



Crl.O.P.No.16257 and 16380 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.01.2024

CORAM

THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

Crl.O.P.No.16257 and 16380 of 2023

and

Crl.M.P.Nos.10281, 10430, 10431 of 2023

Crl OP No.16257 of 2023

1. Sri Sinu Dominic
2. Sri Domnic Savio
3. Sri. Thozhuthumkudy Kuruvila Kuriachan
- 4 Sri Prasanth Gopolakrishnan Nair
5. Smt.Bichu Philip
6. Sri Abraham Kalamannil Joseph
7. Sri.Samuel Abraham
8. Sri Joseph Abraham

... Petitioners /Accused 2 to 6
A8 to A10

Vs.

Smt.Roopa Dileep

...Respondent/Complainant



Crl.O.P.No.16257 and 16380 of 2023

Prayer: Criminal Original Petition under Section 482 of the Criminal Procedure Code to call for the records in Spl CC No.5 of 2022 on the file of the Hon'ble I Additional Sessions Court, Coimbatore and quash the same.

Crl OP No.16380 of 2023

M/s.Kellax Surgicals Private Limited,
58, Gokule Street, Ramnagar, Coimbatore – 641 009
Represented by its Managing Director
Sinu Dominic

..Petitioner /1st Accused

Vs.

Smt.Roopa Dileep

...Respondent/Complainant

Prayer: Criminal Original Petition under Section 482 of the Criminal Procedure Code to call for the records in Spl CC No.5 of 2022 on the file of the Hon'ble I Additional Sessions Court, Coimbatore and quash the same.

For Petitioner : Mr.Karthik Seshadri
in both Crl OPs

For Respondent : Mr.Navod Prasannan
in both Crl OPs

COMMON ORDER

These petitions have been filed to quash the proceedings pending in Spl CC No.5 of 2022 on the file of the Hon'ble I Additional Sessions Court, Coimbatore.



Crl.O.P.No.16257 and 16380 of 2023

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2. The respondent / complainant filed a private complaint before the Court below against 10 accused persons viz. The Company A1 and natural persons A2 to A6 and A8 to A10. The sum and substance of the allegations made in the complaint is that the accused persons are involved in a large scale fraud and they have dishonestly and fraudulently mismanaged the affairs of the company and they have made illegal gains. Hence, according to the respondent, A2 to A6, A8 to A10 are liable to be prosecuted under Sections 36 and 447 of the Companies Act, 2013 and under Sections 420 and 464 of IPC. The Principal District Judge, Coimbatore, took cognizance of the complaint by an order dated 06.07.2022 and for proper appreciation, the same is extracted hereunder :-

Records perused. Taken on file u/s.436(1) and (2), 438 and 439(2) of the Companies Act, 2013, against the accused, Made over to Special Court (I Additional District Court, Coimbatore, for disposal of the case according to law. Call on



Crl.O.P.No.16257 and 16380 of 2023

29.08.2022.

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3. These quash petitions have been filed by A1 to A6 and A8 to A10.

4. The main ground that was urged by the learned counsel for the petitioners is that the Court below did not have the Jurisdiction to take cognizance of the private complaint that was filed by the respondent in view of the bar under Section 212 (6) of the Companies Act. It was further contended that even if the averments made in the complaint are taken as it is, no offence has been made out against the petitioners.

5. Per contra, the learned counsel for respondent / complainant submitted that the bar under Section 212 (6) of the Companies Act will not arise in this case, since such bar will apply only for Section 447 of the Companies Act. Whereas, in the present case, sufficient allegations have been made against the accused persons to make out offence under Section



Crl.O.P.No.16257 and 16380 of 2023

36 of the Companies Act and also under Section 420 and 464 of IPC.

Therefore, the learned counsel for respondent contended that under Section 439(2) r/w.436(2), such a complaint is maintainable and such a complaint can be maintained even by the shareholder or a member of the company. Since the respondent / complainant is a shareholder, the present complaint cannot be held to be not maintainable as was pointed out by the learned counsel for the petitioners. Apart from his submissions, the learned counsel for respondent also relied upon various materials to demonstrate as to how the fraud has been committed in this case. The learned counsel submitted that these materials were very much available before the Court below and it was considered and only thereafter, complaint was taken cognizance and summons was issued to the accused persons.

6. This Court has carefully considered the submissions made on either side and the materials available on record.

7. In the instant case, there is no dispute with regard to the fact that except for A1, A2 to A6, A8 to A10 are all residing at Kerala.



Crl.O.P.No.16257 and 16380 of 2023

Therefore, they are residing at a place beyond the area in which the Court below exercises its Jurisdiction. Hence, it is mandatory on the part of the Court below to have complied with the procedure under Section 202(1) of Cr.PC. The Court below ought to have postponed the issue of process against the accused and should have either inquired the case by itself or should have directed an investigation by the police. During that inquiry, it is also left open to the Court below to take evidence of witnesses. Thereafter, the Court has to pass an order of taking cognizance and that order must reflect application of mind.

