

Jaydeep Madhukar Wakankar vs The State Of Andhra Pradesh on 13 July, 2022

Author: D.Ramesh

Bench: D.Ramesh

THE HONOURABLE SRI JUSTICE D.RAMESH

CRIMINAL PETITION NOS.6284 AND 6285 OF 2021

COMMON ORDER:

Since these criminal petitions arise out of the same crime, both the petitions are being disposed of together with a common order.

2. These two criminal petitions are filed under Section 482 Cr.P.C. seeking to quash the proceedings in C.C.3515 of 2021 (arising out of FIR No.91/2021 dated 12.06.2021) on the file of Chief Metropolitan Magistrate Court, Vishakhapatnam in taking cognizance of offences under Sections 43, 65, 66, 66B, 66D of the Information Technology Act, 2000 and Section 204, 120B of IPC.

3. Heard Sri Siddharth Luthra and Sri Dammalaptai Srinivas, learned senior counsel appearing for Sri V.Vimal Varma and Sri Ginjupalli Subba Rao, learned counsel appearing for the petitioners/A1 and A2 respectively, Sri Dusyanth Reddy, learned Special Public Prosecutor appearing for the respondents 1 and 2, and learned senior counsel Sri Naga Mutthu, and Sri D.Purna Chandra Reddy, learned counsel appearing for the respondent No.3/defacto complainant.

4. The main contents of the complaint made by M/s.Mahathi Software Pvt. Ltd/defacto complainant [Respondent No.3 herein] are that M/s.Allscripts abruptly terminated the MOU with a notice on the 14th May, 2021, thereafter it has breached the privacy of the complainant Company by illegally accessing the servers and removed the subscription and potentially confidential data and further disabled administrative access of complainant's to its own Azure Tenant from the Complainant's office at Vizag by obtaining global admin privileges to Complainant's tenant, for illegal gains.

5. Main allegations in the charge sheet are that M/s.Mahathi Software Pvt. Ltd/defacto complainant entered in to an agreement [Statement of Work (SOW)] with "ALLSCRIPTS" on 18.05.2018. i.e. between M/s.Mahathi Software Pvt. Ltd/defacto complainant and M/s.Allscripts. As per the SOW, M/s.Mahathi Software Pvt. Ltd/ defacto complainant will provide mobile application development and IT services to M/s.Allscripts. The term of the SOW was for a period of 3 years i.e., from 18.05.2018 to 17.05.2020.

6. On 14.05.2021 M/s/All Scripts sent a mail from kim.franks@allscripts.com to their MD Dr.C.Padhmavathi's mail ID and another mail ID stating that they are terminating the said SOW. M/s.Mahathi Software Pvt. Ltd. uses AZURE Cloud computing services to run their company's and

clients' confidential data and other services. M/s.Mahathi Software Pvt. Ltd/defacto complainant provided "Global Admin Privileges" to the Allscripts for administrative convince.

7. That Allscripts and its officials on 14-05-2021, without M/s.Mahathi Software Pvt. Ltd/defacto complainant company's permission accessed company's user accounts and removed administrative access and removed their User Interface Layout and the intellectual property of M/s.Mahathi Software Pvt. Ltd. from 14-05-2021 to 20-05-2021, the LW.1 company/3rd respondent could not access their data and confidential information, after that they came to Cyber Crime Police Station and lodged a complaint. The petitioner in Crl.P.No.6284 of 2021 is arrayed as accused No.1 and the petitioner in Crl.P.No.6285 of 2021 is arrayed as accused No.2 in the charge sheet.

8. The contention of the Petitioner in Crl.P.No.6284 is that the petitioner is the Vice President, Finance and Designated Partner of All Scripts(India) LLP formed by a Limited Liability Partnership Agreement between Allscripts Healthcare IT (Mauritius) and Allscripts Healthcare International Holdings LLC. Further, he is not a Managing Partner as stated in the charge sheet but a Designated Partner. Neither he nor the Allscripts (India) LLP have entered into any agreement with the Respondent No.3.

9. In Crl.P.No.6285 of 2021, the contention of the petitioner is that the petitioner/accused No.2 is the Director, Information Systems at Allscripts (India) LLP and is primarily concerned with desktop and network services and corporate server maintenance for Allscripts (India) LLP, and that the designation -Director, is only a designation and not a statutory position in Limited Liability Partnership, the petitioner is not involved in, nor does he have any responsibility for, any software coding work. The petitioner, who is employee of Allscripts (India) LLP, is being dragged into the said proceedings only to pressurize Allscripts Healthcare, LLC to withdraw their complaint against the respondent No.3 in the United States.

10. Main contention of the petitioners is that there is an ongoing litigation between Allscripts Healthcare, LLC (USA) and Respondent No.3 before the United States District Court of Delaware, as Allscripts Healthcare, LLC had outsourced certain work to Allscripts (India) LLP. Though they have the same first name, Allscripts Healthcare, LLC and Allscripts (India) LLP are two different entities and the later one have no connection with dispute between the Allscripts Healthcare, LLC and Respondent No.3. Therefore, lodging of FIR against the petitioners herein is a counter blast to the proceedings in USA, only to pressurize the Allscripts Healthcare LLC to withdraw the proceedings in USA present complaint is made.

