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Crl.O.P.No. 23653 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.10.2023

CORAM :

THE HON'BLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.23653 of 2019
and Crl.M.P.No.12457 of 2019

M.Rathina Kumar,
S/o. Sundar Rathinam Pillai,
Company Secretary,
Subhiksha Trading Services Ltd,
No - G2, I Block, Land Marvel Garden,
Pillaiyar Koil Street, Rajaji Nagar,
Thiruvannamiyur, Chennai – 600 041.

... Petitioner/A3

Vs.

Union of India,
Represented through Shri MVK Reddy,
Asst Director, Serious Fraud Investigation Office,
Ministry of Corporate Affairs, Govt of India,
Regional Office, Corporate Bhawan,
No. 29, Rajaji Salai,
Chennai – 600 001.

... Respondent/Complainant

Prayer : Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for records and quash the proceedings in EOCC.No. 2/2018 on the file of the learned XV Additional City Civil Court, Chennai.

For Petitioner : Mr. T.R.Sivaram

For Respondent : Mr. A.R.L.Sundaresan, ASGI
Assisted by Mr.R.Rabu Manohar



CrI.O.P.No. 23653 of 2019

ORDER

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The petition has been filed seeking quashment of the complaint filed by the respondent under Sections 159, 166, 209(5), 210, 211(7), 211(8), 217(3), 220, 227 read with Section 233, 240(3) and 628 of Companies Act, 1956 in E.O.C.C No.02 of 2018 pending on the file of the Learned XV Additional City Civil Court, Chennai.

2. There are totally 11 accused in which the petitioner is arrayed as Third accused. The case of the respondent is that Ministry of Corporate Affairs as well as the Registrar of Companies, Tamil Nadu and other Statutory/Regulatory Authorities had received several complaints from the creditors, investors and employees of the Company called M/s.Subhiksha Trading Services Limited (hereinafter referred to as the “Company”) against the activities of the Company. Therefore, the Ministry of Corporate Affairs ordered for inspection as contemplated under Section 209 (A) of Companies Act, 1956 (hereinafter referred to as “Act”) to find out financial irregularities, mismanagement and siphoning of funds. After inspection, Registrar of Companies submitted an inspection report dated 30.03.2010 under Section 234(6) of the Act. On the basis of the reports, ordered for inspection into the



affairs of the company. The said order was challenged by the Company in W.P.No.18813 of 2010 before this Court on technical grounds. While pending Writ Petition, the Government of India sought for withdrawal of the order for investigation with liberty to pass fresh order and therefore, the writ petition was dismissed as withdrawn. Thereafter, Government of India on the basis of the fresh report submitted by the Registrar of Company dated 17.10.2012, recommended for investigation by Serious Fraud Investigation Office (hereinafter referred to as “SFIO”) by a letter dated 24.04.2012. Again it was challenged by the Company before this Court in W.P. No. 4651 of 2013 and obtained order of interim stay dated 25.02.2013 for a period of 8 weeks. Meanwhile, one of the lenders of the company had moved petition before this Court for winding up of the Company. In which, this Court appointed Provisional Liquidator and directed him to take charge of the assets of the Company vide order dated 31.03.2009.

3. Thereafter, this Court by an order dated 29.02.2012 appointed Official Liquidator as Liquidator to take charge of the assets of the Company. In the writ petition filed by the Company, interim order granted by this Court was partly vacated and permitted the SFIO to continue with the investigation. After investigation, SFIO submitted report under Section 241 of Companies Act on



31.03.2017. After dismissal of the writ petition filed by the company by an order dated 11.09.2017, based on the investigation report submitted by SFIO, the respondent initiated prosecution against the accused alleging that, the Company was a Public Limited Company and it was engaged in business of organized retailing by establishing chain stores by a brand named “Subhiksha” selling various products. The 1st accused is the Promoter and Managing Director of the Company. Initially it was incorporated as a private limited company and thereafter changed the name with an authorized capital of Rs.50 lakhs and paid up share capital of Rs. 50 lakhs and thereafter, it became public limited company on 30.03.2005. The authorized and paid up capital were increased upto Rs.74 crores and Rs.5 32.57 crores respectively. It expanded its retail business with an agreement with ICICI Venture Funds Management Company Limited (IVEN). Accordingly, accused persons were nominated as Directors. During investigation, the first accused was summoned to produce books of accounts of the Company as required under Section 209(1) of Companies Act for examination. However, no books of accounts were produced for investigation. Therefore, the Company failed to maintain proper records of its fixed assets, their quantitative details etc.,

