

Shomik Mukherjee vs The State (Govt. Of Nct Of Delhi) & Anr on 28 August, 2020

Author: Anup Jairam Bhambhani

Bench: Anup Jairam Bhambhani

via Video-conferencing

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P. (CRL.) 1335/2020

SHOMIK MUKHERJEE

.....Petitioner

Through: Mr. N. Hariharan, Senior Advocate
with Mr. Karan Kakkar, Advocate and
Mr. Pranav Badheka, Advocate.

Versus

THE STATE (GOVT. OF NCT OF DELHI) & ANR..... Respondents

Through: Mr. Sidharth Luthra, Senior Advocate
with Mr. Anurag Andley, Advocate,
Mr. Nirvikar Singh, Advocate, Ms.
Shubhangni Jain, Advocate, Mr.
Pankaj Singhal, Advocate, Mr. Vivek
Jain, Advocate and Mr. Aditya
Chatterjee, Advocate for respondent
No.2

Mr. Sanjay Lao, ASC for respondent
No. 1/State with S.I. Pradeep/EOW

+ W.P. (CRL.) 1336/2020

RATHINAM GANAPATI

.....Petitioner

Through: Mr. N. Hariharan, Senior Advocate
with Mr. Karan Kakkar, Advocate and
Mr. Pranav Badheka, Advocate.

Versus

THE STATE (GOVT. OF NCT OF DELHI) & ANR..... Respondents

Through: Mr. Sidharth Luthra, Senior
Advocate with Mr. Anurag Andley,
Advocate, Mr. Nirvikar Singh,
Advocate, Ms. Shubhangni Jain,
Advocate, Mr. Pankaj Singhal,
Advocate, Mr. Vivek Jain, Advocate
and Mr. Aditya Chatterjee, Advocate
for respondent No.2

Mr. Sanjay Lao, ASC for respondent
No. 1/State with S.I. Pradeep/EOW

W.P. (CRL.) 1335/2020 & conn. matters.

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+ W.P. (CRL.) 1338/2020

ACTIS CONSUMER GROOMING PRODUCTS LIMITED & ANR.

....Petitioners

Through: Mr. N. Hariharan, Senior Advocate
with Mr. Karan Kakkar, Advocate,
Mr. Pranav Badheka, Advocate and
Ms. Gunjan Mangla, Advocate.

Versus

THE STATE (GOVT. OF NCT OF DELHI) & ANR..... Respondents

Through: Mr. Sidharth Luthra, Senior Advocate
with Mr. Anurag Andley, Advocate,
Mr. Nirvikar Singh, Advocate, Ms.
Shubhangni Jain, Advocate, Mr.
Pankaj Singhal, Advocate, Mr. Vivek
Jain, Advocate and Mr. Aditya
Chatterjee, Advocate for respondent
No.2
Mr. Sanjay Lao, ASC for respondent
No. 1/State with S.I. Pradeep/EOW

+ W.P. (CRL.) 1339/2020

SUPERMAX PERSONAL CARE PRIVATE LTD. & ORS.

.....Petitioners

Through: Mr. Mukul Rohatgi, Senior Advocate
with Mr. Karan Kakkar, Advocate,
Mr. Pranav Badheka, Advocate and
Ms. Gunjan Mangla, Advocate.

Versus

THE STATE (GOVT. OF NCT OF DELHI) & ANR..... Respondents

Through: Mr. Pramod Kumar Dubey, Advocate
with Mr. Nirvikar Singh, Advocate,
Mr. Anurag Andley, Advocate, Mr.
Vivek Jain, Advocate and Mr. Prince
Tiwari, Advocate for respondent
No.2.
Mr. Sanjay Lao, ASC for respondent
No. 1/State with S.I. Pradeep/EOW

W.P. (CRL.) 1335/2020 & conn. matters.

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CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI
ORDER

% 28.08.2020 The petitioners in these four petitions seek the same relief. Accordingly these petitions are being taken-up together.

