

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.14252 of 2016

ORDER:

The petitioner by name Sri P.M.V.Subbarao, practising Company Secretary, so-called partner of M/s. PMV Subba Rao and Associates, Chartered Accountants', is the 2nd accused among two accused including A.1-Bobba Raja Shekar. It is a private complaint of the 2nd respondent-*de facto* complainant by name Sri Bobba Prasad, no other than brother of A.1 supra, in S.R.No.735/15, dated 03.03.2015, that was referred to the police for investigation by the learned XIV Additional Chief Metropolitan Magistrate, City Criminal Courts, Nampally, under Section 156 (3) Cr.P.C. Crime No.426 of 2015 was registered by Panjagutta Police Station on 23.05.2015 for the offences punishable under Sections 403, 406, 417, 420, 427 read with 120-B IPC and after investigation, the police filed the charge sheet for the aforesaid offences and the learned Magistrate therefrom taken cognizance for the offences supra in allotting the Calendar Case No.715 of 2016, which is subject matter of impugnement herein by the petitioner/A.2 supra seeking to quash the same.

2. The contentions in the grounds of the quash petition *vis-à-vis* the submissions of the learned counsel for the petitioner/A.2 in several pages with 23 paras in nutshell are that the petitioner/A.2 is an independent practicing Company Secretary whole time since June, 2000 with certificate of Practice No.3374 without remark having good repute in the Corporate Sector by extending the professional services to various companies. The charge sheet filed by Panjagutta police in a callous and mechanical manner without

going into the veracity of documents available on record and without proper ascertainment of facts and without understanding the technical aspects involved in the company day-to-day affairs with administration including difference between Practicing Company Secretary and a Company Secretary of the company in employment and without going into the merits of the case, erroneously and under immusions, as if the petitioner committed offence of misappropriation of funds or criminal breach of trust or cheating with conspiracy, which is unsustainable and liable to be quashed.

3. The other contention is that the police failed to observe the mistake of facts would not even make *prima facie* case for he is neither employee nor in-house Company Secretary of M/s. Bhanu Hotels and Properties Private Limited at any point of time and not even involved in day-to-day affairs of the entity by maintenance of records, registers and financial aspects of the entity and thereby, nothing to do with the acts and deeds committed by Board of Directors of the entity. What is alleged by the 1st respondent in the charge sheet of without 2nd respondent's consent, share capital of the company was restructured among shareholders of the company and A.1 in-collusion with the petitioner/A.2 restructured the share capital and thereby, A.1 misappropriated the funds is incorrect for non-verification of the company records and audit reports issued by M/s. Machiraju & Associates, Chartered Accountants, Hyderabad, and this erroneous conclusion no way sustain, as audit report, dated 01.09.2007, clearly speak allotment of share capital happened during the financial year 2005-2006 and the 1st respondent-police failed to observe the petitioner on perusal

of the Directors Report, Audited Financial Statements, Annual Reports prepared the Secretarial Compliance Certificate for the financial years 2006-2007 to 2010-2011 respectively and uploaded the same with late fee with digital signatures of one of the Directors of the Company and without ascertaining the said fact, charge sheet filed mechanically. The 2nd respondent-*de facto* complainant intentionally and conveniently did not mention in his complaint as to in which year share capital of the company was restructured. The Board of Directors of the Company issued and allotted 49982 additional and new equity shares of 100 each among themselves by including one Sri B.V.Rao, father of the Directors, as one of the share holder, in addition to earlier share holding pattern of existing Directors and therefrom total share capital of the company become Rs.50,00,000/- divided into 50,000 equity shares of Rs.100/- each and the share capital of the 2nd respondent-*de facto* complainant increased from 09 to 10 in the financial year 2005-2006, which is an internal matter of the company. As such the petitioner/A.2 is nothing to do with the said allotment and restructure of share capital and the police failed to observe this fact that there is no reduction in the share capital of the 2nd respondent/*de facto* complainant, so to allege. Generally, share capital of the company would be allotted to share holders based on their share application monies brought in them by company and the police did not ascertain the said technical aspect in erroneously and without basis implicating the petitioner as A.2. If at all the 2nd respondent-*de facto* complainant feels that his right in the company is defeated illegally, he got every right to take up the matter with Registrar of Companies and also can

