

**THE HIGH COURT OF SIKKIM : GANGTOK**  
(Criminal Jurisdiction)

DATED: 11<sup>th</sup> August, 2017

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**SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

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**CrI. M. C. No. 20 of 2014**

**Petitioner** : Vinay Rai,  
S/o Late Kulwant Rai,  
Aged about 65 years,  
R/o 12, Aurangzeb Lane,  
New Delhi.

**VERSUS**

**Respondent** : State of Sikkim

**AND**

**CrI. M. C. No. 21 of 2014**

**Petitioner** : Vinay Rai,  
S/o Late Kulwant Rai,  
Aged about 65 years,  
R/o 12, Aurangzeb Lane,  
New Delhi.

**VERSUS**

**Respondent** : State of Sikkim

Criminal Miscellaneous Petitions under Section 482 of the Code of  
Criminal Procedure, 1973

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**Appearance**

Mr. Shakeel Ahmed and Mr. Yogesh Kumar Sharma, Advocates  
for the Petitioner.

Mr. Karma Thinlay, Additional Public Prosecutor with Mr. S.K.  
Chettri, Assistant Public Prosecutor and Mr. Thinlay Dorjee  
Bhutia, Advocate for the Respondent.

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## O R D E R

Meenakshi Madan Rai, J.

**1.** By filing these Petitions under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.),' the Petitioner seeks quashing of the Charge-Sheet, the cognizance Order dated 5.6.2013 and subsequent proceedings of the then learned Chief Judicial Magistrate (South and West) at Namchi, in General Register Case No. 119/2013, arising out of FIR No. 51/2012, dated 1.9.2012, under Sections 420/467/471/201/120B of the Indian Penal Code, 1860 (hereinafter 'IPC'), against the Petitioner herein. (*Presently pending before the learned Judicial Magistrate (East) at Gangtok, Sikkim, as General Registrar Case No. 21 of 2013, renumbered as 819 of 2013*).

**2.** Crl. M. C No. 20 of 2014 and Crl. M.C. No. 21 of 2014 are being disposed of by this common Order, as they both pertain to the same FIR.

**3.** It is indeed pertinent to advert briefly to the background of the filing of the instant Petitions. The Petitioner along with two others, were before this Court in Crl. M. C. No. 17/2013, Crl. M. C. No. 18/2013, Crl. M.C. No. 22/2013, Crl. M.C. No.23/2013 and Crl. M.C. No. 24 of 2013, praying for quashing of the First Information Report (for short 'FIR') and the entire Charge-Sheet filed against them, under Sections 406/420/467/120B/34 of the IPC, as detailed hereinabove. This Court, on due consideration of the matter was of the view that, *prima facie*, there were sufficient materials to

continue the proceedings against the accused persons and dismissed the Petitions vide a common Order dated 15.10.2014. Against the Order of this Court, the Petitioner approached the Hon'ble Supreme Court in Special Leave to Appeal (Criminal) Nos. 8923-8924/2014, Vinay Rai vs. State of Sikkim, seeking permission to bring additional facts and file additional documents. The Supreme Court on 1.12.2014, ordered as follows;

".....  
*Mr. Kapil Sibal, learned senior counsel for the petitioner seeks leave to withdraw the special leave petition pointing out that certain documents have not been produced before the High Court and hence to rely upon those documents.*  
*He also prays for liberty to pursue appropriate remedy by placing such facts before the High Court in the matter.*  
*This special leave petition is not pressed and we have not expressed any opinion on the merits of the case. All points raised are kept open before the High Court and the High Court will decide the same in accordance with law. Liberty is granted to apply before the High Court.*  
*Special Leave Petition is dismissed as withdrawn.*  
....."

Hence, the instant Petitions filed with additional documents being Annexures P-6, P-7, P-8 and P-9 and points urged in relation to the documents and the aforestated prayer.

**4.** The Petitioner's case is that the Eastern Institute for Integrated Learning in Management University (for brevity 'EIILM University'), was established vide Notification No. 28/LD/2006 dated 3.4.2006, by enacting the "Eastern Institute for Integrated Learning in Management University, Sikkim Act, 2006 being Act No. 4 of 2006 (hereinafter 'EIILM University Act, 2006'). The sponsor of the said

University was EIILM, Kolkata, West Bengal, a Unit of Malvika Foundation, New Delhi. A Suo Motu FIR, being FIR No. 51/2012 dated 1.9.2012, under Sections 406/420/467/120'B' IPC was registered by the Station House Officer, Jorethang Police Station, South Sikkim, making various allegations against the Management of the EIILM University, where the name of the Petitioner found mention sans his specific role and position in the University. He was granted anticipatory bail vide Order of this Court dated 15.1.2013. That, he has ceased to be a Trustee of the Rai Foundation or of the Malvika Foundation, having resigned therefrom on 9.11.2001 and 22.3.2004, respectively. The Investigating Officer (for short 'I.O.') despite being seized of the matter submitted Charge-Sheet against him on 6.5.2013.