2. For ease of reference, the names of the petitioners and respondents in the four matters are set-out in tabular form below :

S. No. Petition No. Petitioner/s Respondents

1. W.P. (CRL.) No. 1335/2020 Shomik Mukherjee 1. The State (Govt. of NCT of Delhi)

2. Subhash Datta Chaudhuri

2. W.P. (CRL.) No. 1336/2020 Rathinam Ganapati 1. The State (Govt. of NCT of Delhi)

2. Subhash Datta Chaudhuri

3. W.P. (CRL.) No. 1338/2020 1. Actis Consumer 1. The State (Govt. of Grooming NCT of Delhi) Products Ltd. 2. Subhash Datta

2. Actis LLP Chaudhuri

4. W.P. (CRL.) No. 1339/2020 1. Supermax Personal 1. The State (Govt. of Care Private Limited NCT of Delhi)

2. Kenny Abraham 2. Subhash Datta

3. Upendra Gupta Chaudhuri

4. Sanjay Jagtap

3. The petitioners are aggrieved by order dated 17.08.2020 made by the learned Chief Metropolitan Magistrate (CMM), New Delhi District, Patiala House Courts, New Delhi in CC No. 2286/2020, whereby an application under section 156(3) Cr.P.C. has been allowed, leading to registration of FIR No. 0107/2020 registered under sections 406/409/418/420/467/468/471/474/477A/120-B/34 W.P. (CRL.) 1335/2020 & conn. matters. page 3 of 25 IPC at PS: Economic Offences Wing, New Delhi ('subject FIR', for short). Order dated 17.08.2020 is a common order concerning all petitioners. The petitioners also seek quashing of the subject FIR; and stay of the "effect of the FIR", meaning thereby the investigation and proceedings arising therefrom; along with other consequential reliefs.

4. The essence of the challenge to the impugned order is that it has been made without application of judicial mind, without application of established principles of law and without appreciating the conclusions contained in status report/action taken report dated 'nil', stated to have been filed on 23.07.2020 by the Economic Offences Wing (EOW).

5. The genesis of the disputes are investments of about US Dollars 225 million and loans of about US Dollars 39.3 million made/extended by M/s Actis Consumer Grooming Products Limited, Mauritius ('ACGPL', for short) in/to M/s Tigaksha Metalics Private Limited (India) and other dropdown subsidiaries and connected corporate entities around the world; resulting in a 41.7% shareholding with 82% voting rights in M/s Super-Max Luxembourg S.a.r.l. From such investment and loan transactions, certain disputes have arisen between the parties and one M/s Super-Max Mauritius

('SMM', for short) which is stated to be the balance 59.83% shareholder. Another entity with a central role in the disputes is M/s Super-Max Personal Care Pvt. Ltd., which is a subsidiary of SMM. The individual petitioners in these petitions are the promoters, shareholders, directors and principal officers of the various entities connected with the dispute. As is the wont, multiple civil proceedings have been filed arising from such disputes; and a chart summarising such proceedings has been filed alongwith the petitions. According to the petitioners, W.P. (CRL.) 1335/2020 & conn. matters. page 4 of 25 some 19 proceedings are pending between the parties at various stages before the London Court of International Arbitration, the High Court of England & Wales, the Himachal Pradesh High Court, Bombay High Court, National Company Law Tribunal (Mumbai), Grand Court of the Cayman Islands, Court of Justice of the Canton of Geneva, the Supreme Court of the Commonwealth of the Bahamas, and the Dubai Court of First Instance. These proceedings, arising from investments made by ACGPL, are stated to be in relation to its shareholding and voting rights in the various entities. Suffice it to say however, that the full details of the labyrinth of corporate entities, their inter se shareholdings, and of the disputes between various parties are not required to be examined in the present proceedings; and only a brief overview is necessary, especially at this stage.

