

Shri Ishtiaq Hussain Siddiqui vs Registrar Companies Ministry Of ... on 20 December, 2024

Author: Sanjay Dwivedi

Bench: Sanjay Dwivedi

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IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE SANJAY DWIVEDI
ON THE 20th OF DECEMBER, 2024
MISCELLANEOUS CRIMINAL CASE NO. 6919 OF 2024
SHRI ISHTIAQ HUSSAIN SIDDIQUI
Versus
REGISTRAR, COMPANIES, MINISTRY OF CORPORATE AFFAIRS

Appearance :

Shri S.A. Saud - Advocate for the petitioner.

Shri Pushpendra Yadav - Deputy Solicitor General for the respondent.

Reserved on : 10/12/2024

Pronounced on : 20/12/2024

ORDER

By filing the instant petition under Section 482 of the Code of Criminal Procedure [for short 'Cr.P.C.'], the petitioner is invoking jurisdiction of this Court for quashing of complaint case bearing Registration No.SC/12/2021.

2. The challenge is founded mainly on the grounds that on the basis of complaint and allegations made therein, an offence has been registered against the petitioner under Section 447 of the Companies Act, 2013 [in short 'the Act of 2013'] and that the allegations made against the petitioner in the complaint clearly reveal that the alleged offence was committed during the period from year 2006 and as such, offence could have been registered under the provision i.e. Section 186(7) and the petitioner can be punished under Section 186(13) of the Act of 2013. The provision of Section 447 of the Act of 2013 was inserted in the Act itself by way of amendment made in the year 2013 and to the offence which was committed prior to enforcement of said provision, the same cannot be applied and the petitioner cannot be tried under the said offence because it is a settled principle of law that the provisions cannot be made applicable retrospectively and it has only prospective effect. He submits that even otherwise, if the allegations made in the complaint are considered to be true at their face value, the offence alleged to have been committed by the petitioner falls within the ambit of Section 185 of the Act of 2013, therefore, no offence can be registered under Section 447 alleging

fraud against the petitioner because the whole allegations made in the complaint do not fall within the definition of fraud as has been prescribed in the proviso appended with Section 447 itself. He further submits that merely because the petitioner's earlier petition [M.Cr.C. challenging the proceedings] has been dismissed by the High Court and that order has been affirmed by the Supreme Court in SLP, it does not mean that the second petition under Section 482 is not maintainable. He submits that it is a trite law that the point, if any, is not argued in the petition preferred before the Court, the second petition under Section 482 can be entertained. He submits that the applicability of the provisions of Sections 185, 188 and 186 has not been considered by the Court on earlier occasion and even not argued that when separate provisions are there, under which allegations and offence alleged to have been committed by the petitioner falls, then there was no occasion for the authority to try the present petitioner under Section 447 of the Act of 2013. He also submits that in view of the law laid-down by the Supreme Court in the case of State of Haryana & Others vs. Ch. Bhajan Lal and others, AIR 1992 SC 604 and the yardstick laid-down therein, the proceedings can be quashed.

3. Per contra, learned counsel for the respondent opposes the submissions made by learned counsel for the petitioner and submits that in view of the settled legal position, when earlier petition got decided by the Court and that observation got affirmed by the Supreme Court, second petition is not maintainable. Pointing-out to paragraphs-22, 23 and 24, he submits that the applicability of Section 447 of the Act of 2013 has been considered by the Court and the contention of learned counsel for the petitioner was rejected, therefore, the same ground cannot be raised again in the present petition. According to him, the petition is not maintainable. He also submits that looking to the allegations made against the present petitioner, when the offence was committed in the year 2018 and was a continuous offence and currency period of said offence started from year 2006 and ended in year 2018, then it is clear that the offence has been committed after enforcement of Section 447 of the Act of 2013, and therefore, according to the respondent, nothing wrong has been committed by the authority. He submits that looking to the facts and circumstances of the case, it is for the trial Court to see whether fraud has been committed or not and offence of Section 447 is applicable or not, but at this stage, this Court cannot consider this aspect and the same should be left for the trial Court and petition under Section 482 of Cr.P.C. seeking quashment of complaint, is not maintainable. He further submits that as per the allegations made against the present petitioner, it is not only a violation of the provisions of Sub section-7 of Section 186, but the conduct of the petitioner moves beyond the said provision and it is nothing but a fraud as has been specified and prescribed under Section 447 of the Act of 2013, therefore, nothing wrong has been committed while registering the offence under Section 447 of the Act of 2013. He submits that when the Supreme Court, while dismissing the SLP, has already observed that the petitioner is at liberty to raise the objections before the trial Court, then there is no reason for filing the present petition and the petitioner can raise all these grounds before the trial Court.

