

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 11TH DAY OF JULY 2023 / 20TH ASHADHA, 1945

CRL.MC NO. 6042 OF 2022

AGAINST THE ORDER IN CC NO.417/2021 OF CHIEF JUDICIAL MAGISTRATE,
ALAPPUZHA

PETITIONER/ACCUSED NOS.2 AND 3 :-

- 1 ASHOK KUMARAN @ SABU C, AGED 62 YEARS
S/O CHANDRASEKHARA PILLAI KARUVACHAM
VEETIL HOUSE, PUTHENSANKETHAM
THEVALAKKARA, KOLLAM, PIN - 691590

- 2 D. HARIKUMAR, AGED 58 YEARS
S/O G. DAMODARAN NAIR MAVILIL BUILDING
NO.15, PERANNE WEST CHANGANASSERY,
KOTTAYAM PRESENTLY RESIDING AT 1ST
FLOOR, BUILDING NO.40, AL HITMI VILLAGE
C RING ROAD, UMM GHUWAILINA, DOHA,
QATAR-55436, PIN - 686101

BY ADVS.

G.HARIKUMAR (GOPINATHAN NAIR)
AKHIL SURESH

RESPONDENTS/COMPLAINANT & DE FACTO COMPLAINANT :-

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031

- 2 SEBY ANTONY, AGED 54 YEARS
S/O DAVID ANTONY, ARUKKATTIL HOUSE, POOMKAVU
PATHIRAPPALLY VILLAGE, ALAPPUZHA, PIN - 688521

SMT. NEEMA T V, SR. PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
11.07.2023, ALONG WITH Cr1.MC.5901/2022, THE COURT ON THE SAME
DAY PASSED THE FOLLOWING:

Crl.M.C No. 5901 of 2023 & 6042/2022

:2:

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
TUESDAY, THE 11TH DAY OF JULY 2023 / 20TH ASHADHA, 1945
CRL.MC NO. 5901 OF 2022
AGAINST THE ORDER IN CC NO.417/2021 OF CHIEF JUDICIAL MAGISTRATE,
ALAPPUZHA

PETITIONER/ACCUSED 1 :-

1 B RAVINDRAN PILLAI @ DR RAVI PILLAI
AGED 68 YEARS
S/O BALAKRISHNA PILLAI RAVIGEETHAM,
KADAPPAKADA, KOLLAM PRESENTLY RESIDING AT
VILLA NO.1316, ROAD NO. 7921,
BLOCK NO.579, AI JANABIYAH,
BAHRAIN-11953, PIN - 691008

BY ADVS.
G.HARIKUMAR (GOPINATHAN NAIR)
Seby Cicily Antony
AKHIL SURESH
ANU BALAKRISHNAN NAMBIAR
ATHUL M.V.

RESPONDENTS/COMPLAINANT & DE FACTO COMPLAINANT :

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
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S/O DAVID ANTONY, ARUKKATTIL HOUSE,
POOMKAVU PATHIRAPPALLY VILLAGE,
ALAPPUZHA, PIN - 688521

Cr1.M.C No. 5901 of 2023 & 6042/2022

:3:

SMT.NEEMA T.V. , SR.PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 11.07.2023, ALONG WITH Cr1.MC.6042/2022, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

"CR"

ORDER

These petitions are filed under Section 482 of the Code of Criminal Procedure ("the Code" for the sake of brevity), seeking to quash all further proceedings in C.C.No. 417/2021 on the file of the Chief Judicial Magistrate court, Alappuzha.

2. The petitioner in Crl.M.C.No. 5901/2022 is the 1st accused, and the petitioners in Crl. M.C.No.6042/2022 are the accused Nos. 2 and 3 in C.C.No.417/2021 in the above case. They are facing prosecution for having committed offences punishable under Sections 420, 468, and 471 r/w. Section 34 of the IPC.