6. Mr. Mukul Rohatgi and Mr. N. Hariharan, learned senior counsel appearing for the petitioners in these matters submit that the SMM Group of entities has failed to honour the shareholding and voting rights of the ACGPL Group entities in several ways, despite the fact that an investment/loan of nearly INR 2,000 crores has been made/extended by the ACGPL Group to the SMM Group. It is further contended that two of the main dramatis personae, one Mr. Rakesh Malhotra and the complainant Mr. Subhash Datta Chaudhuri, have been removed from SPCPL in 2017 and 2014 respectively.

7. Mr. Rohatgi, learned senior counsel summarises the principal challenge to the impugned order and the subject FIR in the following points :

(a) that the impugned order made under section 156(3) Cr.P.C. directing registration of the subject FIR is ex-

W.P. (CRL.) 1335/2020 & conn. matters. page 5 of 25 facie bereft of any discussion or reasoning; and proceeds purely on the basis of the complaint, without even so much as drawing any inference of criminality from the allegations contained in the complaint;

(b) that no affidavit in support of the application under section 156(3) Cr.P.C. has been filed, which, as per the mandate of the Supreme Court in Priyanka Srivastava & Anr. vs. State of U.P. & Ors.1, should have been insisted upon before entertaining the application to prevent abuse of process. Furthermore, the lame ground of the prevailing coronavirus pandemic, which has been cited for exemption from filing such affidavit, is untenable; and has been employed only to evade the obligation of filing such affidavit, so as not to take responsibility for the contents of the application;

(c) that the reason for not filing an affidavit in support of the section 156(3) Cr.P.C. application is that the complainant Mr. Subhash Datta Chaudhuri is in fact merely a 'proxy' for Mr. Rakesh Malhotra, and has neither any connection nor any bona fidé interest in the subject matter of the

disputes between the parties. The complainant was not concerned with any of the entities between 2014 and 2017, which is the period to which the disputes mainly relate; and the (2015) 6 SCC 287 W.P. (CRL.) 1335/2020 & conn. matters. page 6 of 25 complainant has acted solely at the behest and instance of Mr. Rakesh Malhotra to file an entirely mala fide complaint thereby shielding Mr. Rakesh Malhotra from coming to the fore and facing the consequences for making false allegations;

(d) that the complainant first made complaint dated 20.06.2019 with PS:EOW, whereupon a thorough preliminary inquiry was conducted by the EOW for a period of about 06 months and a status report/action taken report was filed on 23.07.2020; but the impugned order has been passed without at all considering or appreciating the contents of the status report/action taken report, which report records the following conclusion :

"It is also pertinent to mentioned that both parties are already engaged in several litigations such as Arbitration Case No.8/2018 in Honble High Court of Himachal, Petition No.419/18, 2500/18, 264/17 before NCLT and suit No.210/2019 before Honble Bombay High Court and issued raised in the present complaint are also subject matter in the litigaitons. In view of the above mentioned facts and circumstances, the allegations leveled by the complainant could not be substantiated during the course of enquiry. Hence, the complaint has been filed."

(emphasis supplied) W.P. (CRL.) 1335/2020 & conn. matters. page 7 of 25

(e) that the impugned order, which has been passed in a perfunctory and casual manner, has resulted in the serious consequence of registration of the subject FIR against 14 accused, including corporate entities, their directors and principal officers, thereby setting into motion the criminal law machinery, in a case of gross misuse and abuse of the process of law;

(f) that the mala fides that attend the filing of the section 156(3) Cr.P.C. application, leading to the making of the impugned order and registration of the subject FIR, are also clear from the fact that companies of the SMM Group were required to take certain steps in the pending arbitration proceedings before the London Court of International Arbitration before 20.10.2020; but to avoid taking such steps, the complainant was prompted by Mr. Rakesh Malhotra to file the section 156(3) application on 02.07.2020. This is borne-out by e-mail communication dated 23.08.2020 addressed by counsel for Mr. Rakesh Malhotra to the Arbitral Tribunal, seeking to completely stall arbitral proceedings based purely on the registration of the subject. FIR. Attention in this regard is drawn to the subject and contents of the said e-mail communication, which read as under:

"Subject : [EXT] Urgent Request To Stay All Proceedings In LCIA Arbitration No 183927 & Consider THE Ld Chief Metropolitan Magistrate, Patiala House Court, New Delhi W.P. (CRL.) 1335/2020 & conn. matters. page 8 of 25 Order & Economic Offences Wing, Delhi Police (EOW) FIR.

***** "... There is, therefore, a clear and complete overlap of issues between the court ordered police investigation and the present arbitration. In this background, the case

being one of "serious fraud", the same may not be capable of arbitration and is one that requires investigation by the police authorities /criminal justice system in India."

(emphasis supplied) It is submitted that the above e-mail clearly evidences the real intention of initiating criminal proceedings in India, namely to completely stall on- going arbitral proceedings pending against the persons/entities at whose instance the complainant has acted;

(g) that as per the verdict of the Supreme Court in Lalita Kumari vs. Govt. of U.P. & Ors. 2 , a preliminary inquiry is mandated inter-alia in commercial matters; but in this case the learned Magistrate omitted to consider the fact that after such preliminary inquiry, the EOW has concluded that the allegations in the complaint could not be substantiated;

(h) that on the principles laid-down in State of Haryana & Ors. vs. Bhajan Lal & Ors.³, in particular paras 102.2 and 102.7 of that judgment, no cognisable (2014) 2 SCC 1 1992 Supp (1) SCC 335 W.P. (CRL.) 1335/2020 & conn. matters. page 9 of 25 offence is disclosed in the complaint since the disputes are essentially of a civil nature, which are pending in various courts and in arbitral proceedings; and moreover, the filing of the section 156(3) Cr.P.C. application as well as the registration of FIR are attended by mala fides and therefore the FIR deserves to be quashed;

(i) that a closer look at the transactions from which the disputes have arisen will show that the offences alleged, even if taken at face value, do not have any proximate connection with Delhi but the FIR has been registered in this jurisdiction.

8. Mr. Siddharth Luthra, learned senior counsel and by Mr. Pramod Kumar Dubey, learned counsel appear on behalf of respondent No. 2/complainant in the various petitions; and oppose the issuance of notice and grant of interim relief vis-à-vis the subject FIR. The principal contentions raised by Mr. Luthra are :

(a) that a petition under Articles 226/227 of the Constitution of India read with section 482 Cr.P.C. is not maintainable as a challenge to an order made under section 156(3) Cr.P.C., since such an order is amenable to revision under sections 397 and 401 Cr.P.C., as held by this court in Nishu Wadhwa vs. Siddharth Wadhwa & Anr. : (2017) 236 DLT 612.

Reference in this regard is drawn to para 6 of the said judgment;

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(b) that since an FIR has already come to be registered in compliance of the impugned order under section 156(3) Cr.P.C., the prayer for setting-aside the order is now infructuous;

(c) that the transactions which form subject matter of the complaint relate to a period from 2011 onwards, when the complainant was very much involved in the business of the various corporate entities; and therefore has knowledge of such transactions and is accordingly competent to file the

complaint.

9. For reference, the concluding portion of the impugned order reads as under :

" ***** As per the Action Taken Report (ATR), IO has contacted the alleged accused persons who have informed that some civil proceedings are pending between the parties and apart from this, some arbitration proceedings are also pending.

