IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF JANUARY, 2021

BEFORE

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

CRIMINAL PETITION NO.5480 OF 2016
C/W
CRIMINAL PETITION NO.5481 OF 2016

BETWEEN:

1. M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
NO.574, PARK HOUSE, 80 FT. ROAD,
8TH BLOCK, KORAMANGALA,
BANGALORE - 560 095,
REPRESENTED BY ITS DIRECTOR,
MR. VASUDEVAN SUDHINDRANATH.

2. DR. CHIRIANKANDATH JOSEPH ROY,
CHAIRMAN & MANAGING DIRECTOR,
M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
NO.574, PARK HOUSE, 80 FT. ROAD,
8TH BLOCK, KORAMANGALA,
BANGALORE - 560 095,

3. SRI. VASUDEVAN SUDHINDRANATH
DIRECTOR-FINANCE,
M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
NO.51/7/1, "CHITRAKOOT", RATNA AVENUE,
RICHMOND ROAD,
BANGALORE - 560 025.

4. MRS. LINY MOONJELY ROY
CHAIRMAN & MANAGING DIRECTOR,
M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
NO.574, PARK HOUSE, 80 FT. ROAD,
8TH BLOCK, KORAMANGALA,
BANGALORE – 560 095.

5. SRI. ABDUL GAFFAR PALLIKANDY
DIRECTOR,
M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
3/2, AL AMEEN APARTMENTS,
PATALAMMA TEMPLE STREET,
BASAVANAGUDI,
BANGALORE - 560 004.

6. SRI. JOSEPH THERUVIPARAMBLI ALEXANDER
DIRECTOR,
M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
THERUVIPARAMBIL HOUSE,
P.O. KUMBALANGHI,
ERNAKULAM - 682 O07,
KERALA.

7. SRI. SUNIL PARAKKAL KRISHNAN
DIRECTOR,
M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
NO.81/6, JYOTHI,
NANDIDURGA EXTENSION,
BENSON TOWN,
BANGALORE - 560 046.

8. CHIRIYANKANDATH VARGHESES JOSEPH
DIRECTOR,
M/S. CONFIDENT PROJECTS (INDIA) PVT. LTD.,
NO.110, 1ST MAIN, 7TH BLOCK,
KORAMANGALA,
BANGALORE - 560 095. ... PETITIONERS
(COMMON)

(BY SRI.VIVEK HOLLA, ADVOCATE OF M/S. HOLLA & HOLLA)

AND:

THE INCOME TAX DEPARTMENT,
BY DEPUTY COMMISSIONER OF
INCOME TAX, CIRCLE-2(1) (1),
BENGALURU – 560 095,
REPRESENTED BY DR. K.J. DIVYA.

... RESPONDENT
(COMMON)

(BY SRI. K.V. ARAVIND, ADVOCATE)

THESE CRIMINAL PETITIONS ARE FILED UNDER SECTION 482 OF CR.P.C. PRAYING TO SET ASIDE THE ORDER DATED 29.03.2016 PASSED BY THE COURT OF SPECIAL COURT (ECONOMIC OFFENCES), BANGALORE IN C.C.NO.85/2016 AND C.C.NO.86/2016 RESPECTIVELY (ANNEXURE –B) AND QUASH THE COMPLAINT FILED IN [C.C.NO.85/2016 AND C.C.NO.86/2016 RESPECTIVELY ON THE FILE OF THE COURT OF THE SPECIAL COURT (ECONOMIC OFFENCES), BANGALORE (ANNEXURE-A)

THESE CRIMINAL PETITIONS COMING ON FOR ADMISSION AND HAVING BEEN RESERVED FOR ORDERS ON 11.12.2020, THIS DAY, **THROUGH VIDEO CONFERENCE** THE COURT PRONOUNCED THE FOLLOWING:

ORDER

Criminal Petition No.5480 of 2016

1. The petitioners are before this Court seeking for setting aside the order dated 29.03.2016 passed in C.C.No.85/2016 pending on the file of the Court of Special Court (Economic Offences), Bengaluru, in issuing summons to the petitioners herein.

2. The first petitioner is a Company carrying on the business of construction of apartments and development and sale of plots. Petitioner Nos.2 to 8 are the Directors of the said Company. It is stated that

2.1. The Company follows the accrual accounting system i.e., income and expenses are accounted regardless of whether or not money/cash actually change hands. The sale is entered into the books when the agreement to sell is entered into with the customer rather than when the money/cash is collected. Irrespective as to whether the purchaser pays the amount or not, the income is shown in the books of account of the Company and tax is paid thereon.

2.2. The Company had submitted its returns for the assessment year 2013-14 on 30.09.2013 declaring a total income of Rs.17,98,20,900/-. As per the income declared, the tax payable thereon was

Rs.6,41,89,214/-. However, since the Company did not have the money to make the payment of tax and they had a negative balance in the bank account of the first petitioner Company, the said tax amount was not paid.

2.3. On 08.12.2015, the Deputy Commissioner of Income Tax issued notice to one of the Directors calling upon him to attend the office of the Deputy Commissioner of Income Tax and give evidence. In his place, the third petitioner appeared and gave a statement as regards the questions asked for on that day.

2.4. In the said statement recorded on 01.12.2015, he was specifically asked if the Company has made payment of taxes

for the year 2013-14, where he has specifically answered "no" and on enquiry as to the reasons for non-payment, he has given a detailed answer stating that the same is mainly on account of the drop in sales and drop in the receipt of amount from such sale.

2.5. In furtherance thereof, another show cause notice came to be issued by the Deputy Commissioner of Income Taxes on 31.12.2015 on account of the default having been accepted by the said Director and called upon the Principal Officer of the Company to appear before the Deputy Commissioner of Income Tax to show cause as to why penalty proceedings should not be initiated.

2.6. In reply thereto, the Chartered Accountant of the Company appeared before the Deputy Commissioner of Income Tax and gave a letter stating that the real estate market is going through a sluggish period and that there has been drastic fall in the receipt of money by the Company. They are in the process of obtaining loan for the purpose of making payment of the due tax.