4. Considering the submissions made by learned counsel for the parties and on perusal of record, the preliminary question with regard to maintainability of petition as has been raised by learned counsel for the respondent saying that earlier also a petition i.e. M.Cr.C. No.41956 of 2023 was filed under Section 482 of Cr.P.C. in which quashing of complaint case registered as Complaint Case No.SC/12/2021 was sought to be quashed and similar relief is being claimed in this petition,

therefore, this petition is not maintainable because the order of dismissal of previous petition passed by the High Court, was also affirmed by the Supreme Court. In the order of the Supreme Court, liberty was granted to the then petitioner to raise all the grounds before the trial Court and as such, declined to interfere in the order passed by the High Court.

5. Shri Pushpendra Yadav, Deputy Solicitor General has raised objection that in such a circumstance, this petition is not maintainable whereas learned counsel for the petitioner has tried to impress the Court that it is a settled principle of law and in number of cases, Hon'ble Supreme Court has observed that dismissal of petition under Section 482 of Cr.P.C. does not debar the petitioner or other accused persons to file second petition under Section 482 of Cr.P.C.

6. Learned counsel for the petitioner has submitted that in the earlier petition, present petitioner was not the party and that petition had been filed by some other person. It is also pointed out that the said petition which got dismissed by the High Court was affirmed by the Supreme Court and the point which is being raised in the present petition had not been considered and no opinion was expressed by the High Court because the said point was never argued and raised before the Court. As per the submission made by learned counsel for the petitioner in a case of Anil Khadkiwala vs. State (Government of NCT of Delhi) and another passed in Criminal Appeal NO(s) 1157 of 2019, the Supreme Court has held that the previous petition if does not contain a specific factual plea then second petition under Section 482 of Cr.P.C. would not be treated to be a repeat application and also not barred to entertain the second petition. In the judgment passed in Anil Khadkiwala (supra), the Supreme Court has dealt with the following question :-

"The application preferred by the appellant under Section 482, Cr.P.C. to quash the summons issued in complaint case no.3403/1/2015 was dismissed by the High Court opining that since the earlier CrI.M.C. No.877 of 2005 for the same relief had already been dismissed, the second application was not maintainable."

7. To answer the aforesaid question, Hon'ble Supreme Court observed as under :-

"3. The appellant then preferred a fresh application under Section 482 giving rise to the present proceedings. The High Court noticing the reliance on Form 32 issued by the Registrar of Companies, under the Companies Act, 1956, in proof of resignation by the appellant prior to the issuance of the cheques, issued notice, leading to the impugned order of dismissal subsequently.

4. Learned counsel for the appellant submitted that there was no bar to the maintainability of a second application under Section 482, Cr.P.C. in the peculiar facts and circumstances of the case, relying on Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Mohan Singh and Ors., AIR 1975 SC 1002.

5. Learned counsel for respondent no.2 relied upon order dated 06.05.2019 of this Court in Atul Shukla vs. The State of Madhya Pradesh and another (Criminal Appeal No.837 of 2019) to contend that such an application was not maintainable. The

cheques being post-dated, the appellant cannot escape its answerability.

6. We have considered the respective submissions on behalf of the parties and are of the opinion that the appeal deserves to be allowed for the reasons enumerated hereinafter.

7. The complaint filed by respondent no.2 alleges issuance of the cheques by the appellant as Director on 15.02.2001 and 28.02.2001. The appellant in his reply dated 31.08.2001, to the statutory notice, had denied answerability in view of his resignation on 20.01.2001. This fact does not find mention in the complaint. There is no allegation in the complaint that the cheques were post-dated. Even otherwise, the appellant had taken a specific objection in his earlier application under Section 482, Cr.P.C. that he had resigned from the Company on 20.01.2001 and which had been accepted. From the tenor of the order of the High Court on the earlier occasion it does not appear that Form 32 issued by the Registrar of Companies was brought on record in support of the resignation. The High Court dismissed the quashing application without considering the contention of the appellant that he had resigned from the post of the Director of the Company prior to the issuance of the cheques and the effect thereof in the facts and circumstances of the case. The High Court in the fresh application under Section 482, Cr.P.C. initially was therefore satisfied to issue notice in the matter after noticing the Form 32 certificate. Naturally there was a difference between the earlier application and the subsequent one, inasmuch as the statutory Form 32 did not fall for consideration by the Court earlier. The factum of resignation is not in dispute between the parties. The subsequent application, strictly speaking, therefore cannot be said to a repeat application squarely on the same facts and circumstances.