11. It is further contended that the petitioners were implicated as accused Nos.1 and 2, since cyber crime police were unable to proceed against the Allscripts Healthcare, LLC and its employees located in USA, commenced the investigation against Allscripts (India) LLP. Petitioners were also not aware of the merger, acquisition or any agreement until Respondent No.2/Cyber crime police visited the petitioners in and handed over 41-A Cr.P.C notice. Only after receiving 41A notice petitioners were came to know about the SOW and the proceedings in USA by letters from Allscripts Healthcare, LLC, USA.

12. The fact that SOW was entered between Allscripts Healthcare, LLC and Respondent No.3 was admitted by the Respondent No.3 in USA Court proceedings. Further a notice clause in the SOW stated that any notice on Allscripts to be addressed to Raj Toleti. (currently Director of Respondent No.3). Therefore, the terms of the SOW were also to be construed in accordance with the laws of the State of Florida.

13. M/s.Allscripts Healthcare, LLC asked Microsoft to transfer all of Health Grid's Microsoft accounts, subscriptions and administrators for the MPE applications from the former Health Grid enterprise account to the enterprise account of Allscripts Healthcare, LLC with Microsoft. Microsoft completed the said transfer with an effective date of 01.11.2018. Thereafter, all amounts billed for the Microsoft Azure software and services supporting the MPE applications and environment were billed to and only paid by Allscripts Healthcare LLC under the Microsoft enterprise account of Allscripts Health Care LLC. Respondent No.3 started providing support to Allscripts Healthcare LLC in its development and enhancement of the MPE applications and code pursuant to that SOW. Mr.Raj Toleti was instrumental in fructifying this agreement.

14. Further it is submitted in the petitions that Mr.Raj Toleti was also arrayed as a party in the USA litigation. He was the founder of Health Grid, Mahati and Andor, and was employed with Allscripts Healthcare, LLC pursuant to the acquisition of Health Grid. After the acquisition, Mr. Raj Toleti entered into SOW with Respondent 3 representing Allscripts Healthcare, LLC, which is the reason his contact coordinates are mentioned in the notice clause. Subsequently, Mr.Toleti and Allscripts Healthcare, LLC parted ways on 31-03-2021 with confidential settlement agreement and now under his guidance (who is the promoter and director of Respondent No.3), Respondent No.3 has filed a criminal complaint.

15. On 06-09-2019 respondent No.3 has assigned all of its rights and obligations under the SOW, to Andor Health LLC through an assignment agreement. Hence, Respondent No.3 has no basis to claim breach of agreement with Allscripts Healthcare, LLC and no rights under the SOW to demand access to the data or any other and no intellectual property right to any aspect of the MPE applications. As a result of the assignment agreement, Andor Health LLC billed Allscripts Healthcare, LLC for services rendered and the same was paid by Allscripts Healthcare, LLC to Andor Healthcare, LLC. Therefore, the Respondent No.3 did not have any rights to/in/or under the Microsoft enterprise account of Allscripts Healthcare, LLC.

16. An email was sent by Kim Franks to Respondent No.3 on 14.05.2021 as Allscripts Healthcare, LLC did not intend to extend the SOW, Respondent No.3 has to cease the use of Allscripts Healthcare, LLC's materials, software and confidential Information. In view of the pending expiry of SOW, Allscripts Healthcare, LLC revoked the administrative access that had been provided to Respondent No.3. Pursuant to the SOW, several days after the administrative rights of respondent No.3 were revoked, (after the expiry of SOW), the Respondent no.3 reached out to Mr.Jeff Franks on 19-05-2021 and advised him that respondent No.3's ability to administer its Office 365 account had been impacted by the change, for which, Mr.Franks responded and agreed to work with Respondent No.3 for which a reply of Thank You was sent by Respondent No.3. Thereafter, on 17.05.2021 a complaint was filed by Allscripts Healthcare LLC against inter alia respondent No.3 before the

United States District Court for the District of Delaware alleging violation of contractual obligations and misappropriation of the trade secrets of Allscripts Healthcare LLC. The complaint was later amended on 14.06.2021 and thereafter on 06.08.2021. The subject matter of the USA court proceedings is with regard to the issue of access of Allscripts Healthcare LLC's Mobile Patient Experience and Microsoft Azure Tenant, wherein the Respondent No.3 have entered appearance and also filed counter claim in the USA court proceedings.

17. On 12.06.2021, as a counter blast to the complaint by Allscripts Healthcare LLC before the Delaware Court, Respondent No.3 filed a complaint with Police Cyber Crime, Visakhapatnam City with allegations that (i) a MOU was entered into between Complainant and Allscripts Health Care Technologies Pvt. Ltd. on 18.05.2018; and (ii) this MOU was abruptly terminated on 14.05.2021. Further alleged that Allscripts breached the privacy of respondent No.3 by illegally accessing servers and disabling of administrative access of respondent No.3 to the Azure Tenant for illegal gains.