3. Short facts are as under

a. In the complaint lodged by the 2nd respondent before the NRI Cell of the Kerala Police, it is alleged that he had worked as Manager in M/s Nasser S Al Hajri and Partners General Trading and General Contracting Company (hereinafter referred to as "Al Hajri GCC"), a company owned by the

1st accused. It is further alleged that Nasser S Al Hajri Corporation (hereinafter referred to as "Al Hajri Corp") is another company owned by the 1st accused, with a presence only in Saudi Arabia. Al Hajri Corp is not entitled to take contract work in Kuwait. In order to secure a work contract in Kuwait, the accused is alleged to have created a bogus identity as a Subcontractor of Flour Daewoo and Hyundai for a project with Kuwait Petroleum. It is further alleged that Al Hajri Corp manipulated records and forged the signatures of over 2,000 employees of Al Hajri GCC and made the employees work on the project. It is further alleged that employees of Al Hajri GCC were not eligible to work on the project and were not eligible for Workmen's Compensation under the Insurance Scheme. The accused is also alleged to have forged the documents to make it appear that Al Hajri GCC had an endorsement certificate of insurance policy from a Kuwaiti Insurance Company for its employees, including the complainant. The complainant and other employees were issued fake identity cards with insurance policy details. As per the law in force in Kuwait, all the employees of a contracting company are required to have a valid insurance policy for their workmen who are engaged at the site. While

working on the project, the complainant was allegedly diagnosed with a pathological illness/occupational hazard. He had to be hospitalized for extended periods. He raised a claim for insurance, which was rejected on the ground that he was not covered under a valid insurance policy.

b. On the strength of the above complaint, Crime No.949/2018 was registered by the Alappuzha North Police Station on 19.4.2018. It appears that the Crime was transferred to the Kollam West Police Station, and the same was re-transferred to the Alappuzha North Police Station. Finally, Annexure-A7 final report was submitted on 1.7.2019, wherein it is stated that though the investigation conducted by the police and the witness statements disclosed that the de-facto complainant was persuaded to work in the company by making him believe that he was covered under an Insurance Scheme, the police is not able to come to a conclusion as to the place of occurrence of the offence. Accordingly, the case was referred to as a "mistake of fact," and requested the Court to remove the case from the file.

c) On receipt of summons from the court, the complainant approached the learned Magistrate and filed a protest complaint. The learned

Magistrate recorded the sworn statement of the complainant and two of his witnesses. After conducting a preliminary inquiry, the learned Magistrate was of the view that the statement of the complainant, witnesses, and the documents produced by the complainant disclosed that there are sufficient grounds to proceed against the accused for having committed the offences punishable under Sections 420, 468 and 471 r/w. Section 34 of the IPC. The learned Magistrate also took note of the statement of the investigating officer that the investigation disclosed that the accused persons have committed the crime and therefore decided to take cognizance and registered the case as C.C.No.417/2021.

d) The above order is under challenge.

4. Sri. Nagamuthu, the learned Senior counsel appearing for the 1st accused, has raised the following contentions:

- A close reading of the complaint would disclose that the allegation is that the complainant was employed with the company Al Hajri GCC. It is the Company which is to take Insurance Policy for its workmen. If the company has failed to take a policy, only the company can be made

liable and not the petitioner herein. At any rate, if by the acts of the company, any extant law in Kuwait was violated, action ought to have been initiated in the foreign country and not in India.

- The petitioner's employer, the Company, who benefited from the illicit activity, has not been implicated in the case. Given that vicarious liability does not apply in criminal law, the prosecution of the 1st defendant, the Managing Director, is unjustifiable.
- The specific allegation is that a Kuwait-based company failed to take an Insurance Policy in Kuwait as mandated by the laws of Kuwait. The said act is not an offence as per the Indian Penal Code, as the alleged omission occurred in Kuwait and was committed by a company that is not a citizen of India. To substantiate that a company, though a juristic person is not a citizen of India, reliance is placed on **State Trading Corporation of India, Ltd. v. CTO**¹. If that be the case, the principal officers of the company cannot be tried as no offence has been committed by them, which is punishable under the IPC.

