted that in fact it was the company of the petitioner (Ms/ Shri Vishnu Eatables) that had entered into an agreement with M/s Katyayani, and therefore the company was in fact a necessary party to the criminal proceedings, if at all they are to be held to be maintainable.

In this context, he referred to a document dated July 11, 2007 (sought to be placed on record by way of a miscellaneous application filed), which is actually a letter addressed on behalf of M/s Katyayani to the company of the petitioner, i.e. M/s Shri Vishnu Eatables.

36. As regards a report under Section 202 Cr.P.C. being necessary to be referred to before issuing process, Mr. Bahl relied upon a judgment of the Supreme Court in **Abhijit Pawar v. Hemant Madhukar Nimbalkar & Anr.** 2017 (1) RCR (Criminal) 405, which in turn referred to an earlier judgment in **Mehmood Ul Rehman v. Khazir Mohammad Tunda** 2015 92) RCR (Criminal) 517, wherein it was held that though undoubtedly no speaking order is required to be passed at the stage of issuing process, even in terms of Section 203 Cr.P.C. (with such detailed reasoning to be given only if the complaint is to be dismissed), however, “there must be sufficient indication in the order passed by the Magistrate, that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C., if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 Cr.P.C., by issuing process for appearance”.

Distinguishing the judgment referred to by learned counsel for the respondent, Mr. Bahl submitted that the judgment of the Delhi High Court in *Rahul Gandhi* is no longer good law in view of the judgment in *Abhihit Pawars'* case, as also in **National Bank of Oman v. Barakara Abdul Aziz and Anr.** (2013) 2 SCC 488.

[It is to be noticed here that actually the said judgment is on the issue of whether procedure under Section 202 Cr.P.C. should have been resorted to or not by the Magistrate, after the amendment thereto was made in 2005].

37. On the issue of a company being a necessary party to criminal proceedings where dealings are with a company whose Directors or

functionaries are alleged to have duped the complainant, Mr. Bahl referred to the judgment that in fact was on a previous hearing cited by Mr. Mukesh Rao, in Sunil Bharti Mittal v. Central Bureau of Investigation 2015 (2) RCR (Criminal)¹, wherein it was held, as already noticed earlier, that there was no vicarious liability unless the statute specifically provides for it and consequently, if an individual committed an offence on behalf of a company, he is to be made an accused only alongwith the company.

Mr.Bahl reiterated that the respondent-complainant had paid most of the money by cheques to M/s Katyayani directly, and therefore the petitioner cannot be held liable or culpable for the commission of any criminal offence, simply because he was the person who introduced the aforesaid company to the complainant.

38. Thus, the arguments of the parties stood concluded as detailed hereinabove.

39. Having considered the arguments raised on both sides, as also the orders impugned before this Court, in my opinion, this petition cannot be allowed, for the reasons set out hereinafter.

Firstly, as regards the company of the petitioner not having been arraigned as an accused and therefore the petitioner not being liable on account of any vicarious liability, at this stage at least (untill substantive evidence is led by both sides before the learned trial Court), it would appear to me that the petitioner having approached the complainant alongwith one Mahender Sharma, offering on behalf of M/s Katyayani, that an Auto LPG Gas Filling Station can be set up if the complainant provides land and fulfils other conditions of obtaining NOCs etc., with at that stage the petitioners' company not having entered into any agreement with M/s.Katyayani, it cannot

be stated for certain (at this stage) that the petitioner was acting on his own behalf or on behalf of his company, i.e. M/s Shri Vishnu Eatables. As per the complaint, the petitioner approached the complainant alongwith Mahender Sharma, first in the month of August 2007, whereas his agreement with M/s Katyayani, for distributorship, (copy Annexure P-6 with the petition), is dated May 27, 2008 (with the year 2002 however written in Annexure P-6, admitted by learned counsel for the petitioner to be a typographical error), with that agreement also having, in fact, been cancelled within a period of slightly over four months, on October 6, 2008, vide the cancellation deed (Annexure P7). (That aspect, of the cancellation deed, would be looked at a little later).

Thus, even though the payment made by the complainant is stated to be in favour of the company of the petitioner, i.e. M/s Shri Vishnu Eatables, there being no written contract between the said company and the complainant, nor even with M/s Katyayani and the petitioners' company, I would not hold at this stage at least, that the said company was a necessary party and that the petitioner could not have been arraigned as accused in the complaint, without also arraigning the company so.