18. Allscripts Health Care Technologies India Pvt. Ltd is a subsidiary of Allscripts Healthcare Solutions Inc. separate from Allscripts (India) LLP. It is reiterated that Allscripts Healthcare Technologies India Pvt. Ltd is essentially a dormant entity with extremely limited or no business taking place since about December 2017. It is to be noted that the complaint filed by Respondent No.3 was nearly one month after the alleged incident and was also a couple of weeks after Allscripts Healthcare, LLC had initiated the litigation against respondent No.3 and the related entities in United States. Therefore, it is abundantly clear that the criminal complaint is a counter blast to the U.S. litigation.

19. It is further contended that the respondent No.3 on 30.07.2021 also sent a legal notice to Allscripts Healthcare LLC, Allscripts (India) LLP and Allscripts Healthcare Technologies Pvt. Ltd., alleging that the recipients had stolen Respondent No.3's data and demanded the return of respondent No.3's stolen IP. All the recipients duly responded to the above-mentioned legal notice. Further they have reiterated that they are separate and distinct entities from Allscripts Healthcare LLC and that they do not have any relation with respondent No.3 or the SOW. Though the Allscripts Healthcare LLC sent 3 letters to the respondent No.3 through their USA Counsel requesting them to clarify/detail information breached, but there has been no reply thereto, that itself indicates that it is a counter blast case.

20. The petitioner/accused No.1 apprehending arrest, by virtue of being the designated partner of Allscripts (India) LLP, filed W.P. No.14029 of 2021 challenging the issuance of Section 41 A Cr.P.C. notice before this Hon'ble Court. This court vide its order dated 16.07.2021 had prima facie noted that Allscripts Healthcare LLC, USA and Allscripts (India) LLP were different entities and that the petitioner was not concerned with administrative affairs of Allscripts Healthcare LLC, USA and accordingly directed the respondent No.2 to not to take any coercive steps against him including arrest till the next date of hearing and extended from time to time, and is in operation.

21. The petitioner/accused No.1 also filed a petition in CrI.P.No.4157 of 2021 for quashing of FIR No.91 of 2021, wherein this court, after hearing arguments at length, on merits of the matter, directed the Investigation Officer not to take any coercive steps against the petitioner, while

allowing the Investigation Officer to proceed with the investigation.

22. On 20.09.2021 the respondent No.2 filed the charge sheet against inter alia petitioner (accused NO.1) under Sections 43, 65, 66, 66-B, 66-C, 66-D of the IT Act and Section 204, 120 IPC before the Chief Metropolitan Magistrate, Vishakhapatnam which is being challenged in the present petition.

23. Petitioners have relied on several grounds to quash the proceedings against them, those are i) Company was not made a party, ii) no specific allegations are made out against the petitioners iii) ingredients of alleged offences are not met.

24. While the allegations in the charge sheet have been made against Allscripts (India) LLP but it has not been made an accused. The petitioners cannot be held vicariously liable for the acts of the company without making the company an accused.

25. Further contended that the ingredients of alleged offences against petitioners are not met out. The petitioners have fully cooperated with the investigation and shared all necessary documents within knowledge as evidence by replying to the notices served under Sections 160 and 91 of Cr.P.C.. There are no specific allegations against the petitioners with respect to the offences under IT Act, as there is no mention of the data which was allegedly stolen and the complaint dated 12.06.2021 as well as the charge sheet, both are silent on what data was allegedly stolen by the accused.

26. Section 66 B deals with Punishment for dishonestly receiving stolen computer resource or communication devise. However, a perusal of the charge sheet and complaint would demonstrate that there is no allegation of receiving stolen computer resource of communication device against the petitioners and hence, Section 66 B of the IT Act would not apply to the present case.

27. Further it is submitted that the contents of the charge sheet and the complaint, would demonstrate that the ingredients of Section 66 C are not met as there was no fraudulent misuse of the password or signature of the respondent No.3; also not even would reveal the identity of theft to attract the Section 66 D of the IT Act.

28. Further contended that the ingredient of Section 120(B) of IPC are not met in the particular facts of the case as the petitioner had no knowledge of the incidents alleged in the complaint and charge sheet.

29. Further the petitioner relied on the judgment of the Hon'ble Supreme Court in Ravindranatha Bajpe V.Mangalore Special Economic zone Ltd.,¹ it is held that the issuing summons or process against a person is a very serious matter and therefore, unless there are specific allegations and the role attributed to each accused more than the bald statement, the Magistrate ought not to have issued the process. Therefore, in the instant case, the order taking cognizance and issuing summons is a non-speaking mechanical order without any reasons and application of mind, thus liable to be quashed.