¹ (1964) 4 SCR 99

- As Section 4 of the IPC is not applicable to a foreign company, there was no legal basis on the part of the learned Magistrate in directing the complainant to approach the Central Government for sanction under Section 188 of the Cr.P.C.
- Placing reliance on the law laid down in **Sunil Bharti Mithal v. CBI** ², it is submitted that if an offence requiring mens rea is committed, the mens rea of the alter-ego, i.e., the persons in charge of the affairs of the company and who act on behalf of the company has to be attributed to the company. However, both the company as well as the alter-ego must be prosecuted. The failure of the complainant to prosecute the accused is, therefore, illegal.
- Only if the persons in charge of the affairs of the company commit an individual overt act while acting on behalf of the company can they be prosecuted. In the case on hand, no specific overt act has been attributed to any of the accused that they acted on behalf of the company. On that count as well, the prosecution of the accused is

² (2015) 4 SCC 609

unsustainable under the law.

- The order taking of cognizance by the learned Magistrate is silent as to whether the decision to take cognizance and issue summons was taken on the materials available in the final report made under Section 173(2) or on the materials made available by the complainant in the inquiry under Section 200. A second complaint will lie only if there was any manifest error or manifest miscarriage of justice in the previous order or if the complainant relies on new facts or materials which were not to his knowledge or, with reasonable diligence, could not have been brought forward in the previous proceedings.
- No material has been adduced to substantiate that the complainant had lodged a claim for compensation and that the claim was rejected. Even if the claim was rejected, the complainant has not disclosed the reason for the rejection of the claim. The complaint is vague and false and did not warrant the taking of cognizance by the learned Magistrate.
- Even if the allegations in the complaint are accepted in its entirety, there is no material to show that the accused had made any representation to

the complainant to take up employment in the Kuwait company or the manner in which the complainant was deceived. Even the statement of the witnesses does not disclose any deception or fraudulent inducement on the part of the accused, which persuaded the de-facto complainant to do or omit to do anything, if which he would not do or omit if he were not so deceived. On that sole ground, the taking of cognizance of the offence under Section 420 of the IPC is bad.

- Under no circumstances would an offence under Section 468 be attracted in the instant case. There is no whisper of an allegation in the complaint or in the evidence adduced before the learned Magistrate to bring out that a false document was allegedly made and that the manner in which the said document was made. If that be the case, the learned Magistrate was not justified in taking cognizance of the offence under Sections 468 and 471 of the IPC.

5. Sri Harikumar, the learned counsel appearing for the accused Nos. 2 and 3, adopted the contentions of the learned Senior Counsel. He would

make the following additional submissions.

- No part of the cause of action has arisen within the local jurisdiction of the learned Magistrate. The complainant was employed in Kuwait, and the allegation is that the employment was not in compliance with the law in Kuwait. There is no case that the Kuwaiti authorities have initiated any legal prosecution against the complaint or its principal officers. The question of non-compliance with the laws in Kuwait cannot be raised before an Indian Court, which has no jurisdiction.
- No cogent material was placed before the Court for it to conclude that the petitioner had lodged a claim and that the same was rejected by the Insurance Company. Even in the brief statement given before the court, nothing of relevance was stated. However, the Court proceeded to take cognizance.
- Apart from the complainant, the witnesses examined before the learned Magistrate is his wife and brother-in-law. They merely parroted his version. Without applying his mind to whether the allegations make out a prima facie case, process was issued to the accused.

- Other than an allegation that the accused Nos. 2 and 3, are working in the company registered in Kuwait, there is no whisper as to how and in what manner the allegation would constitute an offence against them.