2.7. Despite this, the Assessing Officer on 14.01.2016, i.e., the Deputy Commissioner of Income Tax passed a penalty order under Section 221(1) of the Income Tax Act imposing a penalty of Rs.46,36,961/- and issued two notices.

2.8. Immediately thereafter on 20.01.2016 and 21.01.2016, a search and seizure was conducted on the first petitioner – Company and its various premises.

2.9. Notices were issued on 01.02.2016 and 05.02.2016 to the Company to show cause as to why prosecution under Section 277 of the Income Tax Act were not to be initiated. Though the petitioner-Company replied the same, the proceedings in C.C.No.85/2016 came to be initiated by the Income Tax Department against the petitioners for the alleged offence under Sections 276 (C) (2) and 277 of the Income Tax Act.

Criminal Petition No.5481 of 2016

3. The petitioners are before this Court seeking for setting aside the order dated 29.03.2016 passed in

C.C.No.86/2016 pending on the file of the Court of Special Court (Economic Offences), Bengaluru, in issuing summons to the petitioners herein.

4. The first petitioner is a Company carrying on the business of construction of apartments and development and sale of plots. Petitioner Nos.2 to 8 are the Directors of the said Company. It is stated that

4.1. The Company follows the accrual accounting system i.e., income and expenses are accounted regardless of whether or not money/cash actually change hands. The sale is entered into the books when the agreement to sell is entered into with the customer rather than when the money/cash is collected. Irrespective as to whether the purchaser

pays the amount or not, the income is shown in the books of account of the Company and tax is paid thereon.

4.2. The Company had submitted its returns for the assessment year 2014-15 on 30.09.2014 declaring a total income of Rs.21,49,19,000/-. As per the income declared, the tax payable thereon was Rs.8,08,49,132/-. It is claimed that they had made payment of tax of Rs.7,83,69,785/-. However, no such payment had been made, since the Company did not have the money to make the payment of tax and they had a negative balance in the bank account of the first petitioner Company, the said tax amount was not paid.

4.3. On 04.02.2016, the Deputy Commissioner of Income Tax issued a show cause notice calling upon as to why the penalty proceedings should not be initiated. This was replied by the petitioner on 23.02.2016. However, considering the same on the very same day, the Income Tax Department passed an order imposing a penalty of Rs.78,36,979/- and filed a proceedings in C.C.No.86/2016 on 29.03.2016 alleging offences under Sections 276 (c) (2) and 277 of Income Tax Act, which was taken cognisance by the Magistrate on 29.03.2016 and summons were issued. It is aggrieved by the same that the petitioners are before this Court.

5. Sri.Vivek Holla, learned counsel for the petitioners would submit that

5.1. For the purpose of applicability of Sections 277 and 276 (C) (2) of the Income Tax Act, there must be a willful attempt on the part of the petitioners and/or the assessee to make false statement willfully and attempt to evade tax which is not the situation in the present case. In this regard he relies on ***Rakapalli Raja Rama Gopala Rao vs. Naragani Govinda Sehararao and another [(1989) 4 SCC 255]***

> *4. The short question then is whether it can be said that the tenant's default to pay or tender rent from December 1977 to May 1978 was not wilful to avail of the benefit of the proviso extracted above. It may be noticed that in cases where the tenant has defaulted to pay or tender the rent he is entitled to an opportunity to pay or tender the same if his default is not wilful. The proviso is couched in negative form to reduce the rigour of the substantive provision in Section 10(2) of the Act. An act is said to be wilful if it is intentional, conscious and deliberate. The expressions "wilful"*

and "wilful default" came up for consideration before this Court in S. Sundaram Pillai v. V.R. Pattabiraman. After extracting the meaning of these expressions from different dictionaries (see pp. 659 and 660: SCC pp. 605 and 606) this Court concluded at p. 661 as under: (SCC 606, para 26)

"Thus, a consensus of the meaning of the words 'wilful default' appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom."

Since the proviso with which we are concerned is couched in negative form the tenant can prevent the decree by satisfying the Controller that his omission to pay or tender the rent was not wilful. If the Controller is so satisfied he must give an opportunity to the tenant to make good the arrears within a reasonable time and if the tenant does so within the time prescribed, he must reject the landlord's application for eviction. In the present case, it is not in dispute that the tenant did not pay the rent from December 1977 to May 1978 before the institution of the suit. Under the eviction notice served on him in December 1977 he was called upon to pay the rent from December 1977 only. The appellant tenant did not pay or tender the rent from December 1977 to May 1978 not because he had no desire to pay the rent to the respondents but because he bona fide believed that he was entitled to purchase the property under the oral agreement of 14-10-1977. He had also paid Rs 5000 by way of earnest money under the said oral agreement. True it is, his suit for specific performance of the said oral agreement has since been dismissed but he has filed an appeal which is pending. He, therefore, bona fide believed that he was entitled to purchase the property under the said oral agreement and since he had already paid

Rs.5000 by way of earnest thereunder he was under no obligation to pay the rent to the respondents. In order to secure eviction for non-payment of rent, it must be shown that the default was intentional, deliberate, calculated and conscious with full knowledge of its consequences. Here is a tenant who felt that even though he had invested Rs.5000 as earnest the vendor has sold the property to the respondents in total disregard of his right to purchase the same. This is not a case of a tenant who has failed to pay the rent without any rhyme or reason. He was not averse to paying the rent but he genuinely believed that he was under no obligation to do so as he had a prior right to purchase the property. We are, therefore, of the opinion that this is a case in which the Controller should have invoked the proviso and called upon the appellant to pay the arrears from December 1977 to May 1978 within a certain time. Failure to do so has resulted in miscarriage of justice. We are, therefore, of the opinion that the ejectment decree cannot be allowed to stand.

5.2. The petitioners have not made any such willfully false statement and evaded the payment of tax inasmuch as the taxes due have been paid from time to time.

5.3. The first petitioner Company while filing its returns for the assessment year 2013-14 was required to file returns by 30.09.2013

being the last date of filing and as such did and in fact filed its returns in time by uploading the returns and balance sheet on the web portal of the Income Tax Department on 30.09.2013.