4. The statutory auditor of the company for the years 2004-05, 2005-06



& 2006-07 stated in his statement under Section 240 of the Act, relied upon the Internal Auditor Reports for the respective Financial Years in respect of inventory and fixed assets. The internal auditor who was arrayed as 9th accused was examined and he has stated in his statement that the internal audit reports for the years 2004 -05 & 2005-06 were not signed by him and he had signed internal audit report only for the year 2006-07. The statutory auditor while expressing his opinion on the financial statement for the period 2004-05 had qualified that, company had not maintained proper records showing full particulars of the fixed assets.

5. Further the Directors' Report for the year 2004 -2005 did not contain any explanation for the management regarding the qualification of the Statutory Auditor except that the company was taking effective steps to implement the systems and procedures as required therein. Therefore, the company had not maintained proper records showing full particulars of the assets. The balance sheets for the years 2004 to 05, 2005- 06 and 2006-07 of the Company are not reflecting the true and fair view of the affairs of the Company. Therefore, the accused are liable to be prosecuted under Section 211(7) and 211(8) read with section 628 of Companies Act, 1956.



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6. On perusal of the Director's report for the year 2004-05, 2005-06, 2006-07 did not contain fullest information and explanations in their reports on every reservation, qualification and adverse remarks contained in the auditors report of their respective financial years. Therefore, they are liable to prosecuted under Section 217 (3) of the Act.

7. The company had not filed its annual returns from the year 2008- 2009 onwards. It did not hold Annual General Meeting from the year 2009 onwards. It had not filed balance sheets and profit and loss statement from the year 2007 to 2008 onwards. Therefore, accused violated the provisions of Sections 159, 166, 210 and 220 of the Act.

8. Though, during the investigation, summons were duly served on the accused, they failed to appear for investigation and as such non-co-operation in the investigation would amount to punishment under Section 240(3) of the Act.

9. During the course of the investigation, Statutory Auditors failed to comply the prescribed and mandatory standard proceedings. While auditing, the investigation pointed out several instances of falsification of books of



accounts, omission of material facts by the company. Therefore, they are liable to be punished for the offence under Sections 628 read with Section 211 of the Act.

10. The Statutory Auditors had facilitated the company by failing to impart their statutory duty of verification of sales, purchases and related party transactions and therefore they are liable to be prosecuted for the offence under Sections 233 read with Section 227 of the Companies Act.

11. The above complaints were lodged by the respondent on 06.07.2015. After recording the sworn statement of the respondent, the trial Court had perused the documents and had taken cognizance for the offence under Sections 159, 166, 209(5), 210, 211(7), 211(8), 217(3), 220, 227 read with Section 233, 240(3) and 628 of the Companies Act, 1956 and issued summons to the accused. Except some of the accused persons, all the accused persons challenged the complaint lodged by the respondent.

12. The learned counsel appearing for the Petitioner has raised following grounds to quash the complaints filed by the respondent.

1. The trial Court has no jurisdiction to try the offences



under the companies act as per section 435 of the Companies Act, 2013 (herein after called New Act). Accordingly, Special Court can only try the case arising out of the offences under the Act.

2. The complaint itself barred by limitations. Except the offence under Section 628 of the Act, other offences are punishable with fine or six months imprisonment. The offence under Section 628 of the Act, is punishable with 2 years of imprisonment. Therefore, the period of limitation is only three years to file a complaint under the Act. The alleged occurrence had taken place from the year 2006-07. Therefore, the very complaint itself hopelessly barred by limitation.

3. The trial Court had taken cognizance without applying its mind and without perusal of the records. Therefore, the very cognizance itself is vitiated since as per section 204 of Cr.P.C., the trial Court has to form an opinion only after due application of mind that there is sufficient basis for processing against the accused and the formation of such opinion has to be stated in the order of cognizance itself. The trial court had taken cognizance



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on the date of recording the sworn statement from the respondent and after perusal of huge volume of papers on the same day formed opinion and had taken cognizance as against the accused and issued summons.

