



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF OCTOBER, 2022

BEFORE

THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ

CRIMINAL PETITION NO. 3550 OF 2017



BETWEEN:

SRI. M. GOPAL
S/O MUNIYAPPA THIMMAPPA
AGED ABOUT 45 YEARS
R/AT BEVAHALLI, PADMGHATTA POST
KASABA HOBLI, MULBAGLU TALUK
KOLAR DISTRICT-563131

...PETITIONER

(BY SRI. V. LAKSHMINARAYANA, SR. COUNSEL A/W
KUM. SHILPA RANI, ADVOCATE)

AND:

SRI. GANGA REDDY
S/O LATE ANJANAPPA
AGED ABOUT 55 YEARS
R/AT NO.18, KALKERE MAIN ROAD
5TH CROSS, SRI M.V. NAGAR
2ND BLOCK, RAMAMURTHY NAGAR
BENGALURU-560016

... RESPONDENT

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



THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO CALL FOR THE ENTIRE RECORDS IN C.C.NO.561/2016 PENDING ON THE FILE OF THE LEARNED PRINCIPAL CIVIL JUDGE AND JMFC, MULABAGAL AND ALLOW THIS PETITION AND QUASH THE ENTIRE PROCEEDINGS IN C.C.NO.561/2016 ON THE FILE OF THE LEARNED PRINCIPAL CIVIL JUDGE AND JMFC, MULABAGAL AND ETC.

THIS CRIMINAL PETITION COMING ON FOR ADMISSION AND HAVING BEEN RESERVED FOR ORDERS ON 9.09.2022, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:



ORDER

1. The petitioner is before this Court seeking for the following reliefs:
 - a. *Call for the entire records in C.C.No.561/2016 pending on the file of the learned Principal Civil Judge and JMFC, Mulabagal;*
 - b. *Allow this petition and quash the entire proceedings in C.C.No.561/2016 on the file of the learned Principal Civil Judge and JMFC, Mulabagal.*
 - c. *Issue any other order and grant such other and further reliefs as this Hon'ble Court deems fit in the facts and circumstances of the case, in the interest of justice.*

2. The petitioner is the accused in P.C.R.No.54/2015 which had been filed by the respondent/complainant herein. The petitioner and the respondent are the directors of the company called "MG 6 Wholesale Market (India) Pvt. Ltd." (hereinafter for brevity referred to as 'Company')

3. The petitioner is stated to be owning 55% of the share capital and the respondent is holding 45% of the share capital in the Company. There are various allegations that have been made as regards the



petitioner having defrauded both the Company and the complainant and it is in that background that the aforesaid private complaint, was filed.

4. The factual aspects may not be relevant for being discussed in the present matter since what arises is only a point of law after reference to the arguments advanced by both the learned counsel.
5. The Learned Magistrate, after recording the sworn statement, had issued the process after registering the complaint in Register-III.
6. Sri. V.Lakshminarayana, learned Senior Counsel appearing for the petitioner, would submit that:
 - 6.1. The allegations which have been made against the petitioner are for an alleged offence under Section 447 of the Companies Act, 2013 (for short, 'the Act').
 - 6.2. Section 447 of the Act is reproduced hereunder for easy reference:



447. Punishment for fraud:- Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Explanation- For the purpose of this Section -

- (i) "fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
- (ii) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;
- (iii) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

6.3. By referring to Section 439 of the Act, he submits that all offences under the Act are deemed to be non-cognizable, except those



covered under Sub-section 6 of Section 212 of the Act. Section 439 of the Act is reproduced hereunder for easy reference:

439. **Offences to be non-cognizable.-** (1) *Notwithstanding anything in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.*

(2) *No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder of the company, or of a person authorised by the Central Government in that behalf:*

Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India:

Provided further that nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

(3) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), where the complainant under sub-section (2) is the Registrar or a person authorised by the Central Government, the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.*

(4) *The provisions of sub-section (2) shall not apply to any action taken by the liquidator of*



a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies.

Explanation.—The liquidator of a company shall not be deemed to be an officer of the company within the meaning of sub-section (2).

6.4. By referring to Sub-Section (6) of Section 212 of the Act, he submits that the offence under Section 447 of the Act has been made cognizable and, therefore, the said offence went out of the purview of Section 439 of the Act and as such, it is the procedure under Section 212 of the Act which is required to be followed, and a private complaint cannot be filed by a shareholder or a director. Section 212 of the Act is reproduced hereunder for easy reference:

212. Investigation into affairs of Company by Serious Fraud Investigation Office.

(1) Without prejudice to the provisions of section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—



(a) on receipt of a report of the Registrar or inspector under section 208;

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government,

the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(2) Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.

(3) Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order.

(4) The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall



have the power of the inspector under section 217.