5.4. The first petitioner Company while filing its returns for assessment year 2014-15 was required to file returns by 30.09.2014 being the last date of filing and as such did and in fact filed its returns in time by uploading the returns and balance sheet on the web portal of the Income Tax Department on 30.09.2014.

5.5. Since the portal did not accept the return without the amount paid as income tax being entered into it, the said amount was

entered and the income tax returns were up-loaded.

5.6. It is not that the entry was made to avoid or evade payment of tax, the same was made only for the purpose of up-loading the return on the web portal, by that time as per Section 26AS returns of the first petitioner-Company, an amount of Rs.2.90 crores had already been paid towards the total amount due of Rs.6,41,89,214/- for the assessment year 2013-14. As regards assessment year 2014-15, the Petitioner not having any money to pay the previous year's tax had not made any payment for assessment year 2014-15.

5.7. It is not that the first petitioner -Company avoided or evaded payment of taxes

inasmuch as 50% of the tax amounts have been paid for assessment year 2013-14 and the balance would have been paid by the petitioner-Company in due course as and when it received cash flows irrespective of the proceedings adopted by the Income Tax Department.

5.8. In this regard, he relies upon the decision of this Court in Crl.P No.4891/2014 c/w Crl.P No.4892/2014 *[**M/s.Vyalikaval House Building Co-operative Society Ltd., and others vs. The Income Tax Department**]* more particularly Paras 9 and 10 thereof, which are extracted hereunder for easy reference:

"9. In the instant case, the only circumstance relied on by the respondent in support of the charge levelled against the petitioners is that, even though accused filed the returns, yet, it failed to pay the

self-assessment tax along with the returns. This circumstance even if accepted as true, the same does not constitute the offence under Section 276C (2) of the Act. The act of filing the returns by itself cannot be construed as an attempt to evade tax, rather the submission of the returns would suggest that petitioner No.1 had voluntarily declared his intention to pay tax. The act of submitting returns is not connected with the evasion of tax. It is only an act which is closely connected with the intended crime, that can be construed as an act in attempt of the intended offence. In the backdrop of this legal principle, the Hon'ble Supreme Court in the case of Prem Dass – vs – Income Tax Officer cited supra, has held that a positive act on the part of the accused is required to be established to bring home the charge against the accused for the offence under Section 276C(2) of the Act.

10. In the case on hand, conduct of petitioner No.1 making payments in terms of the returns filed by him, though delayed and made after coercive steps were taken by the Department do not lead to the inference that the said payments were made in an attempt to evade tax declared in the returns filed by him. Delayed payments, under the provisions of the Act, may call for imposition of penalty or interest, but by no stretch of imagination, the delay in payment could be construed as an attempt to evade tax so as to entail prosecution of the petitioners for the alleged offence under Section 276C(2) of the Act. In that view of the matter, the prosecution initiated against the petitioners, in my considered opinion, is illegal and tantamount to abuse of process of Court and is liable to be quashed".

5.9. Relying on the aforesaid decision, he submits that in the present case, it is not

that the payments have not made at all, all dues of income tax have been made. Referring to ***Vyalikaval's*** case, he contends that this Court in the said case, taking into consideration the payments were made even after coercive steps were invoked, has quashed the proceedings. But, in the present case, payments have been made even before any coercive steps have been taken. Therefore, the petitioners in the present matter stand at a better footing than that of the ***Vyalikaval's*** case and the benefit of the said decision ought to be extended to the petitioners' case also.

5.10. As regards the Directors, he submits that the petitioner No.6 is a resident of Kerala and summons ought not to have been

issued to respondent No.6 without following the due procedure under Section 202 of Cr.P.C. inasmuch it is mandatory for inquiry by the Special Court (Economic Offences) Bangalore to apply its mind as to whether process has to be issued to a person residing outside the jurisdiction of the Court, in this regard he relies on ***Front Row Media Pvt. Ltd. & ors. vs. M/s. Bid & Hammer Auctioneers Pvt. Ltd., and anr. [W.P.Nos.3154-3158/2016 – DD 24.06.2019]***

4. *Dealing with Section 202 of Cr.P.C Hon'ble Supreme Court of India in ABHIJIT PAWAR VS. HEMANT MADHUKAR NIMBALKAR AND ANOTHER reported in (2017) 3 SUPREME COURT CASES 528 in para 12.1.1 has held as under:*

"12.1.1. It is submitted that the procedure stipulated in the said provision is mandatory which imposes an obligation on the Magistrate to ensure that before summoning an accused, who resides beyond his jurisdiction, the Magistrate shall make necessary inquiries 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 is sufficient ground to proceed against the accused. It was submitted that indisputably A-1 resides outside the jurisdiction of the trial court at Kolhapur as he is resident of Pune."

In para 23, the Hon'ble Supreme Court has laid down as under:

"23. Admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the Magistrate to conduct an enquiry or investigation before issuing the process."

***5.** In view of the ratio laid down in the aforesaid decision and in the light of the specific provision contained in Section 202 of Cr.P.C., petitions are allowed. Process issued to the petitioners is set aside. Matter is remitted to the learned Magistrate to proceed in the matter after compliance of the requirements of Section 202 of Cr.P.C. All other contentions urged by the petitioners are left upon for consideration at appropriate stage.*

5.11. ***Lakshmi Narayan Das vs. Amitabh Das***

[Crl.P No.4941/2011 – DD 18.08.2018]

***18.** It is also necessary to note that the petitioner is a resident of Bihar State. Section 202 of Cr.P.C. cast a mandatory duty on the Court to hold an enquiry before issuance of process, when the accused is residing at a place beyond the area in which the Court exercises its jurisdiction. There is nothing in the impugned order to indicate that the learned Magistrate has conducted any enquiry as contemplated under Section 202 of the Cr.P.C. In any case, the complainant himself having failed to make out that the allegations contained in the*

legal notice issued by petitioner were defamatory in nature and that they were made/published with an intent to harm reputation of the complainant, in my view the prosecution of the petitioner is wholly illegal and cannot be sustained. In the above circumstances, continuation of the proceedings against the petitioner is an abuse of the process of law and therefore liable to be quashed. Accordingly the petition is allowed. The proceedings in C.C. No.8002/2011 in so far as the petitioner is concerned are hereby quashed.