6. The de-facto complainant appeared in person and advanced his contentions.

- A refer report was submitted by the police. Upon reading the report, it is clear that the police have concluded, after questioning nine witnesses, that the accused has committed some offence. However, the police referred the matter on the ground that they were unable to ascertain the location of the crime.
- The accused are Indian Citizens, and they have, with fraudulent intent, persuaded the informant and several others to work on a project in Kuwait without insurance coverage. If that is the case, section 4 of the IPC would squarely apply, and the accused would be amenable to the laws of India.
- It is further stated that if the accused had taken valid insurance for the

work in Kuwait, the informant would have been covered under a claim, and he would have obtained compensation for the work-related ailment suffered by him.

- The 1st accused is a well-known and affluent businessman, and it is in order to save his skin that the police have referred the matter to give a clean chit.
- He has also referred to a detailed argument note wherein all the factual matters are detailed, and it is argued that the contentions advanced by the counsel appearing for the accused and the documents produced by them are either false or cooked up.

7. I have carefully considered the submissions advanced and have gone through the records.

8. Both sides have produced extensive records before this Court. However, the question before this Court is whether the learned Magistrate was justified in issuing the process to the accused on the basis of the available materials.

9. Before delving into the merits of the arguments advanced by both sides, it would be apposite to bear in mind the principles laid down in **Pepsi Foods Ltd. v. Special Judicial Magistrate**³, wherein it was held that the summoning of an accused in a criminal case is a serious matter and the learned Magistrate before issuing process shall endeavor to apply his mind to the facts of the case. It was held as follows in paragraph 28 of the judgment.

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 scrutinize 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

³ (1998) 5 SCC 749

prima facie committed by all or any of the accused.

10. Quite recently, in **Sunil Todi and Others v State of Gujarat and Another**⁴, the Apex Court had occasion to refer to the past precedents, and it was observed as under in paragraph 39 of the judgment:

39. This Court has held that the Magistrate is duty bound to apply his mind to the allegations in the complaint together with the statements which are recorded in the enquiry while determining whether there is a prima facie sufficient ground for proceeding. In **Mehmood UI Rehman v. Khazir Mohammad Tunda** (2015) 12 SCC 420, this Court followed the dictum in **Pepsi Foods Ltd. v. Special Judicial Magistrate** (1998) 5 SCC 749 and observed that setting the criminal law in motion against a person is a serious matter. Hence, there must be an application of mind by the Magistrate to whether the allegations in the complaint together with the statements recorded or the enquiry conducted constitute a violation of law. The Court observed:

“20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute

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violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. v. Judicial Magistrate [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter.”

“22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court.

11. With the above principles in mind, I have carefully gone through the materials. As stated earlier, a reading of the protest petition would disclose that the complainant has arrayed three persons in their individual capacity. In the complaint, it is stated that the petitioner was employed with Al Hajri GCC, which is owned by the 1st accused. The allegation against accused Nos. 2 and 3 is that they are closely associated with the 1st accused, and they were

managing many of the companies, including the one in which the petitioner is employed. The company is alleged to have created a bogus identity to secure a work contract in Kuwait by deceiving the main contractor and possibly the Kuwaiti Government, and they were made to believe that the company is a legitimate subcontractor. Ineligible employees were allegedly made to work on the project. The company is also alleged to have forged the signatures of over 2,000 employees of Al Hajri GCC. The specific allegation raised by the complainant in paragraph No. 3 reads as under:

“So in nutshell Nasser Al Haji owned by the 1st accused by way of manipulated records and forged signature of over 2000 employees of Ms Nasser S Al Hajiri and Partners General Trading and General Contracting Company make them to work in the project. In fact, Ms Nasser S Al Hajiri and Partners General Trading and General Contracting Company is not in the project, consequently its employees including the complainant are not eligible for workmen compensation under insurance claim. (sic)

12. What is discernible from the allegations in the complaint is that the fabrications and manipulations were carried out by the Company. However, wrongdoing is attributed to the accused on the premise that they are the

owner and his employees. No specific allegation has been raised in the complaint that the accused had occasion to induce the de-facto complainant either in person or through some other mode to take up employment in the company by assuring him that all the employees are covered by a policy of insurance and that it was by believing their words that he had taken up the engagement. In other words, except for saying that the accused are the owner and his employees, the complainant does not ascribe any incriminating role to the accused.