30. Counter affidavit was filed on behalf of the respondent No.3. The averments made in the counter are as follows:

It is alleged that present petition is filed with the untenable grounds by suppressing the material facts and that there are 2021 SCC online SC 806 absolutely no grounds much less a valid ground to quash the proceedings against the petitioners. As per the audit report dated 23.09.2020 filed before the Ministry of Corporate Affairs filed by the AllScripts (India) LLP that the petitioner/accused No.1 along with Mr. Eric Lee Jacobson who are the designated partners, it shows that profits generated for the year 2020 as Rs.38,15,05,577/- and profits generated for the year 2019 as Rs.37,24,73,119/- and the total profits are routed back to the foreign entities. Therefore, the foreign entities exercise complete control over finances, operation and governance of Indian Entities. If the Indian Entities had any control or were independent as contended by the petitioners, they would retain at least a minor portion of profits. The LLP is engaged in providing software development services to Allscripts Healthcare LLC, USA (an entity under common control). From the quantum of profits generated it is clear that Indian Entity is undertaking large scale of software development works. However, from routing of all the profits back to the foreign entities it is clear that the Indian Entity is not independent or distinct but working for the foreign entity. That Allscripts (India) LLP is an alter ego of Allscripts Healthcare LLC, USA. That the foreign entity Allscripts Healthcare LLC, USA exercised a dominant influence on the management of LLP and has direct control and supervision over its governance. The foreign Entity undertook detailed consideration of financial operations of LLP on a regular basis.

31. Further it is contended that the 3rd respondent, as per the agreement made on 18.05.2018, has fulfilled all the terms of the agreement under the project scope and continued until 17.05.2021. The 3rd respondent received an email from Mr. Kim Franks, VP, Consumer Engagement of Allscripts group from the email address Kim.Franks@allscripts.com on 14.05.2021 informing that they are not renewing the agreement dated 18.05.2018. Therefore, the agreement was terminated as on 14.05.2021. Since the termination of the agreement, on numerous occasions Allscripts group and its officials have breached the privacy of the 3rd respondent and removed/copied the 3rd respondent's confidential data from the 3rd respondent's Azure tenant in India. That the Allscripts group also disabled administrative access of the 3rd respondent's users to its own Azure tenant from Office in Vishakhapatnam illegally and without their consent. Therefore, the respondent No.3 have engaged support of Microsoft and its resellers in order to restore access and admin privileges to the tenant it rightfully has owned for the last 6 years. The 3rd respondent has documented evidence of unauthorized and illegal activities of the Allscripts group on 19.05.2021 and on 21.05.2021 within the 3rd respondent's Azure tenant in India. These illegal activities are punishable under Indian Penal Code, 1860 and Information Technology Act, 2000. Therefore, the 3rd respondent filed a criminal complaint at Cyber Crime Police Station in Visakhapatnam city, Andhra Pradesh on 31.05.2021 for the offences of theft, mischief, forgery, cheating, hacking, cyber crimes, criminal conspiracy and criminal breach of trust under sections 378, 408, 420, 425, 426, 468 r/w 120 B of Indian Penal Code, 1860 and under Sections 43, 65 and 66 of Information Technology Act, 2000,

which is registered as F.I.R.No.91 of 2021 under sections 65, 66 of Information Technology Act, 2000.

32. Pursuant to the said complaint, the investigation officer conducted investigation, examined the defacto complainant and other witnesses, basing the said statements, added accused 1 to 7 in this crime. During the Investigation officer seized a Laptop and Cell phone from the possession of accused No.1 under cover of mediators report. After completion of investigation, investigation officer filed charge sheet, which is numbered as C.C.No.3515 of 2021.

33. Further it is contended that if the Indian Entities had any control or were independent as contended by the petitioners, they would retain at least a minor portion of profits. The investigation also revealed that M/s. Allscripts India LLP does not have any financial autonomy and that it is an alter ego of the foreign entity, as the investigating officer found an audit report dated 23.09.2020 on the site of Ministry of Corporate Affairs, wherein it is shown that the profit generated by Allscripts Healthcare (India) LLP for the 2019-2020 is completely transferred to its partner entities i.e., i) Allscripts Healthcare IT (Mauritius) Ltd and ii) Allscripts Healthcare International Holdings LLC, which was accepted by the petitioner/A1 in his confession statement. Further in an enquiry made with Customer Relation Manager of Web.com/Newfold.com to provide the details of the domain "Allscripts.com", a reply was received on 26.08.2021 through email, which revealed that the domain name Allscripts.com belongs to the organization name:

Allscripts Healthcare LLC situated at USA. The officials of Allscripts (India) LLP including accused No.1 and accused No.2 were using the email with the same domain extension.

34. Further it is contended in the counter that during the course of enquiry, the investigation revealed from the statement of Lw.9, that the petitioner worked on the SOW dated 18.05.2018 on the Health Grid product to be implemented at Sahayadri Hospital in the year 2019. He even acknowledge through mail dated 26.02.2019 wherein he replied, "wow! Great beginning Nihar!!". In further course of investigation, the investigation Officer has accessed the laptop of Mr.Nihar Sheth in his presence and found a folder named "Sahayadri Hospitals"; upon opening the same, they found may emails, which established the alleged crime and the involvement of Jaydeep Madhukar Wakanakar/A1 and Allscripts (India) LLP, however, most of the data was wiped out by the accused. Therefore, the petitioner/A1 deleted/tampered with the evidence to hide his involvement with the help of A2 and A3, and its officials are co-conspirators in the offences committed against the 3rd respondent herein.