5.12. Admittedly, the petitioners did not have money to make payment of the income tax. It is not that the petitioners had money and did not make the payment of the amount. In this regard, he relies on ***Income Tax Officer vs. Chiranjilal Cotton Industries and others [(2001) SCC Online P & H 1615]***

6. *Learned counsel is unable to refer to any evidence on record to show that the assessee had the resources, but it had failed to pay. Still further, the manner in which the payments have been made is indicative of the assessee's financial position. Even, in the bank account the total amount was Rs. 4,114.30. Nothing has been produced on record to show that the delay was wilful.*

7. *Mr. Sawhney submits that opportunities were given to the assessee to make the payment, but the firm as well as the individuals had failed to make the payment.*

8. *It may be so. However, in the absence of positive evidence to show that they had the resources, it cannot be said that the delay was wilful.*

5.13. ***Sushil Kumar Saboo vs. State of Bihar and another [(2009) SCC Online Pat 691]***

9*. The tax court in the case of ITO v. Chiranjilal Cotton Industries reported in [2002] 254 ITR 181 (P&H) held that if prosecution under section 276C(2) of the Income-tax Act would not succeed, if there is no evidence on record to show that the assessee had enough resources to pay the amount and he wilfully evaded to pay tax.*

10. *In the instant case it would appear that assessee had filed an application within time for some more time to pay the due amount on account of financial crunch.*

11. *Thus, I am of the view that there has been no wilful evasion on the part of the assessee to evade the payment of tax. As such I quash the impugned order dated March 30, 2006 passed by the Presiding Officer, Special Judge, Economic Offences, Patna, in Complaint Case No. 336 (C)/2006.*

5.14. As regards the issuance of summons, he submitted that the said order dated 29.03.2016 does not indicate application of mind by the Economic Offences Court inasmuch as the order does not reflect whether the Magistrate has come to the conclusion that any offence has been committed or not and on this ground also the proceedings ought to be quashed. In this regard, he relies on the following decisions:

5.15. ***Sunil Bharti Mittal vs. Central Bureau of Investigation [(2015) 4 SCC 609]***

> ***Head Note D:-*** *Criminal Procedure Code, 1973 – Ss. 190 and 200 to 204- Cognizance – Meaning and scope-Cognizance can be taken under the three conditions mentioned in S.190-Expression "taking cognizance" has not been defined in Cr.PC-However, when the Magistrate applies his mind for proceedings against persons concerned, he is said to have taken cognizance of an offence-Sine qua non for taking cognizance of offence is application of mind by Magistrate and his satisfaction that*

allegations, if proved, would constitute an offence- It is, therefore, imperative that on a complaint or on a police report, Magistrate is bound to consider question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect-words and Phrases- "Cognizance".

48. *Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.*

53. *However, the words "sufficient ground for proceeding" appearing in Section 204 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 the 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.*

5.16. ***S.K.Alagh vs. State of Uttar Pradesh and others [(2008) 5 SCC 662]***

> ***16.*** *The 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.*
>
> ***19.*** *As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the 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 v. R.B.S. Channabasavaradhya)*

5.17. ***National Small Industries Corporation Limited vs. Harmeet Singh Paintal and another [(2010) 3 SCC 330]***

> ***13.*** *Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in*

consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

5.18. ***G.N.Verma vs. State of Jharkhand and another [(2014) 4 SCC 282]***

19. *It has been laid down, in the context of Sections 138 and 141 of the Negotiable Instruments Act, 1881 in National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, that Section 141 is a penal provision creating a vicarious liability. It was held as follows: (SCC p. 336, para 13)*

"13. … It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability."
(emphasis in original)

It was then concluded: (SCC p. 345, para 39)

"39. (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction."

20. *Insofar as the criminal complaint is concerned, it does not contain any allegation against G.N. Verma. The only statement concerning him is that he was the Chief General Manager/deemed agent of the mine and was exercising supervision, management and control of the mine and in that capacity was bound to see that all mining operations were conducted in accordance with the Act, the Rules, Regulations, Orders made thereunder. In the face of such a general statement, which does not contain any allegation, specific or otherwise, it is difficult to hold that the Chief Judicial Magistrate rightly took cognizance of the complaint and issued summons to G.N. Verma. The law laid down by this Court in Harmeet Singh Paintal [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (though in another context) would be squarely applicable. Under the circumstances, we are of the opinion that on the facts of this case and given the absence of any allegation in the complaint filed against him no case for proceeding against G.N. Verma has been made out.*

5.19. ***Tamil Nadu Electricity Board vs. Rasipuram Textile Private Limited and others [(2008) 17 SCC 285]***

Head Note: *Electricity Act, 1910,-Ss 39(1), 44(1)(c) and 49-A proviso-liability-burden of proof-when shifts under S.49-A proviso-Complainant did not aver nor prove that the named directors were in charge and were responsible for the conduct of the business of the company-Trail court convicted the Directors by relying on S.49-A proviso, which puts the burden on the accused to prove that the offence was committed without his knowledge-held, in the absence of any averment in complaint petition or*

any evidence to satisfy the requirements of S.49-A of the Act, the respondents could not have been convicted-only in the event it is proved that a Director or a group of Directors of the Company were in charge of and/or wee responsible for the conduct of the business of the Company, the burden would shift on the accused to establish the ingredients contained in the proviso to S.49-A-Evidence Act, 1872-Ss.101 and 102.