8. In Mohan Singh (supra), it was held that a successive application under Section 482, Cr.P.C. under changed circumstances was maintainable and the dismissal of the earlier application was no bar to the same, observing:

"2. Here, the situation is wholly different. The earlier application which was rejected by the High Court was an application under Section 561A of the CrPC to quash the proceeding and the High Court rejected it on the ground that the evidence was yet to be led and it was not desirable to interfere with the proceeding at that stage. But, thereafter, the criminal case dragged on for a period of about one and half years without any progress at all and it was in these circumstances that respondents Nos. 1 and 2 were constrained to make a fresh application to the High Court under Section 561-A to quash the proceeding. It is difficult to see how in these circumstances it could ever be contended that what the High Court was being asked to do by making the subsequent application was to review or revise the Order made by it on the earlier application. Section 561-A preserves the inherent power of the High Court to make such Orders as it deems fit to prevent abuse of the process of the Court or to secure the ends of justice and the High Court must, therefore, exercise its

inherent powers having regard to the situation prevailing at the particular point of time when its inherent jurisdiction is sought to be invoked. The High Court was in the circumstances entitled to entertain the subsequent application of Respondents Nos. 1 and 2 and consider whether on the facts and circumstances then obtaining the continuance of the proceeding against the respondents constituted an abuse of the process of the Court or its quashing was necessary to secure the ends of justice. The facts and circumstances obtaining at the time of the subsequent application of respondents Nos. 1 and 2 were clearly different from what they were at the time of the earlier application of the first respondent because, despite the rejection of the earlier application of the first respondent, the prosecution had failed to make any progress in the criminal case even though it was filed as far back as 1965 and the criminal case rested where it was for a period of over one and a half years....."

9. In Harshendra Kumar D. vs. Rebatilata Koley Etc., 2011 CrL.L.J. 1626, this Court held :

"22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to Appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the Appellant has resigned much before the cheques were issued by the Company. As noticed above, the Appellant resigned from the post of Director on March 2, 2004. The dishonoured cheques were issued by the Company on April 30, 2004, i.e., much after the Appellant had resigned from the post of Director of the Company. The acceptance of Appellant's resignation is duly reflected in the resolution dated March 2, 2004. Then in the prescribed form (Form No. 32), the Company informed to the Registrar of Companies on March 4, 2004 about Appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the Appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the Appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the Appellant, it would result in gross injustice to the Appellant and tantamount to an abuse of process of the court."

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11. The Company, of which the appellant was a Director, is a party respondent in the complaint. The

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interests of the complainant are therefore adequately protected. In the entirety of the facts and circumstances of the case, we are unable to hold that the second application for quashing of the complaint was not maintainable merely because of the dismissal of the earlier application.

8. Further reliance has been placed by learned counsel for the petitioner on a decision of Supreme Court reported in (1975) 3 SCC 706, Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Mohan Singh and others wherein the Supreme Court has considered the issue of entertaining the second application in a changed set of circumstances under Section 482 of Cr.P.C. and observed as under :-

"2. The main question debated before us was whether the High Court had jurisdiction to make the order dated April 7, 1970 quashing the proceeding against Respondents 1, 2 and 3 when on an earlier application made by the first respondent, the High Court had by its order dated December 12, 1968 refused to quash the proceeding. Mr Chatterjee on behalf of the State strenuously contended that the High Court was not competent to entertain the subsequent application of Respondents 1 and 2 and make the order dated April 7, 1970 quashing the proceeding, because that was tantamount to a review of its earlier order by the High Court, which was outside the jurisdiction of the High Court to do. He relied on two decisions of the Punjab and Orissa High Courts in support of his contention, namely, Hoshiar Singh v. State [AIR 1958 Punj 312 :

60 Punj LR 438 : 1958 Cri LJ 1093] and Namdeo Sindhi v. State [AIR 1958 Ori 20 : 1958 Cri LJ 67 :

ILR 57 Cut 355] . But we fail to see how these decisions can be of any help to him in his contention.