4. Some of the accused are located outside the jurisdiction of the trial Court. When it being so, the trial Court shall postpone the issue of process against the accused and either enquire into the case himself or direct the Investigation to be made by a police officer. The trial Court without ordering any enquiry with the accused who are located outside the jurisdiction of the trial Court, the trial Court mechanically without applying its mind had taken cognizance and issued summons to the accused.

13. Mr.A.R.L.Sundaresan, the learned Additional Solicitor General of India appearing for the respondent submitted that, investigation was completed and submitted report on 31.03.2017 by SFIO. Only thereafter, the respondent came to knowledge about the offence committed by the accused and filed complaint on 06.07.2018. The sanction was accorded under Section 242 of the Act only after vacating the interim order passed in the writ petition by this Court on 23.11.2017. As per section 469(1)(b) of Cr.P.C., when the offence



comes to the knowledge of the respondent, the period of limitation will commence. Therefore, the complaint is very much in time and it is not barred by limitation. The respondent was authorized to lodge the complaint as contemplated under Section 621 of the Act on 23.05.2018.

14. He further submitted that, in so far as cognizance is concerned, 200A of Cr.P.C is applicable for the present case. The complaint filed by the public servant and as such the provision under Section 202 of Cr.P.C is not applicable. In so far as the jurisdiction of the trial Court is concerned, it is curable defect and at any time the complaint may be transferred to the jurisdictional Court. Further, the cognizance taken by the trial Court on good faith as contemplated under Section 190(1)(A) of Cr.P.C. Therefore, it does not require further enquiry though some of the accused persons are located outside jurisdiction of the trial Court.

15. The notification issued by the Ministry of Corporate Affairs dated 03.11.2017 reads as follows:

S.O.3529 (E).- In exercise of the powers conferred by sub-section (1) of section 435 of the Companies Act, 2013 (18 of 2013), the Central Government, with the concurrence of the Chief Justice of the High Court of Judicature at Madras, hereby



designates the following Courts mentioned in column (1) the Table below as Special Court for the purposes of providing speedy trial of offences punishable with imprisonment of two years or more under the said sub-section, namely

TABLE

<i>Courts</i>	<i>Jurisdiction as Special Court</i>
(1)	(2)
XV Additional Court, XVI Additional Court of City Civil Court, Chennai	State of Tamil Nadu except Districts of Coimbatore, Dharmapuri, Dindigul, Erode, Krishnagiri, Namakkal, Nilgiris, Salem and Tiruppur

Thus, the Special Court has only jurisdiction to try the offences punishable with imprisonment for two years or more under the New Act and as per the above notification, the XV and XVI Additional City Civil Court, Chennai have got jurisdiction to try the offences under 435(1) of New Act. Therefore, the trial Court has no jurisdiction to try the complaint lodged by the respondent. Though the offences punishable under the act, the impugned complaint was filed only on 06.07.2018 and as such the provision under Section 435(1) of New Act is very much applicable for the trial Court. Therefore, the special Court only has got jurisdiction to try the offences under the act.



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16. The provision under Section 435(1) of the Act reads as follows:

(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

The amendment came into force for creation of Special Court only for the purpose of speedy trial for the offence under the act.

17. The respondent filed complaint under sections 159, 166, 209(5), 210, 211(7), 211(8), 217(3), 220, 227 read with Section 233, 240(3) and 628 of Companies Act, 1956. Except the offence under Section 628 of the act, other offences are punishable with fine or six months imprisonment only. The offence punishable under Section 628 of the Companies Act, is punishable with two years imprisonment.