40. As regards non-reference to the reports submitted under Section 202 Cr.P.C., as had been called for by the trial Court on three occasions, with three such reports having been submitted, again in the opinion of this Court, such reference is not a *sine qua non* for issuing process in the form of an order summoning an accused, as long as the order of the trial Court discloses reasoning and application of mind by that Court, before issuing such process. The relevant part of the order of the trial Court has already been reproduced earlier in this judgment, showing that *prima facie* at least the trial Court formed an opinion, that an offence, possibly punishable under Sections 420

and 120-B of the IPC, had been made out, payment having been made through cheques and bank drafts by the complainant on a promise of 'deliverance' of a gas filling station, but with the promise not fulfilled.

Whether or not eventually the complainant can prove the offence to have been actually committed or not, would be a matter of evidence to be led before that Court.

Hence, at this stage to hold that the summoning order is bad simply on account of non-reference to the reports under Section 202, which reports hold the petitioner and his co-accused to be not guilty, in the opinion of this Court will not be justifiable, especially in view of what is to be noticed immediately hereinafter.

41. Coming therefore to the argument of Mr. Bahl, learned Senior Counsel, that no offence is even made out against the petitioners, for the reason that it was the complainant himself who had to obtain the NOCs, which were never obtained by him, and therefore the petitioner cannot be held liable for non fulfillment of the complainants' part of the contract.

Though that argument is very attractive at first blush, however, what (again at this stage) cannot be overlooked by this Court, is that the 'Distributor Agreement' between the petitioner and M/s Katyayani, admittedly stood cancelled within less than five months of the agreement having been entered into, i.e. in 2008 itself, which may possibly indicate the intention of the parties, which issue again needs to be gone into by the trial Court in detail, on the basis of evidence led before it, including any substantial investments made by M/s Katyayani/ the petitioner himself, etc.

42. Of course, as regards the contention of learned counsel for the complainant that the documents annexed with the reply of the complainant

are No Objection Certificates, that is an argument to be rejected at the outset, because a bare perusal of the said documents (collectively Annexure R-7 with the reply), show that they are only internal correspondence between various departments and the Deputy Commissioner/District Magistrate, with a no objection certificate actually still to be issued.

43. As regards the argument of Mr. Bahl that even during the pendency of this present petition, despite a query being made to learned counsel for the complainant as to whether the complainant could now obtain the NOCs, and he not having been able to obtain them, Mr. Rao submitted that no such NOCs are now being given and consequently, it would be impossible for the petitioner to obtain them at this stage; with in any case the intention of the petitioner not being honest right from the beginning, which is fortified by the fact that he even cancelled the agreement with M/s Katyayani.

44. As regards Mr. Bahls' contention that the petitioner having been paid Rs.2,66,000/-, with M/s Katyayani having been paid Rs.9,90,000/- by the complainant, therefore, there was no liability of the petitioner for setting up the gas filling station, the contention of the complainant still being that there was never any seriousness on the part of the petitioner or M/s Katyayani that such gas filling station could actually be set up, that aspect would again be gone into by the trial Court on the basis of evidence led before it, including the fact that the distributor agreement was cancelled, also seeing the extent of investment by M/s Katyayani/the petitioner etc., naturally looking at all evidence in toto that may be led by either side at any stage, to prove or disprove the allegation made.

45. Consequently, in view of what has been discussed hereinabove, in the opinion of this Court, the complaint instituted before the learned

Magistrate by the respondent herein, cannot be quashed at this stage; and further, no error is found in the impugned order of the trial Court summoning the petitioner and his co-accused to answer the complaint instituted against them.

Therefore, even the order of the revisional Court, dismissing the revision petition filed against the impugned order of the JMIC dated 15.09.2012, is to be sustained.

Hence, finding no merit in this petition, it is dismissed; but with it made absolutely clear that this Court has made no observation whatsoever on the actual culpability of the petitioner, or otherwise, which would be determined by the trial Court wholly on the basis of evidence led before it by both sides, all observations made hereinabove or in any other orders passed earlier in this petition, only being in the context of whether or not the petitioner was correctly summoned by the trial Court, and whether or not the complaint needs to be quashed at this preliminary stage itself.

July 2, 2018
dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether reasoned/speaking: Yes/no
Whether reportable: Yes/no