approach the Company Law Board with his grievance for rectification of register of members in the company in the appropriate form to decide and resolve the existing disputes between the Board of Directors of the Company including oppression or mismanagement under Sections 397 and 398 of the Companies Act 1956, and having not chosen by the 2nd respondent-*de facto* complainant intentionally and conveniently initiated this malicious prosecution to settle the existing disputes with his brother, A.1 if any to bring him to terms and the police failed to observe this factum and the Company not even made as party to the present proceedings with though the company itself is a separate legal entity and Directors do not own assets of the company and it is the company that own its assets. When the charge sheet mentions petitioner is not an employee of the company and he is in freelance practitioner for many companies. Without understanding the contents of the Secretarial Compliance Certificate of the petitioner, the police came to the wrong conclusion in making the petitioner as if responsible, though his responsibility is only to conduct Board of Directors meeting four times in a year, issue notices to the Directors before its conducting, record minutes of the meetings conducted by Board Members, for which he is being remunerated as decided by the Board of Directors and also to fill all the Annual Returns to the Registrar of Companies, apart from any other duties periodically. The Secretarial Compliance Certificate prepared and uploaded by the petitioner with the Ministry of Corporate Affairs/Registrar of Companies is mentioned as examined the Registers, Records, Books and papers of M/s. Bhanu Hotels and Properties Private

Limited, as required to be maintained under the Companies Act and the Rules made thereunder and as per the provisions contained in the Memorandum and Articles of Association of the Company for the financial year ending by 31.03.2011 and in our opinion and to the best of our information and according to examinations carried out by and explanations furnished to us by the Company, its officers and agents, we certify that in respect of the aforesaid financial year; which is evident that the petitioner is no way responsible for above facts. The Secretarial Compliance Certificate in the prescribed format, in fact designed by Institute of Company Secretaries of India, as a statutory requirement under the Companies Act for every unlisted public/private company with a paid up capital of Rs.10,00,000/- or more to obtain such Secretarial Compliance Certificate from a practising Company Secretary. From that, there is no any wrongful gain to the petitioner, a practising Company Secretary and no basis to say committed any offence of mischief or misappropriation or cheating therefrom. A Director of a Company has to inform the Registrar of Companies whenever there is a change in the residential/communication address and the Registered Office and address of all the Directors mentioned as Door No.6-3-354/8/2/B, Hindi Nagar, Panjagutta, Hyderabad, which is clear from MCA portal and the *de facto* complainant did not object to the restructure of the share capital in the life time of his father or when he joins the joint family in 2009 stated by him and there is no genuineness of the statement of he is away from affairs of the Company since 2003-2008 and away from joint family. The 1st accused allegedly sold land measuring 855 square yards situated

at Panjagutta for meagre amount of Rs.5.16 crores under registered Sale Deed No.2297 of 2010, which is worth about Rs.10 crores. On perusal of the sale deed, it is evident that the same was executed by late B.V.Rao with the consent of Directors and A.1- Raja Shekar as one of the witnesses for the same and it is wrongly mentioned by the police in the charge sheet that the said land was sold by the petitioner/A.2 in collusion with A.1, contrary to the very recitals of the document supra. Even the 2nd respondent-de facto complainant admitted in his complaint that he joined the joint family in the year 2009 and involved himself in day-to-day affairs of the company. Then it cannot be said that the property the sold without his knowledge and the police failed to consider the same, much less to enquire and ascertain in this regard. The charge sheet filed by the police alleges the Annual Returns for the financial years 2007-2011 filed in one go by paying penalty of Rs.4,500/- per year after finalization of sale deed with purchaser to deceive the 2nd respondent-de facto complainant and his interest in the company is only an illusion, without considering the above facts. The petitioner/A.2, practicing Company Secretary is not an author, creator and subscriber of the said Annual Returns, Balance Sheets, and Directors report to shareholder, and Directors are solely responsible for the genuineness and contents of the said documents. The petitioner/A.2, practicing Company Secretary is nothing to do with the acts and deeds committed by A.1 with regard to mishandling of the company cheques, which is an internal matter of the company. Section 5 of the Companies Act, 1956 (corresponding to Section 2 (60) read with 2 (51) of the Amended Act, 2013), reads, responsibility of whole time Director,