35. The Indian Arm of the parent entity primarily deals with development of the computer software for the foreign parent entity. Therefore, for the Indian Arm to say that it has no role in compute related offences committed in India by its parent company is baseless and false, when its primary role is development of computer software and supplying data to M/s.Mahati software Pvt. Ltd. Pursuant to the SOW. With the above information it is clear that Allscripts Healthcare LLC and Allscripts India LLP are not two distinct Entities but part and parcel of Allscripts.

36. The respondent No.3 company is the sole owner of Azure Tenant Cloud Services and the petitioner in conspiracy has tempered and stole the user interface source code, confidential data and intellectual property and also blocked the admin privileges of the Azure Tenant of Mahathi preventing them the access. Therefore, the said complaint dated 31.05.2021 is not a counterblast to proceedings pending before the Court for the District of Delaware and both are independent. Moreover, the proceedings in said Court are in civil nature, where as the nature of proceedings in India is criminal in nature.

37. Replying to the contentions raised by the petitioners, that the prosecution against the petitioners is ought to be quashed as the Company is not made as a party, the 3rd respondent submitted that as per "principle of attribution" a body corporate can only held liable when it knows or forms an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Thus, from principle of attribution it is clear that it is not mandatory to make the body corporate a party and human agents can be solely made party. Only under special circumstances along with the human agent's body corporate is made a party if it knows or forms an intention along with human agents.

38. Further, with regard to the contention of the petitioners that there are no specific allegations made out to attract the ingredients of the offences alleged, 3rd respondent replied that the petitioner has committed the acts in his individual capacity, along with his colleagues in the parent entity. That from the statement of LW.9/ it is clear that the petitioner worked on SOW dated 18.05.2018 on the Health Grid product, to be implemented at Sahayadri Hospital, in the year 2019. He even acknowledged through the mail dated 26.02.2019 wherein he replied, "wow! Great beginning Nihar!!", that to hide his involvement in the crime, in conspiring to tamper and stealing the User Interface Code, confidential data along with the other accused, he tried to evade the investigation and failed to appear before the Investigation Officer on several date to the notices served under section 41-A Cr.P.C.. He appeared only on 26.08.2021 but he failed to divulge any information. Even when he handed over his mobile and laptop to the investigation officer, he wiped out all the data including the communication between him and other accused, who are A3 to A8. Therefore, in the charge sheet it is clearly mentioned that the petitioner has stolen the User Interface Code and confidential data pertaining to patients. Therefore, the contention of the petitioners that there are no specific allegations against the petitioners is baseless.

39. Since the petitioners has deleted/tampered with the evidence to hide their involvement with the help of A3 and A8, all the documentary evidence, which is crucial to determine the criminal conspiracy and their involvement in the crime, to cover the role of the petitioners in the crime, therefore, the conduct of the petitioners satisfies the essential ingredients under Section 204 of IPC and the petitioner conspired to tamper and steal the User Interface Code, confidential data and intellectual property of the respondent No.3, which attracts the ingredients under Section 65, 66, 66-B, 66-C, 66-D of Information Technology Act, 200 and Section 204, 120-B of Indian Penal Code, 1860.

40. Counter filed by the 2nd respondent. In the counter it is submitted that based on the complaint of the 3rd respondent herein, present crime was registered and the investigating officer examined

the defacto complainant and recorded his statements separately. Basing on the said statement, the investigation officer added the accused 1 to 7 in the crime. During the course of investigation, the investigation officer seized a laptop and cell phone from the possession of Accused No.1 and under cover of mediators report. Further the investigation officer recovered laptop from LW.9/Nihar Sheth, who is employee of the petitioner/Accused No.1 Company for the purpose of further investigation. The investigation officer also examined as many as 09 witnesses and recorded their statements as Lws.1 to 9.

41. Further the Inspector of Police, Cyber Crime Police Station, Visakhapatnam City went to office of the M/s.Mahathi Software Pvt. Ltd. and collected the information which is related to the offence. Complainant showed one email hard copy which is received from Allscripts on 14.05.2021 from Mr.Kim Franks through email kim.franks@allscripts.com stating that "Allscripts does not intend to extent or renew the term" to csp@mahati.com. As per the complaint on 15.05.2021, the network administrator as part of his regular work tried to log into M/s.Mahathi software Pvt. Ltd., cloud services, the name of the cloud services is Azure Tenant Cloud Management. But access was denied and it showed a message that "your account (lakshmikanth.konthala@mahati.com) does not have permission to view or manage this page in Microsoft 365 admin centre."

42 He further stated that from 15.05.2021 to 20.05.2021 there was no access of Azure Tenant Cloud Management to M/s.Mahathi Software Pvt. Ltd. and later on 17.05.2021 the complainant contacted the K.G.N. Technologies and informed them that he was not able to log into the Azure Tenant and later the K.G.N. Technologies contacted the Microsoft Authorities, and on 20.05.2021 the K.G.N. Technologies provided the admin access of Azure Tenant Cloud Management to M/s.Mahathi Software Pvt. Ltd. Subsequently, they came to know that they have lost some data.