13. The circumstances under which the Director or the person in charge of the affairs of the company could also be prosecuted were dealt with by the Hon'ble Apex Court in **Sunil Bharti Mittal v. CBI**⁵. While explaining the principle that the criminal intent of the "alter-ego" of the company, that is, the personal group of persons that guide the business of the company, could be imputed to the company/corporation, the Apex Court, relying on the observations in **Iridium India Telecom Ltd. v. Motorola Inc.**⁶ observed that if the person or group of persons who control the affairs of the company

⁵ (2015) 4 SCC 609

⁶ (2011) 1 SCC 74

commit an offence with criminal intent, their criminality can be imputed to the company as well, as they are "alter ego" of the company. It was held as follows in paragraphs 42 and 43 of the judgment.

42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

14. In **Maksud Saiyed v. State of Gujarat**⁷, an identical issue had come up for consideration. It was held as follows in paragraph 13 of the judgment.

⁷ (2008) 5 SCC 668

13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists on that behalf in the statute. Statutes indisputably must contain provisions fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.”

15. It would also be profitable to take note of the observations in **GHCL Employees Stock Option Trust v. India Infoline Ltd.**⁸ wherein it was observed as under in paragraphs 19 and 21:

“19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. [Thermax Ltd. v. K.M. Johny [(2011) 13 SCC 412.]

⁸ (2013) 4 SCC 505

21. In the instant case, the High Court has correctly noted that issuance of summons against Respondents 2 to 7 is illegal and amounts to abuse of process of law. The order† [Ed.: The reference is to Nirmal Bhanwarlal Jain v. GHCL Employees Stock Option Trust, (2010) 114 DRJ 451] of the High Court, therefore, needs no interference by this Court.”

16. The neat principles derived from the jurisprudence established by the Honorable Supreme Court in the aforementioned judgments are as follows.

- a. It is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.
- b. A corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy.
- c. If the individuals controlling a company, often referred to as the company's "alter ego", commit a crime with intent, their actions and ensuing legal repercussions can be attributed to the corporation itself. In other words, the company can be held accountable for the criminal conduct of its leadership.

d. An individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent.

e. The individual who happens to be the director of a Company can be implicated in those cases where the statutory regime itself attracts the doctrine of vicarious liability by specifically incorporating such a provision. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

f. In scenarios where jurisdiction is exercised based on a complaint filed under Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate has to pose unto himself the question as to whether the complaint, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the directors were personally liable for any offense.

g. In case the Magistrate chooses to issue summons to the Directors, it is obligatory to record his satisfaction about the prima facie case against the accused and the role played by them in the capacity of Managing Director, Company Secretary, or Directors. The same is a sine qua non for initiating criminal action against them.

17. Upon scrutinizing the facts of the case in the light of the principles above, I have no doubt in my mind that the materials placed by the party respondent through the complainant, by examining himself and two other

witnesses, contain no substantive material to indicate that the petitioners have personally and with criminal intent committed any act to deceive the complainant. The company, which is alleged to have procured a contract through fraudulent manipulation of records, has not been arrayed as an accused. The learned Magistrate has not applied his mind to the facts and materials presented to conclude at least prima facie that the accused were personally liable for any act allegedly done by the company. The learned Magistrate has also not recorded his satisfaction about the prima facie case against the accused and the role played by them in the capacity of Managing Director, Company Secretary, or Directors. As the same is a sine qua non for initiating criminal action against them, the order issuing process is liable to be reversed for the above reasons.