12. *In terms of the aforesaid provision, therefore, it was obligatory on the part of the complainant not only to make requisite averments in the complaint petition but also to prove that any of the Directors who had been prosecuted for alleged commission of the aforementioned offence was in charge of and was otherwise responsible for the conduct of the affairs of the Company.*

13. *We have noticed hereinbefore that how the learned trial Judge has dealt with the entire aspect. The learned trial Judge has misconstrued and misinterpreted the provisions of Section 49-A of the Act.*

14. *In terms of sub-section (1) of Section 49-A, it is for the complainant to prove that the Director of the Company at the time when the theft was committed was in charge of and/or was responsible for the conduct of its business. Only in the event such an averment is made and sufficient and cogent evidence is brought on record to prove the said allegations, the proviso appended to Section 49-A would be attracted; meaning thereby that only in the event it is proved that a Director or a group of Directors of the Company were in charge of and/or were responsible for the conduct of the business of the Company, the burden would shift on the accused to establish the ingredients contained in the proviso appended to Section 49-A of the Act.*

> ***15.*** *The learned Additional Sessions Judge as well as the High Court, in our opinion, therefore, were right in holding that in the absence of any averment made in the complaint petition as also in the absence of any evidence brought on record by the complainant to satisfy the requirements of Section 49-A of the Act, the respondents could not have been convicted.*

5.20. The Income Tax Department could not have initiated prosecution against all the directors of the company merely by relying upon a provision of Section 2(35) of the Act. It is but required for a criminal prosecution to be initiated that there has to be *mens rea* on the part of the accused, there has to be specific allegation against the accused, omnibus allegation without any overt act being attributed to the said accused would not be sufficient for initiation of prosecution against the said accused. In the present case, all the directors of the company have been

arrayed as accused without there being any specific allegation made against them. In view thereof, he submits that the offence alleged requiring *mens rea*, particular allegation having not been made against any of the directors, proceedings against all the directors are required to be quashed and the proceeding against the company also required to be quashed since the Company by itself cannot be prosecuted.

5.21. On the above submissions, he contends that the Writ Petition needs to be allowed.

6. Per contra, Sri K.V. Aravind, learned Senior Standing Counsel for the Income Tax Department submits that:

6.1. There is a clear offence which has been made out under Section 277 of the Income Tax Act inasmuch the petitioners have categorically mentioned the BSR Code, challan number and the amount which are alleged to have been paid by the petitioners towards the income tax.

6.2. This itself is with an intention to evade tax for the reason that it is only during re-conciliation process conducted by the Income Tax Department that it came to the light that the said payments has not been paid, therefore, resulting in issuance of notices.

6.3. If the re-conciliation process had not been initiated and the amounts found due, the petitioners would have kept quite depriving

and cheating the Income Tax Department of the tax dues thereby being successful in evading the payment of tax.

6.4. In the present case, it is not evasion as normally understood, but the evasion on account of misstatement or a wrong statement made with a malafide purpose that an offence under Section 277 of the Act is committed and it is only on account of the said misstatement that the offence of evasion of tax under Section 276 (C) (2) of the Act has been committed.

6.5. The misstatement being the foundation of the criminal prosecution against the petitioner-Company and there being no defence to the same, more so when admittedly, neither the petitioner –

Company had money nor that the Company has made payment of money, the petitioner-Company could not have uploaded income tax returns mentioning the BSR Code and the amount said to have been paid.

6.6. The word 'willful' used in Sections 256 (C) (2) and 277 of the Act, there is a reverse burden under the Income Tax Act, there is a presumption of *mens rea* on the part of the assessee in evading tax in terms of Section 278E of the Act. The burden of proof is on the assessee to show that the statement made was not willful and/or that there was no willful evasion of tax. Though, he refers to Section 153A second proviso, relating to search and seizure and payment of assessment, he fairly submits

that those may not be relevant for these proceedings since the offences alleged against the petitioner-Company is only under Section 276 (C) (2) and 277 of the Act, resulting in prosecution of the Directors of the Company under Section 278 (B) of the Act.

6.7. In terms of Section 2(35) of the Income Tax Act, the person in-charge of conducting the business is broadly defined in the Act and therefore all the petitioners could be prosecuted under the said provision.

6.8. Insofar as the returns for the year 2013 is concerned, it is the Companies Act, 1956 which would apply and in terms of Section 291 thereof, petitioner Nos.2 to 8 are in-

charge of the affairs of the Company and therefore, they were required to be prosecuted.

6.9. In this regard, he relies on the decision of ***Sasi Enterprises vs. Assistant Commissioner of Income-Tax*** reported in ***[2014] 41 taxmann.com 500 (SC)***. Paras 26 and 30 thereof which are reproduced hereunder for easy reference:

> ***26.*** *We have indicated that on failure to file the returns by the appellants, income tax department made a best judgment assessment under Section 144 of the Act and later show cause notices were issued for initiating prosecution under Section 276CC of the Act. Proviso to Section 276CC nowhere states that the offence under Section 276CC has not been committed by the categories of assesses who fall within the scope of that proviso, but it is stated that such a person shall not be proceeded against. In other words, it only provides that under specific circumstances subject to the proviso, prosecution may not be initiated. An assessee who comes within clause 2(b) to the proviso, no doubt has also committed the offence under Section 276CC, but is exempted from prosecution since the tax falls below Rs.3,000/-. Such an assessee may file belated return before the detection and avail the benefit of the proviso. Proviso cannot control the*

main section, it only confers some benefit to certain categories of assesses. In short, the offence under Section 276CC is attracted on failure to comply with the provisions of Section 139(1) or failure to respond to the notice issued under Section 142 or Section 148 of the Act within the time limit specified therein.

30. Section 278E deals with the presumption as to culpable mental state, which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. The question is on whom the burden lies, either on the prosecution or the assessee, under Section 278E to prove whether the assessee has or has not committed willful default in filing the returns. Court in a prosecution of offence, like Section 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the appellants have to prove the circumstances which prevented them from filing the returns as per Section 139(1) or in response to notices under Sections 142 and 148 of the Act.