(5) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 1[offence covered under section 447] of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by—

(i) the Director, Serious Fraud Investigation Office; or

(ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.



(7) *The limitation on granting of bail specified in sub-section (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.*

(8) ¹*[If any officer not below the rank of Assistant Director] of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.*

(9) ²*[The officer authorised under sub-section (8) shall, immediately after arrest of such person under such sub-section], forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.*

(10) *Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a ³[Special Court or Judicial Magistrate] or a Metropolitan Magistrate, as the case may be, having jurisdiction:*

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the ⁵[Special Court or Magistrate's court].

(11) *The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government.*



(12) *On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.*

(13) *Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.*

(14) *On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.*

⁵[(14A) *Where the report under sub-section (11) or sub-section (12) states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property or cash and also for holding such director, key managerial personnel, other officer or any other person liable personally without any limitation of liability.]*

(15) *Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973.*

(16) *Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office*



under the provisions of the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed.

(17) (a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office;

(b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.

6.5. His submission is that once an offence has been designated to be cognizable under Sub-section 6 of Section 212 of the Act, the provision of Section 439 of the Act that deals with non-cognizable offences would not be applicable and the procedure prescribed under Section 212 of the Act has to be strictly followed.

6.6. In terms of the second proviso to Sub-Section 6 of Section 212 of the Act, it is only on the basis



of a complaint filed by the registrar or an inspector that cognizance could be taken, or in the absence thereof. There is an embargo on taking cognizance by any Court, whether it is the Special Court or otherwise.

6.7. On these grounds, the above proceedings initiated against the petition is required to be quashed.

7. Per contra, Sri. K.V.Sathish, learned counsel appearing for the respondent/complainant would submit that:

7.1. In terms of Sub-section 2 of Section 439 of the Act, a complaint can be filed by the Registrar, a shareholder of the Company or by a person authorised by a central government, in that behalf. The complainant in the present case being a shareholder holding 45% of the share is, therefore, qualified in terms of Sub-section 2 of Section 439 of the Act and as such, the



complaint being validly initiated. The Magistrate has taken cognizance thereof, after appreciating all the facts.

7.2. The right to a shareholder being conferred under Sub-section 2 of Section 439 of the Act cannot be said to have been taken away by Sub-section 6 of Section 212 of the Act and therefore, the complaint is not required to be quashed as sought for by the petitioner.

7.3. The petitioner having already approached NCLT, there is a finding which has been rendered therein that the petitioner has committed fraud to the extent of Rs.1,42,84,389/- (One Crore Forty-Two Lakhs Eighty-Four Thousand Three Hundred and Eighty-Nine only). The said finding having been rendered, and fraud has been established. The contentions now urged by the petitioner cannot be looked into by this



Court, and the proceedings before the Magistrate are required to go on.

8. In re-joinder, Sri. V. Lakshminarayan, learned Senior Counsel for the petitioner, would submit that:

8.1. the finding of the National Company Law Tribunal (NCLT) has been challenged before the National Company Law Appellate Tribunal (NCLAT) in an appeal, there is no finality which has been arrived at in respect of the said finding.

8.2. Be that as it may, the complainant not having the *locus* to file the complaint and the Court being barred by the second proviso under Sub-section 6 of Section 212 of the Act, that finding would not have any bearing.

9. Heard Sri. V. Lakshminarayana, learned Senior Counsel appearing for the petitioner and Sri. K.V.Sathish, learned counsel for the respondent and perused papers.



10. The points that would arise for determination of this Court are:

1. **Whether a shareholder, minority or otherwise, can initiate proceedings before the Magistrate by himself or herself for an alleged offence under Section 447 of the Companies Act, 2013?**
2. **Whether the offence under Section 447 of the Companies Act, 2013 is a cognizable offence or a non-cognizable offence?**
3. **What is the remedy available to a shareholder in the event of the shareholder alleging fraud requiring the initiation of proceedings under Section 447 of the Companies Act, 2013?**
4. **Does the order passed by the learned Magistrate in the present matter suffer from legal infirmity requiring interference?**
5. **What order?**

11. I answer the above points as under:-

12. **Answer to Point No.1: Whether a shareholder, minority or otherwise can, initiate proceedings before the Magistrate by himself or herself for an alleged offence under Section 447 of the Companies Act, 2013?**



12.1. Section 447 of the Companies Act has been reproduced herein above.

12.2. The said provision provides for punishment on account of fraud involving an amount of at least ten lakh rupees or one per cent of the turnover of the Company, whichever is lower. Furthermore, it provides that the fraud in question, if involves public interest, the same would result in higher imprisonment.