18. I also find, after perusing the complaint and also the sworn statements of the complainant, his wife, and brother-in-law, who were examined by the learned Magistrate, that there is no material to show that the petitioners had fraudulently induced the complainant to take up employment by giving false assurances and being persuaded by their words he had joined

the company. All that is mentioned is that a contract was procured by violating the provisions of laws prevailing in a foreign country and nothing more. As held by the Apex Court in **Ram Jas v. State of U.P.**⁹, the ingredients required to constitute the offense of cheating are—

- (i) there should be fraudulent or dishonest inducement of a person by deceiving him;
- (ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or
- (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and
- (iii) in cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

All the ingredients above being absent in the complaint, there was no way in which the learned Magistrate could have issued the process even otherwise.

19. Insofar as the offense under Sections 468 and 471 of the IPC is

⁹ (1970) 2 SCC 740

concerned, Section 468 of the IPC penalizes a person for committing forgery for the purpose of cheating, and Section 471 of the IPC penalizes a person for using as genuine a forged document. Forgery is defined in Section 463 of the IPC. Forgery involves making any false document or part of a document with the intention to cause damage or injury to the public or to any person or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed. Making a false document is the basic ingredient of forgery. Making of a false document must involve any of the three ingredients under Section 464 of the IPC. They are: (1) Making of a document which may include an electronic record or part of an electronic record with the intention of causing it to be believed that it was made by the person by whom the maker knows that it was not made, or (2) Altering a document or an electronic record in any material part without lawful authority after it was made, or (3) Causing any other person to execute or alter a document or an electronic record knowing that such person does not know the contents of the document and the nature of the alteration by reason of unsoundness of mind

or intoxication. There are absolutely no materials either in the complaint or in the statement given by the witnesses to the effect that the petitioners herein made a false document or the manner and mode in which it was made or that they had altered any document or caused any person to execute any document. In that view of the matter, I am of the considered opinion that the learned magistrate has erred in taking cognizance and issuing process to the accused.

20. There is yet another matter. This Court in **Parameswaran Nair v. Surendran and another**¹⁰ has detailed the procedure to be followed by a Magistrate when after submission of the refer report by the police, a protest complaint is filed. Paragraphs 18 and 19 are illuminative, and the same reads as under:

18. When the Magistrate issue notice to the complainant on receipt of the final report and grants the opportunity to the complainant to show why cognizance of the offence is to be taken and the complainant files a protest complaint, it is to be treated only as his objections to the final report, stating his reasons why the report cannot be accepted. If the Magistrate records his statement and that of the witnesses and decides to take cognizance of the offence, after

¹⁰ (2009 (1) KLT 794)

considering all the materials including the final report made by the police under sub-Section 2 of Section 173, it is advisable for the Magistrate to record that the final report is not accepted and on the entire materials he is of the opinion that there is ground to proceed and issue summons under Section 204 of Code of Criminal Procedure. But the fact that no specific order was recorded that final report is not accepted or fact that the decision to take cognizance of the offence and issue process was recorded in the protest complaint, by themselves are not fatal, if the records show that Magistrate has considered all the relevant materials and applied his mind. If after complying these procedures, an order not to take cognizance is passed by the Magistrate, then a second complaint will lie, only if there was any manifest error or manifest miscarriage of justice in the previous order or the complainant relies on new facts or materials which was not to his knowledge or with reasonable diligence could not have brought forward in the previous proceedings.

19. The order passed by the learned Magistrate is to be considered in the light of the aforesaid principles. The order is blank on whether the decision to take cognizance and issue summons was taken on the materials available in the final report made under Section 173(2) or on the materials made available by the complainant in the inquiry under Section 200. The order makes it clear that the learned Magistrate has not considered the question on the proper perspective.

21. In the case at hand, the learned Magistrate has not chosen to record that the final report is not accepted. The records also don't show that the Magistrate has considered the relevant materials and applied his mind.

Furthermore, as held by this Court, a second complaint will lie only if there was any manifest error or manifest miscarriage of justice in the previous order or if the complainant relies on new facts or materials which were not to his knowledge or with reasonable diligence could not have been brought forward in the previous proceedings.