43. Further it is averred that on 08.07.2021 the complainant was re-examined by Inspector of Police, Cybercrime Police Station, Visakhapatnam City and he submitted few documents i.e., mail correspondence between Ms.Pallavi Chuhan, Technical Advisor, Microsoft and Drew Jenkel, Chief Architect, Andor Health. From the same it was revealed that the Microsoft Azure Tenant ID:1566f334-9b33-4f7d-178b-d6ece1469c38 is owned by M/s.Mahathi Software Pvt. Ltd. and the complainant has also shown an email dated 29.06.2021 from Ms.Pallavi Chauhan, Technical Advisor at Microsoft (pallavi.chauhan@microsoft.com) addressed to his colleague, wherein it was stated "Based upon the logs, I can confirm Waren Nash removed the subjected members from the role". It clearly proves that officials of Allscripts illegally gained access and removed Global Admins of Mahati, it clearly shows the involvement of its officials in the crime.

44. Based on the statement of the complainant, the Investigation Officer addressed a letter on 26.06.2021, to Microsoft Authorities to confirm the Azure Tenant Cloud ownership. Then the Microsoft Authorities replied on 19.07.2021 that, "the customer is solely in control of the administrator account, which allows them to retrieve the required information more quickly and efficiently than Microsoft", it is proved that the rightful owner of the Azure tenant is M/s.MahathiSoftware Pvt. Ltd. Basing on that Inspector of Police, Cyber Crime Police Station, Visakhapatnam city served a 160 Cr.P.C. notice on 20.07.2021. Thus, the primary evidence of all the witnesses confirmed the prima facie case against the above noted accused.

45. Further they have averred that on 13.07.2021, the investigation officer served a notice under Section 41-A Cr.P.C to A1/petitioner to appear before the investigation officer on 15.07.2021, but he failed to appear. During the course of further investigation, again notice under section 41-A Cr.P.C. was served on the accused No.1 i.e. petitioner in 6284 of 2021, finally on 26.08.2021 the accused appeared before the investigation officer and his confessional statement was recorded on 26.08.2021 and 27.08.2021. But intentionally he did not provide the details of the relationship between Allscripts India LLP and Allscripts Healthcare LLC, USA and his role in the crime and also tampered with evidence under the Guidance of his legal team through email communication.

46. Further the investigation also reveals that M/s.Allscripts India LLP does not have any financial autonomy it is an alter ego of the foreign entity. LW.16/ searched on the website of Ministry of Corporate Affairs for the public documents of Allscripts India LLP and found one audit report dated 23.09.2020, wherein it shown that the ultimate parent is Allscripts Health Care Solutions Inc., USA founded in 1986 and is incorporated in Delaware with principal executive offices located at 222 Merchandise Mart Plaza, Suite 2024, Chicago, Illinois 60654. Further, the profit generated for the years 2019 and 2020 by the Indian Entity i.e., Allscripts India LLP is completely transferred to its partner entities

(i)Allscripts Healthcare IT (Mauritius) Limited and (ii) Allscripts Healthcare International Holdings LLC; That Allscripts India LLP generated a profit of Rs.37,24,73,119/- for the year 2019 and Rs.38,15,05,577/- for the year 2020 and the entire of these profits are transferred to foreign parent entities. The audit report further stated that Allscripts India LLP is engaged in providing software development services to Allscripts Healthcare LLC, USA. Further, the confession Statement revealed that Allscripts India LLP profits to the extent of 99.92% is sent to Allscripts Healthcare IT Mauritius Limited and remaining profit share is sent to Allscripts International Holdings LLC, USA.

47. Further the Investigation Officer addressed a letter over email on 04.08.2021 to Customer Relation Manager of web.com/newfold.com to provide details of the domain allscripts.com, the details of the activity logs including Registrant/administrator at the time of accessing the domain, the contact details, email id, mobile number, address etc. In reply to the same, he received email on 26.08.2021 from M/s.Bethena Dasher, paralegal Legal at M/s.Newfold Digital Inc. with detailed information and from the same it revealed that the domain name Allscripts.com belongs to the organization name: Allscripts Healthcare LLC situated at 222 Merchandise Mart, Chicago, IL USA. The officials of M/s. Allscripts India LLP including the petitioners i.e. Jaydeep Madhukar Wakankar (A1) and Jignesh Vijaya Kumar Pandya (A2) were using the email with same domain extension "allscripts.com" for communication which was used by the Allscripts Healthcare LLC, USA. Therefore, it is clear that Allscripts Healthcare LLC and Allscripts India LLP are not two distinct entities but one and the same as the officials were using domain name with the same extension for communication.

48. Further submitted that on 31.08.2021 notice under Section 91 Cr.P.C. was issued to the accused No.2, seeking for information and he sought time till 02.09.2021. However, with an apprehension that the accused would tamper the evidence, two teams one headed by LW.4/ visited Pune and the other headed by the Inspector of Police, Cyber Crime Police Station to Vadodra, to examine Mr.