18. The provision under Section 468 of Cr.P.C reads as follows:

(1) Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be—



- (a) six months, if the offence is punishable with fine only;*
- (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;*
- (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years*

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

19. Accordingly, no Court shall take cognizance of the offence of the category after period of limitation. The period of limitation shall be three years. If the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

20. The provision under Section 469 of Cr.P.C dealt with commencement of period of limitation. It reads as follows:

(1) The period of limitation, in relation to an offence, shall commence,—

- (a) on the date of the offence; or*
- (b) where the commission of the offence was not known to*



the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or

(c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from which such period is to be computed shall be excluded

21. The learned Additional Solicitor General vehemently contented that the period of limitation starts in so far as the present complaint is concerned, from the date of knowledge of the offence committed by an accused. On perusal of records revealed that the entire allegations are pertaining to the year 2004 to 2007, such as non production of books of accounts of the company for the period for the year 2004- 05, 2005-06 and 2006 – 07. Further alleged that statutory auditor had not maintained proper records showing full particulars of the fixed assets of company for the year 2004-05, 2005-06 and 2006-07. The report submitted by the Director of the Company for the year 2004-05, 2005-06 and 2006-07 did not contain full information and explanations in their reports on every reservation, qualification and adverse remarks contained in the



auditors report. Further alleged that, from the year 2008 to 2009 onwards, the company had not filed its annual reports. Further during the investigation, accused failed to co-operate with the investigation. The Company and the Statutory Auditors failed to comply the irregularities pointed out such as falsification of books of accounts, omission of material facts by the Company for the years 2004-05, 2005-06 and 2006-07. Therefore, the investigation started even in the year 2010 itself about the irregularities committed by the Company on receipt of several complaints from the creditors, investors and employees of the Company. The Ministry of Corporate Affairs ordered for inspection by its communication dated 15.06.2009 itself. After inspection, Registrar of Companies submitted the inspection report on 30.03.2010 itself. Based on the inspection report, Government of India ordered for investigation by appointing SFIO by its communication dated 23.07.2010 itself.

22. He further contended that though, the order of investigation was challenged before this Court and obtained interim order for a period of 8 weeks and thereafter, it was not extended by this Court. It was clarified by this Court by order dated 23.09.2020 in W.M.P.No.01 of 2015 and 02 of 2013 in W.P.No.4651 of 2013. Therefore, the Ministry of Corporate Affairs had knowledge about the alleged offences committed by the accused. Therefore, the



complaint is hopelessly barred by limitation under Section 468 of Cr.P.C., and it cannot be sustained for trial. The complaint was lodged by respondent on 06.07.2018. Thereafter, the respondent as well as the Counsel for the respondent called absent before the trial Court. Finally on 03.08.2018, sworn statement of the respondent was recorded by the trial Court. It is also pertinent to note that along with the complaint, respondents filed seven documents. The investigation report dated 31.03.2017 is consisting more than 250 pages. On the same day, namely on 03.08.2018, the trial Court perused the documents annexed along with the complaint and on recording of the sworn statement of the respondent had taken cognizance for the offence under Sections 159, 166, 209(5), 210, 211(7), 211(8), 217(3), 220, 227 read with Section 233, 240(3) and 628 of Companies Act, 1956 and issued summons to the accused.

23. As per section 204 of Cr.P.C., the trial Court is of the opinion to take cognizance of the offence on the ground that there is sufficient ground for proceeding and then can issue summons for prosecution provision under Section 204 of Cr.P.C reads as follows:

204. Issue of process –

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—



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

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

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint

(5) Nothing in this section shall be deemed to affect the provisions of section 87

It deals with the issue of process and it relates to commencement of criminal proceedings. If the trial Court taking cognizance of the case upon consideration of materials before it, since that there is a prima facie case for proceeding in respect of the offence, it shall issue process against the accused.

The opinion as to be formed only on due application of mind that there is



prima facie case made out to proceed against the accused.

24. In this regard, the learned counsel for the petitioner relied upon the judgement of the **Hon'ble Supreme Court of India** in ***Sunil Bharti Mittal V. Central Bureau of Investigation*** made in CrI.A.No.34 of 2015 with Nos.35 of 2015 and 36-37 of 2015 on 09.01.20215. The relevant portion is extracted hereunder:

51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e., the complaint, examination of the complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.



53. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is *prima facie* case against accused, though the order need not contain detailed reasons. *A fortiori*, the order would be bad in law if the reason given turns out to be *ex facie* incorrect.