22. As declared by the Apex Court in **Pepsi Foods Ltd.** (supra), summoning an accused in a criminal proceeding is a grave matter. It is not a mechanical process, hinging solely on the presence of two supporting witnesses for the allegations raised by the complainant. The order passed by the learned Magistrate issuing process must reflect an application of judicial mind. For the above purpose, the Magistrate will have to diligently scrutinize the allegations in the complaint, weigh the supporting oral and documentary evidence, and determine whether a prima facie case is made out against all or any of the accused. This is more so in a case where the directors of a Company are sought to be roped in for the acts committed by the Company, particularly when the Company which committed the act is not arrayed as an accused.

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In view of the discussion above, I am inclined to allow these petitions.
The order by which the process has been issued to the accused is set aside.
The complaint will stand dismissed.

All applications are closed.

Sd/-

**RAJA VIJAYARAGHAVAN V,
JUDGE**

PS/08/07/23

APPENDIX OF CRL.MC 6042/2022

PETITIONER ANNEXURES :-

- Annexure A1 TRUE COPY OF EMPLOYMENT AGREEMENT DATED 12.07.2016
- Annexure A2 TRUE COPY OF THE RESIGNATION LETTER OF THE 2ND RESPONDENT DATED 20.09.2017
- Annexure A3 TRUE COPY OF MEDICAL CERTIFICATE OF CITY CLINIC DATED 23.09.2017
- Annexure A4 TRUE COPY OF WORKMEN'S COMPENSATION POLICY DTD.18.11.2014
- Annexure A5 TRUE COPY OF WORKMEN'S COMPENSATION POLICY DTD 01.06.2017
- Annexure A6 TRUE COPY OF FIR NO 949/2018 DATED 19.04.2018 IN THE ALAPPUZHA NORTH POLICE STATION
- ANNEXURE A7 TRUE COPY OF REFER REPORT IN FIR NO.949/2018 FILED BEFORE THE CHIEF JUDICIAL MAGISTRATE COURT, ALAPPUZHA DISTRICT
- ANNEXURE A8 TRUE COPY OF ORDER IN CMP NO.2360/2019 DATED 26.11.2021 PASSED BY THE CHIEF JUDICIAL MAGISTRATE ALAPPUZHA

RESPONDENT'S ANNEXURS :-

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Crl.M.C No. 5901 of 2023 & 6042/2022

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- Annexure R2-1 True copy of the General Terms and Conditions (Rev 3), KNPC Al Zour New Refinery Project (ZOR).
- Annexure R2-2 True copy of the Signature Authorization by Ravi Pillai Dated 04 June 2017, along with a Cover letter Dated 05 June 2017
- Annexure R2-3A TRUE COPY OF THE FDH JV PROJECT ENTRY PASS APPLICATION IN RESPONDENT'S NAME, SUBMITTED BY NASSER S AL HAJRI PARTNERS COMPANY
- Annexure R2-3B True copy of the FDH JV Project HSE Training Log with Respondents name, Submitted by NASSER S AL HAJRI PARTNERS COMPANY
- Annexure R2-3C True copy of the FDH JV Project Entry Pass in the name of Respondent 2, SEBY CICILY ANTONY
- Annexure R2-3D True copy of the Email Sent by the Main Contractor FDHJV, instructing, 2nd Respondent to attend a Contract meeting on 20 August 2017
- Annexure R2-4 True copy of the Forged Version of Subcontract Endorsement No 01/560/201/224 on Insurance Policy 01/084/2015/364, Dated 19 June 2017 submitted by the Accused to the Main Contractor FDH Describing the Sub Contractor's Name as NASSER S AL HAJRI PARTNERS COMPANY, along with a Cover letter Dated 19 June 2017
- Annexure R2-5 True copy of the Communication from M/s FDH JV Dated 17 June 2017, stating M/s FDH JV does not recognize NSH Kuwait.