Managing Director, Director and Company Secretary (in employment) for conducting Board Meetings and General Meetings of the share holders of a Company and responsible for maintenance of statutory registers and minutes books. Share holders appoint statutory auditor of the company at Annual General Body Meetings, who have duty to audit the Annual Accounts prepared by Board of Directors and after duly auditing, Board of Directors circulate to shareholders with notice of AGM's and based on the Annual Accounts and Returns prepared as per law by Board of Directors, the same being uploaded into the public dominin of ROC/MCA portal. The practicing Company Secretary is not responsible for Books of Accounts and maintenance of statutory registers and conduct of meetings of Board of Directors and Shareholders, but for assisting the company as uploading agent to upload the documents with ROC/MCA with digital signature of one of the Directors of the company. The practicing company Secretary can only upload those along with Secretarial Compliance Certificates of previous years with Ministry of Corporate Affairs, ROC with late fee by E-filing with digital signature of Director and practicing professional and petitioner/A.2 strictly followed said procedure for the respective years as permissible under law. The E-challan for paying later issued by Ministry of Corporate Affairs itself shows otherwise E-filing will not accept. The technical requirement for uploading these Annual Accounts shall be approved by the shareholders and Board of Directors. The audited Balance Sheet reflects shareholding pattern certified by Statutory Auditor and not by practicing Company Secretary. The practising Company Secretary

verifies the documents and satisfies himself of presented by authorized Director of Company and he can neither add nor delete any word or figure therein.

4. During pendency of the proceedings, the 2nd respondent-de facto complainant prepared another private complaint making one Sri Alukkas Varghese, Allukkas Joy Vrgheese of M/s. Joyalukkas India Private Limited, Smt Nalla Uma Rani and the petitioner- P.M.V.Subba Rao before XIV Additional Chief Metropolitan Magistrate, Hyderabad, vide C.C.SR.No.4293 of 2015 and the cause of action on the allegations are one and the same in both the complaints and it is suppression of fact of earlier case proceedings in filing of second complaint and the learned Magistrate was pleased to dismiss the said complaint by observing disputed contents mentioned in the complaint are civil in nature.

The *de facto* complainant aggrieved by orders of the learned Chief Metropolitan Magistrate, preferred CrI.R.P No.32 of 2016 before IX Metropolitan Sessions Judge, which is pending adjudication. The petitioner is neither involved in the affairs of the company nor committed any acts and deeds, as alleged by the police in the charge sheet and the *de facto* complainant despite full knowledge of petitioner no way involved in day-to-day affairs of the company, implicated falsely and thereby, the proceedings are liable to be quashed.

5. The 2nd respondent-*de facto* complainant opposed the quash petition saying the petitioner/A.2 had been advising A.1- Raja Shekar in relation to the Secretarial issues like preparation of notes, minutes books, filing of Annual returns and during the year

2006-2007, share capital of the petitioner was reduced from 50% to 2% and file such returns before ROC with late fee in the year 2012. The company holds valuable property at Panjagutta and it mandates a special resolution to pass with 75% voting to dispose of the substantial assets of the company and to avoid the same, the share capital of the *de facto* complainant was reduced with back date of the year 2006 and filed annual returns before ROC in the year 2012 after selling the property to third parties in November, 2011 and as the petitioner assisted A.1-Raja Shekar and Mr.B.V.Rao (since no more) in tampering the records and also prepares annual Secretarial returns and its filing for six years in one go is liable for the criminal prosecution, as he filed letter obtained from the company where company indemnified him from all legal issues, that means he at the time of filing annual returns or preparation of notices and statutory records knew that he is committing offence. As in normal circumstances, no company Secretary in practice would take undertaking and indemnity from company and file annual returns. The Secretarial practice mandates, Company Secretary or a Company Secretary in practice to serve notices of each of the Board meeting on members of the company in terms of Sections 171 to 180 of the Companies Act, which defines member in this regard and police called for the certified copies of the entire record from ROC and found no resolution and notices in relation to sale of immovable property held by the Company and the Memorandum and Articles of the company also mandate that every member should be given opportunity to acquire shares in their proportion in the event of allotment of new shares and Section 81 of the Companies Act also

mandates the same and at the advise of the petitioner/A.2, A.1 and late B.V.Rao hatched entire conspiracy and police was found that prior to reduction, petitioner holds 50% stake in the company and because the special resolution cannot be passed without the consent of the petitioner at the advise of the petitioner/A.2, relevant findings of the police under charge sheet page 28 shows the mischief allegedly done. After filing of the private complaint referred to police and while investigation is under progress, A.1 and the petitioner/A.2 filed joint writ petition and joint bail application, which shows he is assisting A.1 in the company affairs and A.1 and A.2 jointly incorporated a company called M/s. B.V.Infra Projects Private Limited. The petitioner is an initial Director and share holder and the bank statements of the company produced before the police reveals the funds have been diverted to the above said company. Most of the amounts drawn in cash invested as share application money in M/s. B.V.Infra Projects Private Limited. The petitioner/A.2 has professional relationship with A.1 would not have joined as Director in M/s. B.V.Infra Projects Private Limited, which infers he is benefited totally outside the matter of quit proko. The allegations levelled against the petitioner/A.2 are serious in nature, as rendering advise by him is sufficient to bring home the charge. The *de facto* complainant in the process of ascertaining details of properties acquired by M/s. B.V. Infra Projects Limited established the benefits derived by the petitioner and during trial, the 2nd respondent-*de facto* complainant will produce such records in the mean time being ascertained thereby, this Court while dismissing the quash petition can order early disposal of the case preferably