***** "After hearing the detailed argued of Id counsel for complainant as well as going through the record, the allegations points towards deep conspiracy which not only have ramification qua the complainant and the alleged victim companies but may lead to unearthing large scale money laundering activities being done by the accused persons. Hence without commenting upon the merits of averments in the complaint or the reply filed by the IO, I am satisfied that from the contents of the complaint and material available on record, prima facie cognizable offences appears to have been committed. Further, since recovery of cheated amount is to be made and the complainant would not have been able conduct W.P. (CRL.) 1335/2020 & conn. matters. page 11 of 25 detailed investigation which includes collecting records of companies and banking channel therefore, I am satisfied that FIR is required to be registered in the present matter to unearth the truth.

"Taking into consideration all the facts and circumstances, SHO, P.S EOW is directed to register FIR under appropriate sections uninfluenced by sections and the names of accused mentioned in the complaint and investigate in accordance with law."

(emphasis supplied)

10. Considering the shrill nature of the disputes, as is evident from the multiple petitions filed in this court as also the multiple civil litigations pending inter-se the parties across the globe, this court considers it appropriate to briefly recapitulate, even at the stage of issuing notice on the present petitions, the legal considerations to be factored-in for quashing an FIR. In this regard, reference may be made to certain judicial precedents that throw valuable light on the legal principles involved.

11. In Lalita Kumari (supra) the Supreme Court has said this:

"120. In view of the aforesaid discussion, we hold:

***** "120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

***** "120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes W.P. (CRL.) 1335/2020 & conn. matters.
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(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry."

(emphasis supplied)

12. In State of Karnataka vs . L. Muniswamy⁴ the Supreme Court observed that :

"7. The second limb of Mr Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that:

***** "Section 482 of the New Code, which corresponds to Section 561-A of the Code of 1898, provides that:

"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or other wise to secure the ends of justice."

In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil (1977) 2 SCC 699 W.P. (CRL.) 1335/2020 & conn. matters. page 13 of 25 and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or

persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

(emphasis supplied)

13. In Bhajan Lal (supra), which is the leading case on the power to quash proceedings under section 482 Cr.P.C., the Supreme Court has laid down 7 categories of cases in which it would be legally justified to quash an FIR, the relevant ones of which are :

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(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.

W.P. (CRL.) 1335/2020 & conn. matters. page 14 of 25 (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) ***** (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."

(emphasis supplied)

14. Then again, in State of Karnataka vs. M. Devendrappa⁵, the Supreme Court has guided the High Courts to exercise their inherent power thus :

"6. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle *quando lex aliquid alicui* (2002) 3 SCC 89 W.P. (CRL.) 1335/2020 & conn. matters. page 15 of 25 *concedit, concedere videtur et id sine quo res ipsae esse non potest* (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

***** "8. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an

instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana vs. Bhajan Lal. A note of caution was, W.P. (CRL.) 1335/2020 & conn. matters. page 16 of 25 however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows: (SCC pp. 378-79, para 102) ***** "

(emphasis supplied)

15. In Imtiyaz Ahmad vs. State of U.P. & Ors. 6 the Supreme Court has dealt with a case of stay of investigation and has said this :

"55. Certain directions are given to the High Courts for better maintenance of the rule of law and better administration of justice: While analysing the data in aggregated form, this Court cannot overlook the most important factor in the administration of justice. The authority of the High Court to order stay of investigation pursuant to lodging of FIR, or trial in deserving cases is unquestionable. But this Court is of the view that the exercise of this authority carries with it the responsibility to expeditiously dispose of the case. The power to grant stay of investigation and trial is a very extraordinary power given to the High Courts and the same power is to be exercised sparingly only to prevent an abuse of the process and to promote the ends of justice. It is therefore clear that:

(i) Such an extraordinary power has to be exercised with due caution and circumspection.

(ii) Once such a power is exercised, the High Court should not lose sight of the case where it has exercised its extraordinary power of staying investigation and trial.

(iii) The High Court should make it a point of finally disposing of such proceedings as early as possible but preferably within six months from the date the stay order is issued."