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They deal with a situation where an attempt was made to persuade the High Court in exercise of its revisional jurisdiction to reopen an earlier order passed by it in appeal or in revision finally disposing of a criminal proceeding and it was held that the High Court had no jurisdiction to revise its earlier order, because the power of revision could be exercised only against an order of a subordinate court. Mr Chatterjee also relied on a decision of this Court in U.J.S. Chopra v. State of Bombay [AIR 1955 SC 633 : (1955) 2 SCR 94 : 1955 Cri LJ 1410] where N.H. Bhagwati, J., speaking on behalf of himself and Imam, J., observed that once a judgment has been pronounced by the High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment and there is no provision in the Criminal Procedure Code which would enable the High Court to review the same or to exercise revisional jurisdiction over the same. These observations were sought to be explained by Mr Mukherjee on behalf of the first respondent by saying that they should not be read as laying down any general proposition excluding the applicability of Section 561-A in respect of an order made by the High Court in exercise of its appellate or revisional jurisdiction even if the conditions attracting the applicability of that section were satisfied in respect of such order, because that was not the question before the Court in that case and the Court was not concerned to

inquire whether the High Court can in exercise of its inherent power under Section 561-A review an earlier order made by it in exercise of its appellate or revisional jurisdiction. The question as to the scope and ambit of the inherent power of the High Court under Section 561-A vis-a-vis an earlier order made by it was, therefore, not concluded by this decision and the matter

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was res integra so far as this Court is concerned. Mr Mukherjee cited in support of this contention three decisions, namely, *Raj Narain v. State* [AIR 1959 All 315 : 1959 Cri LJ 543 : 1959 All LJ 56], *Lal Singh v.*

State [AIR 1970 Punj 32 : 1970 Cri LJ 267 : ILR (1970) 1 Punj 177] and *Ramvallabh Jha v. State of Bihar* [AIR 1962 Pat 417 : (1962) 2 Cri LJ 625 : 1962 BLJR 553]. It is, however, not necessary for us to examine the true effect of these observations as they have no application because the present case is not one where the High Court was invited to revise or review an earlier order made by it in exercise of its revisional jurisdiction finally disposing of a criminal proceeding. Here, the situation is wholly different. The earlier application which was rejected by the High Court was an application under Section 561-A of the Code of Criminal Procedure to quash the proceeding and the High Court rejected it on the ground that the evidence was yet to be led and it was not desirable to interfere with the proceeding at that stage. But, thereafter, the criminal case dragged on for a period of about one and a half years without any progress at all and it was in these circumstances that Respondents 1 and 2 were constrained to make a fresh application to the High Court under Section 561-A to quash the proceeding. It is difficult to see how in these circumstances, it could ever be contended that what the High Court was being asked to do by making the subsequent application was to review or revise the order made by it on the earlier application. Section 561-A preserves the inherent power of the High Court to make such orders as it deems fit to prevent abuse of the process of the Court or to secure the ends of justice and the High Court must, therefore, exercise its inherent powers having regard to the situation prevailing at the particular point

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of time when its inherent jurisdiction is sought to be invoked. The High Court was in the circumstances entitled to entertain the subsequent application of Respondents 1 and 2 and consider whether on the facts and circumstances then obtaining the continuance of the proceeding against the respondents constituted an abuse of the process of the Court or its quashing was necessary to secure the ends of justice. The facts and circumstances obtaining at the time of the subsequent application of Respondents 1 and 2 were clearly different from what they were at the time of the earlier application of the first respondent because, despite the rejection of the earlier application of the first respondent, the prosecution had failed to make any progress in the criminal case even though it was filed as far back as 1965 and the criminal case rested where it was for a period of over one and half years. It was for this reason that, despite the earlier order dated December 12, 1968, the High Court proceeded to consider the subsequent application of Respondents 1 and 2 for the purpose of deciding whether it should exercise its inherent jurisdiction under Section 561-A. Thus

the High Court was perfectly entitled to do and we do not see any jurisdictional infirmity in the order of the High Court. Even on the merits, we find that the order of the High Court was justified as no prima facie case appears to have been made out against Respondents 1 and 2."

9. The Supreme Court in the case of Vinod Kumar, IAS vs. Union of India & others, Writ Petition(s) (Criminal) No(s). 255/2021 relying upon the decision of Superintendent and Remembrancer of Legal Affairs (supra) has observed as under :-

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"The law on point as held by this Court in "Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh & Ors." reported in SCC (1975) 3 706 is clear that dismissal of an earlier 482 petition does not bar filing of subsequent petition under Section 482, in case the facts so justify. Needless to say that as and when any appropriate application under the Code is preferred by the petitioner, the same shall be dealt with purely on its own merits without being influenced by the dismissal of the instant writ petition."

10. Thus, considering the submissions made by learned counsel for the petitioner in response to the objection raised by learned counsel for the respondent and looking to the legal position as has been enumerated above and also on perusal of earlier order of High Court, it is clear that the present petitioner was not a party in the said petition and he was not the petitioner in the same.