25. Thus, it is clear that, trial Court has to apply its mind before forming an opinion on perusal of records and depositions. In the case on hand, on 03.08.2018, the sworn statement of the respondent was recorded and on the very same day, trial Court had taken cognizance after perusal of the records. As stated supra, respondent annexed 7 documents along with the complaint. The document no.5 is the investigation report and it consisted more than 250 pages and no one can peruse the volume of documents in a day and formed opinion to take cognizance against the accused. Therefore, the above judgment is squarely applicable to the case on hand. The trial Court without even applying its mind had mechanically taken cognizance and issued summons. It is also evident that, some of the accused are located outside the jurisdiction of the trial Court



namely accused No.2, 4 & 5.

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26. As per section 202 of Cr.P.C and the amendment with effect from 23.06.2006, the trial Court before issuing summons, shall have to conduct enquiry by postponing the issue of process to the accused. It is relevant to extract the provision under Section 202(1) of Cr.P.C. provision under Section 202(1) of Cr.P.C., reads as follows:

202. Postponement of issue of process

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200



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27. Admittedly, the accused, 2, 4 & 5 are residing outside the jurisdiction of the trial Court. Therefore, the trial Court should have postponed the issue of process against the accused 2, 4 & 5 and enquire into the case and the trial Court itself or direct an Investigation to be made by the Police Officer.

28. In this regard, learned counsel for the petitioner relied upon the judgement of the **Hon'ble Supreme Court of India** in a case of **Aroon Poorie vs. Jayakumar Hiremath** made in Criminal Appeal No. 843 of 2016 with No. 847 of 2016 dated 05.09.2016. The relevant portion is extracted hereunder:

2. The above apart, from the materials on record it appears that the accused appellants in the present appeals have and maintain residence beyond the local jurisdiction of the learned trial Court. Under the provisions of [Section 202\(1\)](#) Cr.P.C. it was, therefore, mandatory for the learned Magistrate to hold an inquiry either by himself or direct an investigation by the Police prior to the issuance of process. Admittedly, the same had not been done. If the aforesaid mandatory provisions of [Section 202\(1\)](#) Cr.P.C. had not been followed, the learned trial Court would not have the jurisdiction to issue process/summons as has been done.

29. The above judgment is squarely applicable to the case on hand since,



the trial Court had not chosen to conduct any enquiry either by itself or by any police officer prior to issuance of process. Therefore, the issuance of summons to the accused 2, 4 & 5 is vitiated the entire proceedings.

30. In this regard, the learned Additional Solicitor General appearing for the respondent submitted that the complaint has been filed by the public servant and as such, provision under 202 of Cr.P.C., is not applicable to the case on hand. The complaint was filed under Section 200 of Cr.P.C. Therefore, the trial Court had rightly taken cognizance after examining the complaint.

31. The provision under Section 200 of Cr.P.C., is clear that, when the complaint lodged by the Public Servant acting or purporting to act in discharge of official duties, the trial Court need not examine the complainant and the witnesses. Whereas, in the case on hand, sworn statement of the respondent was recorded by the trial Court. Thereafter, on perusal of the documents filed along with the complaint, the trial Court had taken cognizance and issued summons on the same day. Therefore, the contention of the learned Additional Solicitor General cannot be considered for the violation committed by the trial Court by issuing summons to the accused, who are not located within jurisdiction of the trial Court.



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32. In view of the above discussions, the complaints lodged by the respondent cannot be sustained as against the petitioner and it is liable to be quashed. Accordingly, this Criminal Original Petition is allowed and the proceedings in EOCC.No.02 of 2018 on the file of XV Additional City Civil Court, Chennai is hereby quashed as against the petitioner. Consequently, connected miscellaneous petition is closed.

12.10.2023

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Speaking / Non Speaking order
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CrI.O.P.No. 23653 of 2019

G.K.ILANTHIRAIYAN, J.

nsI/veda

To

1. Assistant Director,
Serious Fraud Investigation Office,
Ministry of Corporate Affairs,
Government of India, Regional Office,
Corporate Bhawan, No.29, Rajaji Salai,
Chennai – 600 001.
2. XV Additional City Civil Court, Chennai
3. The Public Prosecutor,
Madras High Court.

CrI.O.P.No.23653 of 2019
and CrI.M.P.No.12457 of 2019