Nihar Seth, Mr.Jignesh Pandey, Mr.Jaydeep Wakankar and Matilda Charles. On 03.09.2021 notice under section 160 of Cr.P.C. was issued to the petitioner/Accused No.2, to which he did not respond. The petitioner/accused No.2 is a Director of Information Securities at Allscripts India LLP and he is aware about the SOW and confidential data belonging to Mahati Software Pvt. Ltd, given his expertise it is likely, he along with Warren Nash together conspired to access and deleted the admin access from Azure Tenant belonging to Mahati and to cover his wrongdoings evaded the investigation.

49. On 03.09.2021 the petitioner/Accused No.1 was put to question by LW.14/ about the business transaction between M/s.Mahati and Allscripts India LLP and his involvement/role along with his colleague Mr.Nihar Sheth. He denied his role and the said transaction and instead stated that he was not aware about the sales operation of Mr.Nihar Sheth. A1 has voluntarily handed over his mobile phone and laptop without handing over the login credentials. LW.14/ also examined Matilda Charles, H.R. Allscripts (India) LLP, Pune on 04.09.2021.

50. During the course of investigation, examined Mr. Nihar Seth on 04.09.2021 about the business transaction between M/s.Mahati and Allscripts India LLP and his involvement/role along with his Colleague Mr.Jaydeep Wakankar/ accused No.1. According to him, in 2019 they started Sahyadri Hospital project to sell Health Grid Product, got approvals to work on this, from his management David Chambers (G.M., Asia Pacific), then he has taken approval from legal teams in USA and India and contacted his technical team and they suggested to contact M/s.Mahathi Software Pvt. Ltd., then he informed through mail on 26.02.2019 to Mr.Jaydeep Madhukar Wakankar, Vice President, Finance, Allscripts India LLP and Matilda Charles, VP, HR, Business Partners, Operations and Admin Allscripts (India) LLP. In further course of investigation, the investigating officer also accessed the laptop of Mr.Nihar Sheth; however, most of the data was wiped out by the accused company. The petitioner/A1 deleted/tampered with the evidence to hide his involvement with the help of A2 and A3, on the advice of A8.

51. Further averred that Jaydeep Madhukar Wakankar Petitioner/A1/deleted/tampered with the evidence to hide his involvement with the help of A2 and A3 and on the advice of A8, during the examination of Mr.NiharSheth, the Inspector of Police, Cyber Crime Police Station found one email dated 02.09.2021 addressed from Ms.Catherine Spector (catherine.spector@allscripts.com) to Mr.NiharSheth wherein she has stated that "not stay at your own residence but rather try to stay with a friend or relative for the moment to avoid the police coming to you and please don't disclose your location, they also suggest you to turn off your primary cell phone and not 'use' it but rather 'find' an alternative phone to use..."

52. In further course of investigation, clearly shows that Allscripts India LLP is the alter ego (alternate personality) of the Allscripts Healthcare LLC., and providing software development services for Allscripts Healthcare LLC and A1, A2, A7 and A8 are co-conspirators along with the officials of the Allscripts foreign entities A3 to A6 and breached privacy of the complainant, removed/copied the confidential data of M/s.Mahathi Software Pvt. Ltd., Viosakhaptnam and also A3 to A6 disabled the administrative access of the complainant users to its own Azure Tenant with the advice of A8 in committing the crime and in tampering with evidence by deleting it to hide their

criminal wrongdoings.

53. Based on the investigation, it clearly discloses that all the marginally noted accused conspired together to tamper and steal the user interface source code, confidential data and intellectual property solely owned by the complainant company, without their written consent and explicit authorization and in contravention to section 43 of the Information Technology Act, by abruptly with malafide intention, without renewing the SOW dated 18.05.2018 and thereby terminating the SOW on 14.05.2021 i.e., three days prior to that of term of the agreement in conspiracy by blocking the global admin privileges of the officials of the complainant's company in the Azure Tenant (Microsoft 365). After completion of investigation, on 20.09.2021 the investigating officer filed charge sheet before the Court of Chief Metropolitan Magistrate, Visakhapatnam against 8 accused for the offences punishable under Sections 43, 65, 66, 65-B, 66-C and 66-D of Information Technology Act, 2000 and sections 204 and 120-B of IPC and the same was taken on file and numbered as C.C.No.3515 of 2021.

54. Replying to the above said contentions, Sri Naga Mutthu, learned senior counsel appearing for the 3rd respondent relied on the judgment in Lalitha Kumari Vs. Govt. Of Uttar Pradesh² wherein the Hon'ble Apex Court held that -

"Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."

2014(2) SCC 1

55. Sri Dusyanth Reddy, learned Public Prosecutor appearing on behalf of the State submitted that based on the averments made in the counter, it clearly discloses that the petitioners have involved in the crime, which attracts Section 43, 65, 66, 65-B, 66-C and 66- D of Information Technology Act, 2000 and also attracts sections 204 and 120-B of IPC .

56. He further contended that Section 319 of Cr.P.C. allows the court, in a case before it, at any stage, to proceed against any person, other than the accused, appears to have committed an offence. Hence, the contention of the senior counsel appearing for the petitioners would not attract in the instant case. During the course of investigation, as per Section 319 of Cr.P.C. and 173 (8) of Cr.P.C., the investigation agency can implead the other accused, by filing supplementary charge sheet.