11. From the order and the facts considered therein, it is clear that the quashing of the complaint case was solely on the ground that the ex post facto application of penal provision is proper or not. The High Court while dismissing the petition observed that at the relevant point of time, it was not proper for the Court to enter into the factual aspect of the matter because Court was of the opinion that prima facie only on the basis of inter-departmental communication, if any summary is prepared, that summary note cannot be considered the opinion and it has no legal sanctity prima facie. The Court at that time refused to enter into the factual aspect of the matter and observed that it can be unveiled only after conducting the trial.

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12. It is clear from the order of High Court that the points raised before this Court in the present petition have not been discussed and no opinion was given by the Court on this aspect which has been argued before this Court. Accordingly, in view of the legal position, the objection raised by learned counsel for the respondent about maintainability of this petition, in my opinion, is not sustainable and accordingly it is rejected and therefore, this petition is held maintainable.

13. Further, in support of his submissions and grounds raised for quashing the complaint case, reliance has been placed by learned counsel for the petitioner upon a view taken by the Supreme Court in the case of State of Haryana & Others vs. Ch. Bhajan Lal and others reported in AIR 1992 SC 604 in which the Supreme Court has laid down the yardstick specifying as to under which

circumstance the power under Section 482 of Cr.P.C. can be exercised and criminal proceeding can be quashed. The yardstick laid down by the Supreme Court is as under :-

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code. (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support

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of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

14. As per the counsel for the petitioner, it is a case in which allegations made against the present petitioner, though available on record but do not constitute any offence under the provision for which offence has been registered. It is also submitted by the learned counsel for the petitioner that when the allegations made against the petitioner and material collected by the prosecution, a specific offence could have been registered under the respective provision which is available under the Act of 2013 then there was no reason to register an offence under Section 447 of the

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Act of 2013, especially, when allegations and material collected do disclose that the main allegations are relating to the period when Section 447 of the Act of 2013 had no application and therefore, instead of Section 447, the offence could have been registered under the respective provisions which

are available under the Act itself i.e Sections 185, 186 and 188 of the Act of 2013. The F.I.R. is available on record which has been prepared on the basis of inspection done by the authority of Central Government exercising the power provided under Section 206(5) of Act of 2013 and at the time of inspection of books of accounts of the company, following irregularities and illegality have been noticed :-

"WHEREAS, during the inspection of books of accounts and financial statements of the company, it is observed by the IO that from 30.11.2000 to 25.07.2006, Alliance Industries Limited (a foreign entity) has made investment of Rs. 144.18 crore by way of purchase of shares at premium. (Out of which, Share Capital amount is Rs.14.66 crore and Premium amount is Rs.129.52 crore.) Further, the company under inspection has given loans to related parties namely P.G.H. International Pvt. Ltd and Sarvajanik Jankalayan Parmarthik Nyas at the terms which are not in the interest of the shareholders/company. It is observed that 66% funds were transferred by the company in F.Y. 2003-04 and from F.Y. 2005-06 onwards, more than 88% funds were transferred by the company to related parties. 100% funds from the Net worth of the company were transferred as on 31.03.2018. The rate of interest was much lesser than the prevailing market price or the company has given interest free loans to related parties instead of carrying on its main business activity. Loans given to Sarvajanik Jankalyan Parmarthik Nyas, a trust

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registered under The M.P. Public Trust Act, 1951 are at the interest rates 1% to 3% during 2003-04 to 2017-18 whereas prevailing market rates at that time was around 6% to 8%. Further, the loans given to related parties namely P.G.H. International Pvt. Ltd. were Interest free. In this manner, company has given wrongful gain to the other related party which includes the management of the company and wrongful loss to the shareholders/company which tantamount to fraud. Thus, there appears violation of Section 447 of the Companies Act, 2013."

15. From the aforesaid alleged irregularities, it is clear that the provision of Section 185 of Act of 2013 is available under which it is permissible to give loan to the directors. Section 185 of Act of 2013 reads as under :-

"185. Loans to directors, etc. - (1) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,--

(a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b) any firm in which any such director or relative is a partner.

(2) A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that--

(a) a special resolution is passed by the company in general meeting:

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Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and

(b) the loans are utilised by the borrowing company for its principal business activities.