(emphasis supplied)

16. Another precedent that deserves attention is the verdict in Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors.7, in which (2012) 2 SCC 688 (1998) 5 SCC 749 W.P. (CRL.) 1335/2020 & conn. matters. page 17 of 25 the Supreme Court has said the following in relation to setting criminal law into motion:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused.

***** "30. It is no comfortable thought for the appellants to be told that they could appear before the court which is at a far off place in Ghazipur in the State of Uttar Pradesh, seek their release on bail and then to either move an application under Section 245(2) of the Code or to face trial when the complaint and the preliminary evidence recorded makes out no case against them. It is certainly one of those cases where there is an abuse of the process of the law and the courts and the High Court should not have shied away in exercising their jurisdiction. Provisions of Articles 226 and 227 of the Constitution and Section 482 of the Code are devised to advance justice and not to frustrate it. In our view the High Court should not have adopted such a rigid approach which certainly has led to miscarriage of justice in the case. Power of judicial review is discretionary but this was a case where the High Court should have exercised it."

W.P. (CRL.) 1335/2020 & conn. matters. page 18 of 25 While in Pepsi Foods (*supra*) the petitioners had challenged a summoning order and had sought quashing of a criminal complaint under section 200 Cr.P.C., this court would think that if summoning of an accused by a court has been held to be a "serious matter", not to be done merely on the formal statements of a witness or two, ordering registration of an FIR by issuing a direction under section 156(3) Cr.P.C. is also an equally grave issue; and ought not to be ventured in a cavalier way, by a perfunctory and non-reasoned order, especially in the face of a status report of the investigating agency saying that the offences alleged have not been substantiated upon a preliminary enquiry.

17. Furthermore, the principles for invocation of the power under section 156(3) Cr.P.C. directing registration of an FIR also need to be considered. These have been expatiated by the Supreme Court *inter-alia* in Priyanka Srivastava (*supra*), where the Supreme Court has observed as under:

"22. In Anil Kumar v. M.K. Aiyappa, the two-Judge Bench had to say this: (SCC p. 711, para 11) "11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed examined the requirement

of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be W.P. (CRL.) 1335/2020 & conn. matters. page 19 of 25 sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

***** "27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the Bank. We are absolutely conscious that the position does not matter, for nobody is above the law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) CrPC and also there is a separate procedure under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

***** "29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same. "30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the W.P. (CRL.) 1335/2020 & conn. matters. page 20 of 25 learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

"31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

(emphasis supplied)

18. Testing the impugned order on the touchstone of the precepts laid down by the Supreme Court in Priyanka Srivastava (supra), clearly the order under section 156(3) Cr.P.C. is seriously wanting.

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19. While in one breath the complainant says that the appropriate remedy against an order under section 156(3) Cr.P.C. is a revision petition under sections 397/401 Cr.P.C., at the same time he also contends that the challenge to the order under section 156(3) Cr.P.C. is now infructuous since an FIR has already been registered. Accordingly, this petition may even be entertained as one seeking only the quashing of the subject FIR.

20. Be that as it may, all objections, including as regards the maintainability of the present petition, are kept open for the time being.

21. Issue notice.

22. Mr. Sanjay Lao, learned ASC enters appearance on behalf of respondent No. 1/Govt. of NCT of Delhi; accepts notice; and seeks time to file status report.

23. Mr. Siddharth Luthra, learned senior counsel appears on instructions of Mr. Anurag Andley, Advocate on behalf of respondent No. 2/Subhash D. Chaudhary in W.P. (Crl.) Nos. 1335/2020, 1336/2020 and 1338/2020; accepts notice ; and seeks time to file counter affidavit.

24. Mr. Pramod Kumar Dubey, learned counsel enters appearance on behalf of respondent No. 2/Subhash D. Chaudhary in W.P. (Crl.) No. 1339/2020; accepts notice; and seeks time to file counter affidavit.

25. Let status report/counter affidavit be filed within 03 weeks; response/rejoinder thereto, if any, be filed within 02 weeks thereafter, with advance copies to the opposing counsel.