6.10. He further relies on the decision of ***Prakash Nath Khanna vs. Commissioner of Income-tax*** reported in ***[2004] 135 Taxman 327 (SC)***, more particularly Paras 12, 17, 21 and 22 which are reproduced hereunder for easy reference:

12. *It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them"- Lenigh Valley Coal Co. v. Yensavage 218 FR 547. The view was re- iterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama AIR 1990 SC 981, and Padma Sundara Rao vs. State of Tamil nadu (2002) 3 SCC 533.*

17. *One of the significant terms used in Section 276-CC is 'in due time'. The time within which the return is to be furnished is indicated only in sub-section (1) of Section 139 and not in sub- section (4) of Section 139. That being so, even if a return is filed in terms of sub-section (4) of Section 139 that would not dilute the infraction in not furnishing the return in due time as prescribed under sub-section (1) of Section 139. Otherwise, the use of the expression "in due time" would loose its relevance and it cannot be said that the said expression was used without any purpose. Before substitution of the expression "clause (i) of sub-section (1) of section 142" by Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1.4.1989 the expression used was "sub-section (2) of section 139". At the relevant point of time the assessing officer was empowered to issue a notice requiring furnishing of a return within the time indicated therein. That means the infractions which are covered by Section 276-CC relate to non-furnishing of return within the time in terms of sub-section (1) or indicated in the notice given*

under sub-section (2) of Section 139. There is no condonation of the said infraction, even if a return is filed in terms of sub-section (4). Accepting such a plea would mean that a person who has not filed a return within the due time as prescribed under sub-sections (1) or (2) of Section 139 would get benefit by filing the return under Section 139(4) much later. This cannot certainly be the legislative intent.

21. *Whether there was wilful failure to furnish the return is a matter which is to be adjudicated factually by the Court which deals with the prosecution case. Section 278-E is relevant for this purpose and the same reads as follows:*

"Presumption as to culpable mental state- (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

22. *There is a statutory presumption prescribed in Section 278-E. The Court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter*

for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial.

6.11. The payments have been made after it was brought to the notice of the petitioners and therefore, the subsequent payment made by the petitioners would not absolve them of the offences which have been committed under Sections 277 and 276 (C) (2) of the Income Tax Act.

6.12. Relying upon the available decisions cited supra and the submission made by the petitioners, he submits that the petitioners are required to stand trial and this Court cannot exercise its power under Section 482 of Cr.P.C., to quash the proceedings and there are prima facie materials made

out indicating that the petitioners are involved in the said offence.

7. In the Re-joinder, Sri.Vivek Holla, learned counsel for the petitioners submitted that

7.1. There are no particular allegations which have been made against any of the Directors of the Company in the complaint and all the allegations made are omnibus allegations and therefore, all the Directors have been roped in as accused without any basis and on this ground also, the petition is required to be allowed.

8. In the light of the above submissions made, the points that would arise for determination are:

(1) Whether for an offence to be said to be committed under Section 277 of the Income Tax Act, the misstatement is

required to be willful to prosecute the assessee?

(2) Whether there is a misstatement or willful misstatement by the petitioners in the present proceedings?

(3) Whether the delayed payment of income tax would amount to evasion of tax or not?

(4) Whether all the Directors of the Company can be prosecuted for any violation of the Income Tax Act by relying on the inclusive definition under Section 2(35) of the Income Tax Act?

(5) Whether the order of cognizance by the Economic Offences Court is proper and correct?

(6) Whether the Magistrate is required to follow the proceedings under Section 202 even for the offences under the Income Tax Act?

(7) What Order?

9. ***<u>Answer to Point No.1</u>: Whether for an offence to be said to be committed under Section 277 of the Income Tax Act, the misstatement is required to be willful to prosecute the assessee?***

<u>Answer to Point No.2</u>: Whether there is a misstatement or willful misstatement by the petitioners in the present proceedings?

9.1. Both the above points being related to each other are taken up for consideration together.

9.2. Sri.K.V.Aravind, learned Senior Standing Counsel for Income-tax Department would contend that there is reverse burden of proof under Section 277 of the Income Tax Act inasmuch as requiring the assessee to support the statements made in the returns.

9.3. Though that may be the case, it cannot be contended that the statements made by the assessee are wrong until proven right. For the purposes of contending that there is a misstatement and that misstatement has been made to evade tax, it would be required for the Income Tax Department to prove the said circumstances.

9.4. In the present case, the misstatement is stated to be as regards the income tax having been paid even though such payment had not been made since the uploaded returns reflected the BSR code, challan number as also the amount paid as income tax. It is alleged that if not for the reconciliation, the petitioner-Company would have got away with non-payment of the taxes. I am unable to accept such a

submission. It is not that there was non-payment of any tax before uploading of the returns.

9.5. The 26 AS returns indicated payment of substantial amount of money due to tax deduction at source. Apart there from, the first petitioner-Company has also made several payments on account of the income tax dues. But however on account of non availability of funds, the entire amount could not be paid before the returns were to be uploaded and/or filed, more particularly, since the last date of filing was on 30.09.2013 for assessment year 2013-14 and 30.09.2014 for assessment year 2014-15.

9.6. If at all the petitioner-Company wanted to default on payment, the petitioner-Company could have not even filed its returns and/or filed its return without payment of monies earlier. The fact that the petitioner-Company has made payments would indicate and establish the bonafides of the petitioner-Company. It is also not disputed that the Petitioner company borrowed money to make payment of the Income tax due, since the amounts accounted on the basis of accrual system of accounting was not received by the Petitioner company.

9.7. It was and is required for the Income Tax Department who has provided the facility for an assessee to upload its returns with the actual amount paid and for the system

to accept the said returns even though the complete amounts had not been paid.

9.8. On enquiry, Sri.K.V.Aravind, learned Senior Standing counsel for respondent would submit that the system as it exists does not provide for acceptance of returns without the complete amount of income tax being shown as paid. In my view and considered opinion such a system is completely flawed. By not accepting the returns due to non-payment of the complete income tax, the Income Tax Department itself is forcing an assessee to default on uploading of its returns.

9.9. The non filing of returns would also result in separate prosecution. It is not in every case that the assessee would have the

money to make payment of the income tax. If there is a default or delay in payment, the authorities can always levy interest on the said amount.

9.10. The assessee in the present case has been forced to upload the returns by mentioning that the entire amount had been paid since without doing so the returns would not have been accepted by the software system set up by the Income Tax Department. Therefore, in my considered view the said statement made has been forced upon the assessee by the Income Tax Department and cannot be said to be misstatement within the meaning and definition thereof under Section 277 of the Income Tax Act.