Explanation.--For the purposes of this sub-section, the expression "any person in whom any of the director of the company is interested" means--

(a) any private company of which any such director is a director or member;

(b) any body corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(c) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

(3) Nothing contained in sub-sections (1) and (2) shall apply to--

(a) the giving of any loan to a managing or whole- time director--

(i) as a part of the conditions of service extended by the company to all its employees; or

(ii) pursuant to any scheme approved by the members by a special resolution; or

(b) a company which in the ordinary course of its business provides loans or gives guarantees or

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securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three year, five year or ten year Government security closest to the tenor of the loan; or

(c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or

(d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.

(4) If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,--

(i) the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees;

(ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; and

(iii) the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh

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rupees but which may extend to twenty-five lakh rupees, or with both."

16. Further, the Act itself provides and made permissible for the company to provide loan and make investment. As such, Section 186 also provides the rate of interest on which loan can be granted and as pointed out by learned counsel for the petitioner that if any violation and contravention of the prescribed procedure for granting loan and investment by the company is done, the Section itself provides mechanism to punish the defaulter and penal provision i.e. sub section 13 of section 186 is very specific. It is also apt to reproduce Section 186 of Act of 2013, which reads as under :-

"186. Loan and investment by company.--(1) Without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than two layers of investment companies:

Provided that the provisions of this sub-section shall not affect,--

(i) a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

(ii) a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

(2) No company shall directly or indirectly--

(a) give any loan to any person or other body corporate;

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(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty per cent of its paid-up share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more.

[Explanation.--For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company.] [(3) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate alongwith the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub- section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting:

Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply:

Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4).] (4) The company shall disclose to the members in the financial statement the full particulars of the loans

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given, investment made or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security. (5) No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained:

Provided that prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, alongwith the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in sub- section (2), and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

(6) No company, which is registered under Section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits. (7) No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.

(8) No company which is in default in the repayment of any deposits accepted before or after the

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commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting.

(9) Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as may be prescribed.

(10) The register referred to in sub-section (9) shall be kept at the registered office of the company and --

(a) shall be open to inspection at such office; and

(b) extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as may be prescribed.

[(11) Nothing contained in this section, except sub- section (1), shall apply--

(a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;

(b) to any investment--

(i) made by an investment company;

(ii) made in shares allotted in pursuance of clause

(a) of sub-section (1) of Section 62 or in shares allotted in pursuance of rights issues made by a body corporate;

(iii) made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 (2 of 1934) and whose principal business is acquisition of securities.]

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(12) The Central Government may make rules for the purposes of this section.

(13) If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Explanation.--For the purposes of this section,--

(a) the expression "investment company" means a company whose principal business is the acquisition of shares, debentures or other securities [and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent of its total assets, or if its income derived from investment business constitutes not less than fifty per cent as a proportion of its gross income;]

(b) the expression "infrastructure facilities" means the facilities specified in Schedule VI"

17. Section 188 of the Act of 2013 also permits related party transactions. That provision is also material so far the alleged transactions of the company referred in the FIR are concerned and the said provision also provides penal provision. Section 188, thus, prescribes as under :-

"188. Related party transactions.--(1) Except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall

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enter into any contract or arrangement with a related party with respect to--

- (a) sale, purchase or supply of any goods or materials;
- (b) selling or otherwise disposing of, or buying, property of any kind;
- (c) leasing of property of any kind;
- (d) availing or rendering of any services;
- (e) appointment of any agent for purchase or sale of goods, materials, services or property;
- (f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
- (g) underwriting the subscription of any securities or derivatives thereof, of the company:

Provided that no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a [resolution]:

Provided further that no member of the company shall vote on such 295[resolution], to approve any contract or arrangement which may be entered into by the company, if such member is a related party: [Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent or more members, in number, are relatives of promoters or are related parties:] Provided also that nothing in this sub-section shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis: [Provided also that the requirement of passing the resolution under first proviso shall not be applicable for transactions entered into between a holding company

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and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.]

Explanation.-- In this sub-section,--

(a) the expression "office or place of profit" means any office or place--

(i) where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(ii) where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(b) the expression "arm's length transaction" means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

(2) Every contract or arrangement entered into under sub-section (1) shall be referred to in the Board's report to the shareholders alongwith the justification for entering into such contract or arrangement. (3) Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a [resolution] in the general meeting under sub-section (1) and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within three months from the date on which such contract or arrangement was

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entered into, such contract or arrangement [shall be voidable at the option of the Board or, as the case may be, of the shareholders] and if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

(4) Without prejudice to anything contained in sub- section (3), it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

(5) Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall,--

(i) in case of listed company, be 300[liable to a penalty of twenty-five lakh rupees]; and

(ii) in case of any other company, be 301[liable to a penalty of five lakh rupees]."