12.3. Section 439 of the Companies Act, which has been reproduced herein above, makes all the offences under the Companies Act non-cognizable and Sub-Section (3) of Section 439 provides that a complaint could be filed by the Registrar or a Shareholder of the Company or a person authorized by the Central Government in that behalf. Thus, any offence being non-cognizable, a complaint could be filed by the Registrar, Shareholder of the Company or a



person authorized by the Central Government. However, Sub-Section (6) of Section 212 of the Act specifically deals with the offences covered under Section 447 of the Act and makes it clear that no Court shall take cognizance unless a complaint is made by the Director, Serious Fraud Investigation Office (SFIO) or the officer of the Central Government authorized by a general or special order in writing in this behalf by that Government. Thus, an offence under Section 447 of the Act is given special treatment in terms of Sub-Section (6) of Section 212 of the Act. It is only that procedure which is prescribed under Sub-Section (6) of Section 212 of the Act which would apply.

12.4. Therefore, I answer Point No.1 by holding that a shareholder, minority or otherwise cannot initiate proceedings before the Magistrate by



himself or herself for an alleged offence under Section 447 of the Act.

13. **Answer to Point No.2: Whether the offence under Section 447 of the Companies Act, 2013 is a cognizable offence or a non-cognizable offence?**

13.1. Sub-Section (6) of Section 212 of the Act is clear that an offence under Section 447 of the Act is cognizable and the method of taking cognizance is also provided. Thus, I answer Point No.2 by holding that an offence under Section 447 of the Act is a cognizable offence.

14. **Answer to Point No.3: What is the remedy available to a shareholder in the event of the shareholder alleging fraud requiring the initiation of proceedings under Section 447 of the Companies Act, 2013?**

14.1. In answer to Point No.1, I have held that a shareholder cannot file any proceedings before the Magistrate for an offence under Section 447 of the Act. However, such a shareholder is not remediless.



14.2. Section 213 of the Companies Act reads as under:-

213. Investigation into company's affairs in other cases.- The Tribunal may,—

(a) on an application made by—

(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or

(ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or

(b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other



misconduct towards the company or towards any of its members; or

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company,

order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

Provided that if after investigation it is proved that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.



14.3. A perusal of the above provision would indicate that on an application being made by not less than one hundred members or members holding not less than one-tenth of the total voting power in the case of a company having a share capital to the Tribunal, the Tribunal if satisfied that there are circumstances suggesting that the business of the company being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent unlawful purpose, if in the formation of the Company, the persons forming a Company are guilty of fraud, misfeasance or other misconduct, etc.

14.4. The Tribunal after giving a reasonable opportunity of being heard to the parties concerned, if being of the opinion that the same is required to be investigated by an Inspector or Inspectors appointed by the Central Government, direct the Central Government to



carry out such investigation by the Inspector and the Central Government would have to appoint one or more competent persons to investigate the affairs of the Company.

14.5. In the event of after investigation, it was proved that the business of the Company is being conducted with an intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or the Company was formed for any fraudulent or unlawful purpose, then every officer of the Company who is in default and the person or persons concerned in the formation of the Company would be punishable for fraud in the manner provided under Section 447 of the Act.

14.6. The above would necessarily imply that on the investigation being complete, it is the provision of Section 212 of the Act which would come into operation i.e., if a Serious Fraud



Investigation Office (SFIO) receives a report of the Inspector about any fraud, then the SFIO can follow the procedure under Section 212 of the Act leading upto initiation of criminal proceedings in terms of Sub-Section (6) of Section 212 of the Act.

14.7. Thus, for a shareholder to avail a remedy under Section 447 of the Act such shareholder essentially needs to go through the procedure under Section 213 of the Act and in the event of a report being submitted by the Inspector to the Tribunal of there being a fraud either the Shareholder or the Tribunal could refer the report to the SFIO who can then follow the procedure provided under Section 212 of the Act and initiate criminal proceedings against the offenders for an offence under Section 447 of the Act.

15. **Answer to Point No.4: Does the order passed by the learned Magistrate in the present matter**



suffer from legal infirmity requiring interference?

15.1. Having come to a conclusion that no proceedings could have been initiated by a Shareholder by himself under Section 447 of the Act and that the requirement under Sub-Section (6) of Section 212 of the Act was required to be complied with. The learned Magistrate without having gone through and appreciated the provisions of Sections 212, 213, 439 and 447 of the Act, the order of cognizance is contrary to the applicable law and therefore, suffers from legal infirmity requiring this Court's interference.

16. **Answer to Point No.5: What order?**

16.1. In view of the answers to the above questions, I pass the following:

ORDER

- i. The Criminal Petition is allowed.



- ii. The proceedings in C.C.No.561/2016 pending on the file of the Principal Civil Judge and JMFC., Mulabagal and all orders passed therein are hereby quashed.

**Sd/-
JUDGE**

GJM/PRS