57. To support his contentions, he has relied on the judgments following :-

a) Sharat Babu Digumarti vs Govt Of (NCT of Delhi), 3 wherein in it is held that -

"32. Section 81 of the IT Act also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative 2017 2 SCC 18 intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply."

b) Radheshyam Kejriwal vs State Of West Bengal & Anr4- wherein in it is held that -

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

58. As per the above judgments, it clarifies that even when the adjudication proceedings are pending, criminal prosecution can be launched simultaneously, as contended by the petitioners that the litigation is pending before the United States District Court of Delaware is not a bar to initiate the criminal proceedings for the (2011) 3 SCC 581 offences committed by A1 to A8 and both the proceedings can be conducted simultaneously.

59. Further submitted that in view of Section 173 (8) of Cr.P.C. and Section 319 Cr.P.C., there is no bar for the investigation officer or for the concerned court, to add accused/ or file any supplementary charge sheet based on the further investigation. Therefore, in view of the said provisions and based on the factual aspects of the present case, there is no ground warranting the interference of this Court under Section 482 of Cr.P.C., hence requested for dismissal.

60. On perusal of the pleadings as well as the submissions of the learned senior counsel, though there is force in the contentions made by the learned senior counsel Sri Sidharth Luthra, that in the present case the respondents, without making the Company as an accused, they cannot proceed against the petitioners, in view of the ratio decided by the Hon'ble Apex Court in Aneeta Hada vs. Godfather Travels & Tours pvt. ltd.⁵

61. Replying to the said contentions, learned senior counsel, Sri Nagamuthu, has strongly demonstrated the distinction between the private complaint and the police complaint. In Aneeta Hada's case, though the Apex Court has considered and applied Section 85 of the Information Technology Act, 2000 with that of Section 141 of Negotiable Instruments Act [N.I. Act], but it has discussed only about the private complaint under Section 141 of N. I. Act, which requires mandatory requirement of issuing notice, the Court has said that when they want to proceed against the Directors, the Company needs to be made as co-accused. But in the instant 2012 5 SCC 661 case, it is a police report, based on the allegations made against the accused, the investigating officer investigated the crime and filed report under section 173 of Cr.P.C., terms as Report of police officer on completion of investigation. For the benefit, relevant provisions of said Section are extracted as

follows:-

173. Report of police officer on completion of investigation:-

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

.....

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-

sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section.

62. A plain reading of the above section of law, clause (8) of section 173 Cr.P.C. gives power to the authorities further investigation, of an offence, after a report under sub-clause (2), has been forwarded to the Magistrate. Suppose if the investigation officer gets any further information, or evidence or oral or documentary he can file a further report.

63. Section 319 of Cr.P.C. deals with Power to proceed against other persons appearing to be guilty of offence. For better appreciation, section 319 Cr.P.C. extracted hereunder:

319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

64. Thus, Section 319 Cr.P.C empowers the Magistrate even at the stage of inquiry or at the stage of trial, of an offence, it appears from the evidence that any person not being the accused has committed the offence, could be tried together.

65. In view of the above two provisions of law, it is clear that there is a distinction between the private complaint and police report.

66. Considering the above submissions and based on the observations made by the Apex Court in Hardeep Singh Vs. State of Punjab and also it clarifies that the even if the Company has not made as a party only prosecution launched against the directors, under Section 319 of Cr.P.C. they can be added or summoned. Hence, there is no impediment that for not adding the Company as a co-accused the directors cannot be added, at any stage if required, the company can be added as a co-accused provided under Section 173 (8) of Cr.P.C.

67. Considering the observations of the Apex Court in the above referred judgments and also observations of the court in Sunil Bharti Mittal vs CBI⁶ this Court feels that there are no grounds to interfere under Section 482 of Cr.P.C. to quash the proceedings only on the ground that the Company is not made a party - co-accused.

68. But as contended by the learned senior counsel Sri Sidharth Luthra that there are no specific overacts allegations made against the petitioners in the complaint, except stating that the petitioners are using the same e-mail portal and even the allegations made in the charge sheet contains no specific overt acts, hence it is vague in nature, however, the person who has been maliciously charged can file a discharge petition before the court, if the allegations which have been made against him are false, the Code of Criminal Procedure provides the provisions for filing a discharge application, 2015 SCC 609 if the evidence given before the Court is not sufficient to satisfy the offence and in the absence of any prima facie case against him, he is entitled to be discharged.

69. Considering the above submissions as well as the observations made by the Hon'ble Apex Court in various judgements referred above, both the criminal petitions are dismissed and the petitioners are given liberty to file discharge application under Section 227 of Cr.P.C., before the trial court. If such application is filed by the petitioners, the trial court shall dispose of it as expeditiously as possible within one month, without influencing the observations made by this court in the present petitions. There shall be no order as to costs.

As a sequel, miscellaneous applications pending, if any, shall also stand closed.

____ JUSTICE D. RAMESH Date: 13. 07.2022 Pnr