within four months and the petitioner cannot take advantage of his commitment is not borne by record.

6. It is contended that as per the expression of the Apex Court in **N.Soundaram v. P.K.Pounraj**¹, the inherent power to be exercised sparingly and cautiously either for ends of justice to secure or to prevent abuse of process, but not to stifle legitimate prosecution and face value of the allegations made out a case no way justified quashing the proceeding and further in **HMT Watches Ltd v. M.A.Abida**², the Apex Court held in similar line in saying though accused can file documents of unimpeachable character to consider by Court in deciding the quash petition on merits with reference to it. In **Umesh Kumar v. State of Andhra Pradesh**³, it was held that the inherent power cannot extend to prejudge the matter by appreciating evidence, but only to evaluate material documents on record to the extent *prima facie* satisfaction of existence of sufficient grounds to proceed against the accused or not. Further, in **CBI v. Vijay Sai Reddy**⁴, the Apex Court at para 26 observed that though A.2 claimed as only Chartered Accountant and rendered his professional advise, because of serious allegations against him of his nexus with A-1 by contacting with many investors all over India, it cannot be claimed he acted only as a Company Auditor for he is brain behind alleged economic offence of huge magnitude, that cannot be ignored. In **State of Haryana v. Bhajan Lal**⁵ at para 8 (1) the Apex Court laid certain guidelines a to g when the proceedings can be quashed and not otherwise, it

¹ (2014) 10 SCC 616

² (2015) 11 SCC 776

³ 2013 (10) SCC 591

⁴ (2013) 7 SCC 452

⁵ (1992 Suppl. (1) SCC 335

is therefrom submitted having record to above, there are no grounds to quash the proceedings and sought for dismissal of the quash petition.

7. Heard both sides at length and perused the material on record.

8. Even from the written arguments submitted by the 2nd respondent-de facto complainant, it is clear from page No.3, para No.3 clause (e), there is no documentary evidence as on date from the police final report to show any role of the petitioner/A.2, but rendering advise by him itself is sufficient to bring home the accusation covered by the charge sheet taken cognizance by the learned Magistrate. It is in fact not sustainable in the absence of showing any material, in fact, in **Vijay Sai Reddy** supra, facts are entirely different leave apart, there is material to show his nexus with main accused A.1 as brain behind with documentary evidence of he contacted several investors all over India in causing to the show run through A.1. Here, it is not the case on hand. So far as the sale of the property at Panjagutta, Hyderabad, concerned, if at all there are any offences committed, it is by late B.V.Rao, their father of A.1 and de facto complainant own brothers and so far as the petitioner concerned, he is no way connected with the sale transaction leave about any role of A.1 even as an attestor to it. Leave about there is a civil remedy, if at all to impugn apart from any sustainability of the criminal prosecution against A.1 in this regard the petitioner cannot be implicated. Undisputedly, the petitioner is not the full time salaried Company Secretary, but his services are in utilization on remuneration basis as a professional Company Secretary. In fact, the audit was done by M/s.

Machiraju and Company, Chartered Accountants, Hyderabad, and the report submitted therefrom and main role of the petitioner is in uploading with late fee to the portal with E-filing and signing along with one of the Directors of the Company. What all the expressions referred in **Sundaram, HMT Watches, Umesh Kumar** are no way in dispute so also of **Vijay Sai Reddy** and what is the principle laid down is the accused is also entitled to place on record any unimpeachable material for its consideration in a quash petition in addition to prosecution material makes out any prima facie case or not and what is required in a quash petition to consider is evaluation of the material on record prima facie and not like appreciation of evidence during trial.

9. Coming to the contention of a letter obtained of not responsible for legal issues that placed reliance by petitioner wanted to be taken advantage by the de facto in saying it is with pre-plan so obtained is untenable for nothing to presume so in the absence of any strong material to implicate a person no one can be on surmises be implicated in a grave offence that to a person is a professional in rendering professional advises.