9.11. ***Hence, I answer Point Nos.1 and 2 by holding that there is no straight-jacket formula which could be laid down as to determine what is a misstatement and what is not. It would be required for the Court and/or the Assessing Officer or the Appellate Authority to determine the same on the facts of the case iiberally in favour of the assessee.***

9.12. **For an offence to be said to be committed under Section 277 of the Income Tax Act, the misstatement is required to be willful made with a malafide or dishonest intention in order to prosecute the assessee.**

9.13. **In view of the discussion hereinabove and the circumstances in which such statement was made, I'am of the considered view that there is no willful misstatement by the petitioners in the present proceedings.**

9.14. **The Income Tax Department is also directed to consider the provisioning of a facility in its software to upload Income Tax Returns with the actual amount paid and for the system to accept the said returns even though the complete amounts had not been paid.**

10. <u>Answer to Point No.3:</u> Whether the delayed payment of Income Tax would amount to evasion of tax or not?

10.1. This question is no longer *res integra* inasmuch as this Court in Crl.P No.4891/2014 (***Vyalikaval's*** case) has held that delayed payment of income tax would not amount to evasion of tax. Applying the same principle to the present fact situation, the delay caused by the petitioner-Company in making payment of the income tax cannot be said to be evasion.

10.2. The fact remains that income tax has been paid and the authorities have received the necessary taxes. If at all, for the said delay, there could be an interest component which could have been levied.

10.3. ***Hence, I answer Point No.3 by holding that delayed payment of Income Tax***

would not amount to evasion of tax, so long as there is payment of tax, more so for the reason that in the returns filed there is an acknowledgement of tax due to be paid.

11. ***<u>Answer to Point No.4:</u> Whether all the Directors of the Company can be prosecuted for any violation of the Income Tax Act in terms by relying on the inclusive definition under Section 2(35) of the Income Tax Act?***

11.1. It is sought to be contended by Sri.K.V.Aravind, learned Senior Standing Counsel for the respondent that in view of Section 2(35) of Income Tax Act all the persons in charge of the business could be prosecuted. The said section 2(35) of the

Income Tax Act is reproduced hereunder for easy reference:

> *(35) —principal officer, used with reference to a local authority or a company or any other public body or any association of persons or any body of individuals, means—*
>
> *(a) the secretary, treasurer, manager or agent of the authority, company, association or body, or*
>
> *(b) any person connected with the management or administration of the local authority, company, association or body upon whom the Assessing Officer has served a notice of his intention of treating him as the principal officer thereof,*

11.2. Sri.Vivek Holla, learned counsel for the petitioners would contend that Section 2(35) of the Income Tax Act is more or less in *pari materia* with Section 138 of Negotiable Instrument Act and as such, he by relying upon the decisions in ***Alagh's*** case, ***Ramkishan Rohtagi's*** case, ***Harmeet Singh Paintal's*** case, ***G.N.Verma's*** case and ***Rasipuram***

Textile Private Limited's case contends that unless a specific averment has been made to implicate the particular Director in the said offence, no criminal prosecution could be initiated against the said Director.

11.3. A perusal of the complaint as filed by respondent-Income Tax Department would indicate that there are only *omnibus* allegations which had been made against the Directors. The contention and/or the allegation is that the uploading of the income tax returns with false data amounts to misstatement for the purposes of evasion. For this purpose, it would have had to be ascertained as to who has made such a statement for the purpose of initiating action.

11.4. Be that as it may. Since I have answered point Nos.1 and 2 by holding that in the present case there is no misstatement, the question of the Directors being liable for prosecution would not arise.

11.5. **Hence, I answer Point No.4 by holding that all the Directors of the Company cannot be automatically prosecuted for any violation of the Income Tax Act. There has to be specific allegations made against each of the Directors who is intended to be prosecuted and such allegation would have to amount to an offence and satisfy the requirement of that particular provision under which the prosecution is sought to be initiated, more so when the prosecution is**

initiated by the Income Tax department who has all the requisite material in its possession, and a preliminary investigation has been concluded by the Income Tax department before filing of the criminal complaint.

12. <u>Answer to Point No.5</u>: Whether the order of cognizance by the Economic Offences Court is proper and correct?

12.1. The order of cognizance in both cases is identical and is extracted below:-

> *"Perused Complaint and Connected papers, materials placed proceed against the A-1 to 8 to take Cognizance. Hence "Cognizance" taken for the offence P/U/Sec 276c(2) and 277 R/W/S. 278B of the Income Tax Act, 1961. Register the case as C.C. in 3rd register and issue Accused Summons to accused No.1 to 8 through RPAD if RPAD charges paid R/by-27-05-2016".*

12.2. Shri Vivek Holla, leaned counsel for the petitioners has contended that the Court

taking Cognisance is required to apply its mind while taking Cognisance, the above order passed does not indicate such application of mind as such the order of Cognisance is to be set aside.

12.3. The Hon'ble Apex Court as also this Court in a catena of decisions has categorically held that the court taking Cognisance is required to apply its mind to the allegations made and the applicable statute and thereafter pass a reasoned order in writing taking Cognisance, which should be apparent from a reading of the order of Cognisance to indicate that the requirement of *"sufficient grounds for proceedings"* in terms of Section 204 of the code has been complied with.

12.4. At the time of taking Cognisance, there must be a proper application of judicial mind to the materials before the said Court either oral or documentary, as well as any other information that might have been submitted or made available to the Court.

12.5. The test that is required to be applied by the Court while taking Cognisance is as to whether on the basis of the allegations made in the Complaint or on a police report or on information furnished by a person other than a police officer, is there a case made out for initiation of criminal proceedings.

12.6. For the above purpose, there is an assessment of the allegations required to be made applying the law to the facts and

thereby arriving at a conclusion by a process of reasoning that Cognisance is required to be taken.

12.7. An order of Cognisance cannot be abridged, formatted or formulaic. The said order has to make out that there is a judicial application of mind. Since without such application, the same may result in the initiation of criminal proceedings when it was not required to be so done.

12.8. The order of taking Cognisance is a safeguard inbuilt in the criminal justice system so as to avoid malicious prosecution and/or frivolous complaints.