8. The scope of Section 202(1) of Cr.PC was dealt with by the Apex Court in **Vijay Dhanuka and Others v. Najima Mamtaj and Others** reported in **2014 14 SCC 638** and the relevant portions are extracted hereunder:

10. However, in a case in which the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction whether it would be mandatory to hold inquiry or the investigation as he thinks fit for the purpose of deciding whether or not there is sufficient ground for



proceeding, is the question which needs our determination.

In this connection, it is apt to refer to Section 202 of the Code which provides for postponement of issue of process.

The same 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, and shall, *in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, 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 Session; 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.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an



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Crl.O.P.No.16257 and 16380 of 2023

officer in charge of a police station except the power to arrest without warrant.”

(emphasis supplied)

11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process “in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction” and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words “and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction” were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

“False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.”

The use of the expression “shall” prima facie makes the inquiry or the investigation, as the case may be, by the



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Crl.O.P.No.16257 and 16380 of 2023

Magistrate mandatory. The word “shall” is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word “shall” in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression “shall” and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

13. In view of the decision of this Court in *Udai Shankar Awasthi v. State of U.P.* [(2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708] , this point need not detain us any further as in the said case, this Court has clearly held that the provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment: (SCC p. 449, para 40)

“40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were outside his territorial jurisdiction. *The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it [Ed.: The matter between the two asterisks has been emphasised in original as well.] mandatory to postpone the issue of process [Ed.: The matter between the two asterisks has been emphasised in original as well.] where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned.* The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he



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Crl.O.P.No.16257 and 16380 of 2023

thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases.”

(emphasis
supplied)

9. The position of law is reiterated in ***Aroon Poorie v. Jayakumar Hiremath*** reported in **2017 7 SCC 767**, wherein the Apex Court held that the provisions of Section 202(1) is mandatory and the learned Magistrate has to hold an inquiry prior to the issuance of process.

10. The Apex Court once again reiterated this position of law in the latest order in Special Leave Appeal Crl.No.2135 of 2022, dated 22.8.2023.

11. The consistent view of the Apex Court is that the order taking cognizance of the complaint must specifically reflect application of mind under Section 202(1) Cr.PC and the non-compliance thereof will result in failure of justice. On that ground alone, the order taking cognizance can be interfered by this Court in exercise of its jurisdiction under Section 482 of Cr.PC.



Crl.O.P.No.16257 and 16380 of 2023

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12. The cognizance order passed by the Court below has been extracted supra. It is evident from this order that the Court below has not complied with the mandate under Section 202 (1) of Cr.PC and the complaint has been mechanically taken cognizance and it has been made over to the First Additional District Court, Coimbatore.

13. It is not necessary for this Court to go into the merits of the case and deal with the rival contentions raised by either side. This is in view of the fact that the very cognizance that has been taken by the Court below is illegal for non compliance of the mandate under Section 202(1) of Cr.PC. Hence, without going into the merits of the case, this Court is inclined to set aside the cognizance order that was passed by the Principal District Judge, Coimbatore, dated 06.07.2022 and accordingly, the same is hereby quashed.

14. The matter is remitted back to the file of the Principal District Judge, Coimbatore. The learned Judge shall strictly follow the mandate under Section 202(1) of Cr.PC and apply his mind on the allegations made



Crl.O.P.No.16257 and 16380 of 2023

in the complaint and the materials filed along with the complaint and if necessary, shall also record the evidence of witness and thereafter, pass the cognizance order. The cognizance order passed by the Court below should reflect application of mind. This process shall be completed by the Principal District Judge, Coimbatore within a period of four weeks from the date of receipt of a copy of this order. Depending upon the order passed by the learned Principal District Judge, the parties can work out their remedy in the manner known to law.

15. In the result, both these Criminal Original petitions are disposed of with the above directions. Consequently, the connected miscellaneous petitions are closed.

30.01.2024

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Index : Yes/No

Speaking order: Yes/No

Neutral citation: Yes/No



Crl.O.P.No.16257 and 16380 of 2023

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To

1. I Additional Sessions Court, Coimbatore
2. The Principal District Judge, Coimbatore,
3. The Inspector of Police,
Thudiyalur Police Station,
Coimbatore District.
4. The Public Prosecutor,
Madras High Court.



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Crl.O.P.No.16257 and 16380 of 2023

N.ANAND VENKATESH,J

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Crl.O.P.No.16257 and 16380 of 2024
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Crl.M.P.Nos.10281, 10430, 10431 of 2024

30.01.2024