18. As per learned counsel for the petitioner, Section 447 has been introduced by way of amendment in the Act of 2013 and in earlier Act, there was no such provision like Section 447. Therefore, it is apt to reproduce Section 447, which reads as under :-

"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

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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.

[Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to [fifty lakh rupees] or with both.] Explanation.--For the purposes 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.

19. Learned counsel for the petitioner has also pointed out that the element of fraud was introduced first time in the year 2013 and fraud itself has been defined with the explanation attached with

proviso of Section 447 but looking to the alleged irregularity, offence of fraud is not

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made out and secondly for the transaction which took place prior to 2013, retrospective application under Section 447 cannot be made.

20. Shri Pushpendra Yadav, learned counsel appearing for respondent has submitted that the transaction which is found to be illegal and Section 447 has been applied, cannot be confined to the period prior to enforcement of Section 447 but since it continued even after period of enforcement of Section 447 and that was done for wrongful gain therefore, offence of Section 447 has rightly been registered against the petitioner and he submits that it was a question of trial and therefore, nothing wrong has been done and this Court, at this stage, cannot examine this aspect.

21. The Karnataka High Court in the case of Srividya C.G. vs. Serious Fraud Investigation Office (W.P. No.4380 of 2018) has considered the applicability of Section 447 of the Act of 2013 and put the confusion at rest and held that no such offence shall be tried under Act of 2013 which had been committed at the time when Act of 2013 was not even in force rather such offence shall be deemed to be prosecuted under the old Act only. The observation made by the Court is as follows :-

"61. The alleged offences were purportedly committed during the period when the Companies Act of 1956 was in effect. The initiation of legal proceedings under Section 36, in conjunction with Sections 447 and 448 of the 2013 Act, lacks legal authority. The petitioners cannot be prosecuted for actions that were not deemed punishable under the provisions of the 1956 Act. This purported action violates Article 20, Sub Clause 1 of the Constitution of India, which safeguards against retrospective criminalization."

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The Court also observed that Article 20(1) of the Constitution of India provides so and prescribes as under :-

"20. Protection in respect of conviction for offences.-

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

22. Notably, the pyramid of submissions made on behalf of the respondent is based on three pillars. Primarily about the maintainability of the petition; secondarily, about the applicability of Section 447 on the basis of continuous offence and transactions made as per the complaint even after enforcement of the Act, 2013 and tertiary, that at this stage this court should not exercise the powers

enshrined under Section 482 of CrPC and should be left for the trial court.

23. For fathoming the depth of above threefold submissions, on the face of record and legal position already set at rest, which would definitely navigate the path, I find it apposite to deal with the submissions one-by- one in the following manner:-

(i) So far as the submission about maintainability of the petition is concerned, this court has already observed in foregoing paragraphs that the petition is maintainable.

(ii) As far as applicability of the provisions of Section 447 of Act, 2013 is concerned, I am not convinced with the submission made at the behest of the respondent that it is a continuous offence even after the year 2013 and therefore Section 447 has rightly been applied. From the allegations

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made, it is clear that the Investigating Officer did take note of transactions made from 30.11.2000 to 25.07.2006 and also the transactions of Financial Year 2003-04 and Financial Year 2005-06 and further transactions made upto the year 2017-18. The allegations made in the FIR do confirm that it is not a continuous offence inasmuch as the transactions made in different years. The definition of Financial Year under the old Companies Act, 1956 is prescribed in Section 2(17), wherein it is provided that the period in respect of which any profit or loss account of the body corporate laid before it in annual general meeting is made up, whether that period is a year or not. Moreso, as per the 'Financial Year' as defined under Section 2(41) of Act, 2013, it is clear that the period ending on 31st of March of every year. Thus, it can profitably be held that it is not a continuous offence. My view takes strength from the view taken by the Supreme Court in the case of Udai Shankar Awasthi vs. State of Uttar Pradesh and another (2013) 2 SCC 435, wherein the Supreme court has considered the aspect of continuous offence and came to observe as under:-

"Continuing offence

23. Section 472 CrPC provides that in case of a continuing offence, a fresh period of limitation begins to run at every moment of the time period during which the offence continues. The expression "continuing offence" has not been defined in CrPC because it is one of those expressions which does not have a fixed connotation, and therefore, the formula of universal application cannot be formulated in this respect.