10. So far as the service of notice to each of the board meeting on the members of the company from the secretarial practice manual mandates with reference to Sections 171 to 180 and 81 of the Companies Act and what the Memorandum and Articles speak, every member should be given opportunity to acquire shares in their proportion in the event of allotment of new shares, if at all it is done is by the other Directors of the Company including those responsible for day-to-day affairs and cannot for that be made

responsible on a professional Company Secretary who renders services to several companies like this, if any. The fact that the prior to reduction of the year 2006-2007 of the share capital of the petitioner from 50% to 2% show in filing return before ROC with late fee in the year 2012 and without which for 50% stake in the company special resolution cannot be passed without the consent of the petitioner that cannot be presumed of it was done at the instance of the petitioner or there is a conspiracy therefrom. No doubt, in the written submissions of *de facto* complainant it is mentioned that after filing of the complaint, referred to police in registration of the crime and pending investigation before filing charge sheet, A.1 and the petitioner/A.2 filed joint writ petition or joint bail application by itself not sufficient to say that they are privy including from they jointly incorporated the Company M/s B.V.Infra Projects Private Limited and any such relation of them developed by establishment of M/s. B.V.Infra Projects Private Limited might have inspired them to file of the joint petitions in Court that does not mean they are privy to the earlier offences. In fact, in Writ Petition No.22609 of 2015 filed before this Court another Bench by A.1 and the petitioner/A.2 as petitioners, wherein the affidavit given by A.1 in seeking to quash the proceedings of Crime No.425 of 2015, dated 23.05.2015, which is the second FIR. He stated at para No.4 that he and the de facto complainant herein as 3rd respondent to the writ petition made through father B.V.Rao (since no more) as one of the Directors of the Company besides making him as Managing Director and their father used to look after the entire affairs till he died on 16.12.2012 and after his demise, they both in consultation with

other sold away some lands and created into the books of account and entire account books have been verified by 3rd respondent (de facto complainant herein) and further entire books have been verified by him time to time and he developed ill-will and evil eye to deprive A.1's legitimate share in the company in movable and immovable properties as well hatched a plan and filed private complaint that is referred to police and pending as crime supra and the petitioner is concerned, he used to assist in the affairs of the company and it is false to say that he is employee of the company or misappropriation of any funds of the company along with A.1. It is if at all any crime committed is by A.1, brother of de facto complainant and their late father B.V.Rao whatever the assistance as Company Secretary a professional in his role to the company and not to the individual even from that allegation placed reliance, no way makes him liable for prosecution.

11. So far as the funds of the company i.e., M/s. Bhanu Hotels Private Limited diverted to M/s.B.V.Infra Proujects Private Limited concerned there is no basis to establish the same from the police final report and if at all during trial what the de facto complainant alleges he could produce evidence he can ask for inclusion of the petitioner as co-accused invoking Section 319 Cr.P.C. as per the guidelines of the Constitutional Bench of Apex Court in **Hardeep Singh v. State of Punjab**⁶ and for that with the pretence of he is likely to produce in future by securing some material in anticipation the prosecution without basis cannot be allowed to continue against the petitioner as A.2. When as on the date, there is no such material or record to implicate him into a grave offence.

⁶ 2014 (3) SCC 92

12. The Apex Court in **C.B.I, Hyderabad v. K.Narayana Rao**⁷ observed that mere giving of opinion with reference to the documents even inaccurate or erroneous cannot made liable a professional like Advocate for criminal prosecution, but for the professional was acting as a conspirator to defraud the bank, if such a case is made out, as mere negligence unaccompanied by any moral delinquency on the part of a practitioner in exercise of the professional duties does not amount to professional misconduct or criminal liability to fasten much less as conspirator and aider or abettor with party.

13. Having regard to the above, the petition is allowed by quashing the proceedings against the petitioner as A.2 to the police final report out come of the complaint of the 2nd respondent from the learned Magistrate taken cognizance for the offences stated supra against him for no sustainable material to implicate him to such crime from any professional negligence and for no material to show any criminal conspiracy or other criminal offences of cheating or criminal breach of trust or mischief therefrom. However, it will not prevent, it at all in future, during trial there is any material brought on record to add him as accused for any of the offences.

Dr. B. SIVA SANKARA RAO, J

JANUARY 21, 2019

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⁷ (2012) 3 SCC 1183

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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Date: 21.01.2019

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