26. List on 23.10.2020.

W.P. (CRL.) 1335/2020 & conn. matters. page 22 of 25 Crl. M.A. No.11781/2020 in W.P. (Crl.) 1335/2020 (for stay) Crl. M.A. No.11788/2020 in W.P.(Crl.) 1336/2020 (for stay) Crl. M.A. No.11792/2020 in W.P.(Crl.) 1338/2020 (for stay) Crl. M.A. No.11796/2020 in W.P.(Crl.) 1339/2020 (for stay)

27. By way of these applications, the petitioners seek stay of investigation in the subject FIR.

28. Issue notice.

29. Counsel as above, accept notice.

30. Status report/reply be filed within 03 weeks; rejoinder/s thereto, if any, be filed within 02 weeks thereafter, with advance copies to the opposing counsel.

31. On a prima-facie view of the averments made in the petitions, as supported by the documents filed along therewith; and the submissions made at the bar, this court is persuaded by the following position :

(a) that there is no discussion, nor any reasoning, nor any inferences contained in the impugned order that would show application of judicial mind, on the basis of which the direction has been issued for registration of the subject FIR;

(b) that though an affidavit as mandated by the Supreme Court in Priyanka Srivastava (supra) has not been filed in support of the application under section 156(3) Cr.P.C., professedly by reason of the prevailing lockdown due to the coronavirus pandemic, and although this defect may be curable, the fact remains that the application has been finally allowed without fulfilling this requirement. As a result the applicant has not owned-up to the contents of the application;

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(c) that there is no dispute that there are no less than 19 civil proceedings pending inter se various parties in connection with multiple, complex investments and corporate transactions, in various forums around the world since 2016; and that therefore the subject FIR is founded upon what is essentially a commercial dispute of a civil nature arising from corporate/commercial transactions;

(d) that immediately upon a favourable order being made under section 156(3) Cr.P.C. and the registration of the subject FIR, the contesting corporate group has

vidé e-mail dated 23.08.2020 sent intimation to the Arbitral Tribunal before which proceedings are pending inter-alia seeking stay of all proceedings and citing "clear and complete overlap of issues between the court ordered police investigation and the present arbitration"; and in fact suggesting that "the case being one of "serious fraud", the same may not be capable of arbitration and is one that requires investigation by the police authorities /criminal justice system in India.". From this communication it is evident that the effort is clearly to stall the arbitral proceedings which are underway before the Tribunal;

(e) that, without a shadow of doubt, the consequence of registration of the subject FIR is grave and serious inasmuch as it sets into motion a complex, and likely coercive, investigative process, which will lead almost inevitably to the arrest of the accused persons. In cases where corporate fraud is alleged, the promoters, directors and all members of the senior management of the implicated corporate entities get exposed to imminent W.P. (CRL.) 1335/2020 & conn. matters. page 24 of 25 threat of arrest. Such action would have an immediate domino effect in this case on all civil proceedings pending between various corporate entities; and would act as a sure-shot tool of bringing tremendous pressure upon the petitioners to capitulate and succumb to the demands that are subject matter of the dispute between the parties.

32. In view of the above discussion, this court is persuaded to think that impugned order dated 17.08.2020 and FIR dated 19.08.2020 registered as a consequence, are required to be examined in more detail in the backdrop of the law laid down by various judgments cited above. Prima-facie the impugned order appears to suffer from non- application of mind and lack of reasoning; and the registration of the FIR appears to be an act of misuse and abuse of the machinery of criminal law for ulterior motive and therefore informed by mala fidés. In the circumstances, to permit investigation or proceedings to go on pursuant to the subject FIR does not appear to be justified.

33. In this view of the matter, without expressing any opinion on the merits of the case, the operation of the impugned order and further investigation arising from the subject FIR is stayed till the next date of hearing.

34. List on 23.10.2020.

ANUP JAIRAM BHAMBHANI, J.

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