- Annexure R2-6 True copy of the Communication from the Petitioners to the Main Contractor M/s FDH JV, Dated 17 June 2017, Along with a Cover letter
- Annexure R2-7 True copy of the Communication from the Petitioners to the Main Contractor M/s FDH JV, Dated 18 June 2017 along with a cover letter.
- Annexure R2-8 TRUE COPY OF COMMUNICATION FROM THE MAIN CONTRACTOR M/S FDH JV, TO PETITIONERS DATED 28 JUNE 2017
- Annexure R2-9 True copy of the Real Version of subcontract Endorsement No.01/560/201/224 on insurance Policy 01/084/2015/364 dated 19 June 2017, submitted by the Accused to the Main Contractor FDH Describing the Sub Contractor's Name as NASSER S AL HAJRI Corp Co KSA along with a Cover letter Dated 03 July 2017
- Annexure R2-10 True copy of the Notice from 2nd Respondent to Kuwait Insurance Company, Dated 8/12/2017
- Annexure R2-11 True copy of the postal receipts and reply from Kuwait insurance company
- Annexure R2-12 TRUE COPY OF THE FINAL POLICE REPORT NO.764/1-2019 IN FIR 949/2018/ALAPPUZHA NORTH POLICE DATED 11 MAY 2019
- Annexure R2-13 True Copy of the order Dated 26 November 2021 by the CJM Court Alapuzha.
- Annexure R2-14 True copy of the Central Government Sanction as per proviso to CrPC 188. Request Reg Number :-0080/0010/293318/2022 Dated 27 April 2022

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Annexure R2-15 True copy of the Arab News Report, Dated 18 September 2012, wherein 12 Indian Workers employed by the Petitioners Company, were killed in an accident Enroute from work site, and 24 Fatally injured

Annexure R2-16 True Copy of the Email Complaint sent to NRI Cell by 2nd Respondent

APPENDIX OF CRL.MC 5901/2022

PETITIONER ANNEXURES :-

- Annexure A1 TRUE COPY OF EMPLOYMENT AGREEMENT DATED 12.07.2016
- Annexure A2 A TRUE COPY OF THE RESIGNATION LETTER OF THE 2ND RESPONDENT DATED 20.09.2017
- Annexure A3 A TRUE COPY OF MEDICAL CERTIFICATE OF CITY CLINIC DATED 23.09.2017
- Annexure A4 TRUE COPY OF WORKMEN'S COMPENSATION POLICY DT.18.11.2014
- Annexure A5 TRUE COPY OF WORKMEN'S COMPENSATION POLICY DT 01.08.2017
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:38:

- Annexure R2-15 True copy of the Arab News Report, Dated 18 September 2012, where in 12 Indian Workers employed by the Petitioners Company, were killed in an accident Enroute from work site, and 24 Fatally injured
- Annexure R2-16 True Copy of the Email Complaint sent to NRI Cell by 2nd Respondent
- ANNEXURE R2-17 TRUE COPY OF THE HIGH COURT ORDER DATED 28 FEBRUARY 2023, IN IA NO.2/22 IN DBP/17/2021
- ANNEXURE R2-18 TRUE COPY OF THE IMPLEADING PETITION FILED BEFORE THE DIVISION BENCH OF KERALA HIGH COURT BY THE PETITIONER, DATED 19.12.2022
- ANNEXURE R2-19 TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY MR.JIJU SREENIVASAN (POWER OF ATTORNEY, ON BEHALF OF MR.RAVI PILLAI DATED 17.01.2023 [FALSE EVIDENCE AS IN POINT NO.4, STATING NSH KUWAIT HAS INSURANCE IN PROJECT L9ZR HI 30-K 407]
- ANNEXURE R2-20 TRUE COPY OF THE REPLY BY SEBY ANTONY TO THE COUNTER AFFIDAVIT FILED BY THE PETITIONER (ACCUSED 1) DATED 22.01.2023
- ANNEXURE R2-21 TRUE COPY OF THE E MAIL COMMUNICATION BETWEEN D HARIKUMAR (3RD ACCUSED IN CC/417/2021 AND SEBY ANTONY