24. In Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan [AIR 1959 SC 798]

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AIR p. 807, para 31 this Court dealt with the aforementioned issue, and observed that a continuing offence is an act which creates a continuing source of injury, and

renders the doer of the act responsible and liable for the continuation of the said injury. In case a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the said act may continue. If the wrongful act is of such character that the injury caused by it itself continues, then the said act constitutes a continuing wrong. The distinction between the two wrongs therefore depends upon the effect of the injury. In the said case, the Court dealt with a case of a wrongful act of forcible ouster, and held that the resulting injury caused was complete at the date of the ouster itself, and therefore there was no scope for the application of Section 23 of the Limitation Act in relation to the said case.

25. In *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath* [(1991) 2 SCC 141 : 1991 SCC (Cri) 315] this Court dealt with the issue and held as under :

"7. ... According to Black's Law Dictionary, [5th Edn. (Special Deluxe)], 'continuing' means 'enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences'. Continuing offence means 'type of crime which is committed over a span of time'. As to period of statute of limitation in a continuing offence, the last act of the offence controls for commencement of the period. 'A continuing offence, such that only the last act thereof within the period of the statute of limitations need be alleged in the indictment or information, is one which

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may consist of separate acts or a course of conduct but which arises from that singleness of thought, purpose or action which may be deemed a single impulse'. So also a 'continuous crime' means 'one consisting of a continuous series of acts, which endures after the period of consummation, as, the offence of carrying concealed weapons. In the case of instantaneous crimes, the statute of limitation begins to run with the consummation, while in the case of continuous crimes it only begins with the cessation of the criminal conduct or act.'"

On the anvil of above legal touchstone, it becomes clear like a noon day that each and every offence committed in different Financial Years, on the face of allegations made in the complaint, the offence committed after enforcement of the Act, 2013 cannot be consolidated and tried under Section 447 of Act, 2013. Ergo, the Financial Year prior to Act, 2013 can be treated differently to that of Financial Year as defined in the Act, 2013. Especially, the transactions as have been considered by this court hereinabove can be tried under specific provision available under Act, 2013 itself and also available in the old Companies Act, 1956 with the penal provision. As such, it is testified that the respondent has utterly committed illegality in setting the sails of trial proposing to apply Section 447 retrospectively.

Over and above, the Supreme Court in the case of *Commissioner of Income Tax (Central)-1, New Delhi vs. Vatika Township Private Limited* (2015) 1 SCC 1 dealing with the provisions of Income Tax

Act, has observed as under :-

"General principles concerning retrospectivity

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27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-à-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit* :

law looks forward not backward. As was observed in *Phillips v. Eyre* [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal

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with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.* [(1994) 1 AC 486 :

Shinnihon Steamship Co. Ltd. [(1994) 1 AC 486 :

(1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

In view of the aforesaid, it is clear that trying offence by the respondent under Section 447 applying the same retrospectively, is apparently illegal and it can be considered to be a malicious prosecution. Essentially, when the prosecution has come under the shadow of malice, the Supreme Court has already engrafted yardsticks in the case of Bhajan Lal (supra). In view of the thoughtful yardsticks formulated by the Supreme Court, which make me undoubtedly unhesitant to hold that the prosecution in the case at hand is not sustainable in the eyes of law and

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such proceedings can be quashed by this court exercising the power provided under Section 482 of CrPC.

(iii) So far as the third submission made on behalf of the respondent about exercising power by this court at this stage is also not sustainable inasmuch as it is a settled principle of law that if on the basis of allegations contained in FIR, the court finds considering the same to be true at its face value, the offence registered is not formulated and prosecution can be considered to be malicious prosecution, same can be quashed.

24. In view of the above discourse, this petition is allowed. The proceedings of Complaint Case No. SC/12/2021 pending in the Court of XVIII District & Additional Sessions Judge, Bhopal are hereby quashed.

25. The petition is, accordingly, allowed.

(SANJAY DWIVEDI) JUDGE PK PARITOSH DN: c=IN, o=HIGH COURT OF MADHYA PRADESH, ou=HIGH COURT 2.5.4.20=43c946b45c8a66c03b68676e788802a41cc03b5b9567caf9 KUMAR c 2 c 3 b 9 8 1 b 8 c b 6 5 9 6 , p o s t a l C o d e = 4 8 2 0 0 1 , s t = M a d h y a P r a d e s h , s e r i a l N u m b e r = 6 7 8 D C 3 0 1 9 9 4 B 4 9 6 0 1 2 A 9 6 4 3 D 9 2 E 6 C 6 3 3 5 F 1 1 A 9 3 D A 5 4 F 2 D F B 6 E 4 4 B 8 B 7 A 4 5 0 4 4 F C , c n = P A R I T O S H K U M A R Date: 2024.12.20 18:45:28 +05'30'