12.9. When a complaint or a police report or information by a person other than police officer is placed before the Court, the

judicial officer must apply judicious mind coupled with discretion which is not to be exercised in an arbitrary, capricious, whimsical, fanciful or casual way.

12.10. Any offence alleged being one of commission or omission attracting penal statutes; Cognisance can be taken only if the allegations made fulfil the basic requirement of the said penal provision. At this point, it is not required for the Court taking Cognisance to ascertain the truth or veracity of the allegation but only to appreciate if the allegations taken at face value, would amount to the offence complained of or not. If Yes, Cognisance could be taken, if No, taking Cognisance could be refused. The only manner of ascertaining the above is by the manner of

recordal made by the Court in the order taking Cognisance. The order passed by the court taking Cognisance would therefore reflect such application of mind to the factual situation

12.11. In the above background the order passed by the Magistrate does not indicate any such consideration by the Magistrate.

12.12. It can be ex facie seen that the order of the Magistrate does not satisfy the requirement of arriving at a prima facie conclusion to take Cognisance and issue process let alone to the accused residing outside the Jurisdiction of the said Magistrate.

12.13. Mere reference to the provisions in respect of which offences are alleged to have been

committed would not be in compliance with the aforesaid requirement of the statutes as also the various decisions of the Honb'le Apex Court extracted hereinabove.

12.14. When there are multiple accused, the order is required to disclose the application of mind by the Court taking Cognisance as regards each accused.

12.15. The Court taking Cognisance ought to have referred to and recorded the reasons why the said Court believes that an offence is made out so as to take Cognisance more so on account of the fact that it is on taking Cognisance that the criminal law is set in motion insofar as accused is concerned and there may be several cases

and instances where if the Court taking Cognisance were to apply its mind, the Complaint may not even be considered by the said Court taking Cognisance let alone taking Cognisance and issuance of Summons.

12.16. In view of the above, I am of the considered opinion that the order dated 29.03.2016 taking Cognisance is not in compliance with applicable law and therefore is set aside.

12.17. **I answer Point No.5 by holding that the order of Cognisance dated 29.03.2016 in both matters is not in compliance with the requirement of Section 191(1)(a) of the Cr.P.C and further does not indicate the**

procedure under Section 204 of Cr.P.C having been followed. At the time of taking Cognisance and issuance of process, the Court taking Cognisance is required to pass a sufficiently detailed order to support the conclusion to take Cognisance and issue process, in terms of the discussion above. The judicious application of mind to the law and facts of the matter, should be apparent on the ex-facie reading of the order of Cognisance.

13. <u>Answer to Point No.6</u>: Whether the Magistrate is required to follow the procedure under Section 202 even for the offences under the Income Tax Act?

13.1. Section 202 of Cr.P.C. is extracted hereunder for easy reference:

*"202. **Postponement of issue of process.-***

1. *Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take Cognisance 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 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 officer- in- charge of a police station except the power to arrest without warrant.*

13.2. A perusal of the Complaint indicates that the address of accused No. 6 provided by the complainant himself is that of Kerala. There is no address of accused No.6 within the jurisdiction of the Magistrate at Bangalore which has been provided. The only allegation which has been made is that he is a Director of accused No. 1 and proceedings have been initiated merely on that ground.

13.3. Admittedly Accused No.6 resides beyond the Jurisdiction of the Learned Trial Court.

13.4. The protection under Section 202 (2) of the Cr P.C. is provided so as to not inconvenience an Accused to travel from outside the Jurisdiction of the Court taking Cognisance to attend to the matter in that Court. Therefore, before issuing Summons to an accused

residing outside the Jurisdiction, there has to be an application of mind by the Court issuing Summons and after conducting an enquiry under Section 202 (2) of Cr.P.C. the Court issuing Summons has to come to a conclusion that such Summons are required to be issued to an accused residing outside its jurisdiction.

13.5. Section 202 of Cr.P.C. extracted above provides for the safeguard in relation to persons not residing within the jurisdiction of the said Magistrate, not to be called or summoned by the said Court unless the Magistrate were to come to a conclusion that their presence is necessary and only thereafter issue process against the accused.

13.6. In the present case, as could be seen from the extract of the order dated 29.03.2016 in

answer to point No.5 above, there is no such postponement made by the Magistrate, but as soon as the Magistrate received a complaint, he has issued process to accused No.6, who is residing outside the jurisdiction of Magistrate.

13.7. In view of the above, it was required for the Magistrate to conduct a mandatory enquiry as per Section 202 (2) of the Cr.P.C.

13.8. There being a violation of the requirement under Section 202 of Cr.P.C., I am of the considered opinion that the Magistrate could not have issued summons to petitioner No.6 without following the requirement and without conducting an enquiry under Section 202 of Cr.P.C. as held by the Hon'ble Apex Court in ***Vijay Dhanka vs. Najima***

Momtaj *reported in* ***(2014) 14 SCC 638*** as also by this Court in ***B.S.YEDIYURAPPA vs. State of Karnataka [Crl.P. No.100964/2020, DD 11.09.2020]*** *and* ***SRI. KUNAL BAHL and Another vs. STATE OF KARNATAKA [In CRL. P. No.4676 OF 2020, DD 07.01.2021]***

13.9. **I answer Point No. 6 by holding that :**

13.9.1. **In the event of accused being an individual, if the said accused has a temporary residence within the jurisdiction of the Magistrate, again merely because he does not have a permanent residence, there is no enquiry which is required to be conducted under Section 202 of Cr.P.C. It would, however, be required for the**

Magistrate to in the event of issuance of summons/process record as to why the enquiry under Section 202 of Cr.P.C is not being held.

13.9.2. **When the accused has no presence within the jurisdiction of the Magistrate where the offence has been committed, then it would be mandatory for an enquiry under Section 202 of the Cr.P.C to be held.**

14. ***Answer to Point No.7: What Order?***

14.1. In view of the above discussion and reasoning, I am of the considered opinion that the prosecution initiated by the respondent against the petitioners is misconceived and not sustainable and as

such, the complaints in C.C.No.85/2016 and C.C. No. 86/2016 are hereby quashed.

Sd/-
JUDGE

PL/Prs*