**5.** The learned Trial Court vide its Order dated 5.6.2013, took cognizance in a routine manner without application of judicial mind and summoned the Petitioner and others named therein, to face trial. The Police failed to collect any legally admissible evidence against the Petitioner and the statement of witnesses under Sections 161 and 164 of the Cr.P.C. do not support the Prosecution case. The Charge-Sheet fails to disclose what conspiracy the Petitioner had entered into and a wrongful reference has been made to a few emails responded to by the Petitioner in his advisory capacity, which were without promise of any illegal act and are not admissible in evidence. The Police have wrongfully linked the Rai Foundation Trustees therein with the Petitioner treating him as the owner/beneficiary of the Trust when the Trust is a Charitable Trust,

duly registered under Section 12 of the Income Tax Act, 1961. The EIILM University has been granted accreditation by the University Grants Commission (for short 'UGC'), under Section 22 of the University Grants Commission Act, hence, the question of the Petitioner conspiring with the EIILM University does not arise.

**6.** That, allegations in the Charge-Sheet about the pendency of Central Bureau of Investigation matters against the Petitioners are sub judice and cannot be referred to in the instant matter. That, the Police have relied on Annexure C-6, statements of the Axis Bank, to establish that large amounts of money were transferred to the Petitioner but the statements extending from 18.3.2005 to 4.4.2013 reveal that only Rs.4,49,941/- (Rupees four lakhs, forty-nine thousand, nine hundred and forty-one) only, was paid to the Petitioner by the Rai Foundation as consultancy charges. It is prayed that in the absence of any materials to make out a case against the Petitioner under any of the afore cited provisions of the IPC and there being no concept of vicarious liability in criminal proceedings, this Court may quash the proceedings as prayed.

**7.** In response, the State-Respondent averred that the Petitioner had agitated the same facts before this Court in the earlier Petitions which have been dismissed with an observation that there are *prima facie* materials against him. That, the suo motu case was registered after conducting a preliminary inquiry and obtaining permission from the government for registration of the case. That, the Petitioner appeared after four months of absconsion from the

Investigating Agency and was thereafter granted anticipatory bail. The statements of the Officers of Human Resource Development Department prove that the Petitioner was the Chairman and the Founder of Malvika Trust, duly corroborated by documentary evidence being the 'Minutes' of the relevant Meeting annexed with the Charge-Sheet.

**8.** That, upon search warrant being issued by the learned Chief Judicial Magistrate, South and West Sikkim, in connection with the case, when the Investigating Team reached the location at the Delhi Head Office, it was found abandoned, the documents and computers having been removed and the officials incommunicado. The statements of the students and other official witnesses prove that the students were cheated by the Members/Management of the EIILM University. Although, the Petitioner had in Criminal Miscellaneous Case No. 21 of 2013, denied receiving any remuneration, in contradiction thereof, he now admits receipt of certain amounts by way of remuneration. It is also averred that the Petitioner has responded to the email of one Henok Guangul, as the Head of the University rather than a Consultant. As the Petitioner is stated to be the overall In-Charge of the Rai Foundation and EIILM University, the responsibility of any action taken by the University falls on the Petitioner. That, the documents as per directions of this Court were filed in the previous matter (Annexure P-17), after which the Court being satisfied dismissed all the Petitions so filed under Section 482 of the Cr.P.C. That, in the statements recorded under

Sections 161 and 164 of the Cr.P.C., the Petitioner has been named as the overall Chairperson.

**9.** A Rejoinder was filed to the said response of the State, contending that facts and documents regarding the resignation of the Petitioner from Malvika Foundation and Rai Foundation were never pleaded or annexed with the previous Petitions and were subsequent to the Order of the Hon'ble Supreme Court. The Petitioner claims ignorance of any search operation carried out by the State-Respondent in its Delhi Office and that in the absence of any case against the Petitioner, the Petition be allowed in terms of the prayers made.

**10.** In Crl. M.C. No. 21 of 2014, the Petitioner reiterated the Orders of the Hon'ble Supreme Court dated 1.12.2014 and averred that the Investigating Agency had lodged FIR No. 92 of 2013 dated 6.5.2013, under Sections 467/468/471/181/120B of the IPC at the Sadar Police Station, Gangtok. The Petitioner herein, was named in the FIR with similar allegations as those in FIR No. 51/2012. FIR No. 92 of 2013, was challenged before this Court and quashed vide Order of this Court dated 4.6.2013. The Investigating Agency carried out further investigation under FIR No. 51/2012 and filed supplementary Charge-Sheet.

**11.** The Petitioner is, thus, aggrieved with the contents of the supplementary Charge-Sheet which alleges that one Mandeep Kaur had never attended regular classes nor visited the campus in

Sikkim but had completed the course via distance mode while the University had reflected it as regular mode. Further, she was awarded a degree by way of distance education without the approval of the Distance Education Council (for short 'DEC'). In fact, Mandeep Kaur had pursued M.A. in Education from the Directorate of Distance Learning of EIILM University, as evident from the admission-cum-examination form, duly signed by her, clearly mentioning that she is pursuing the course from distance learning mode. Her statements make no allegations against the Petitioner. The Police have falsely alleged that Mandeep Kaur obtained a government job on the basis of a degree of EIILM University, when in fact she is working in a Private College. The allegation in respect of forgery of document is also void, as the opinion of the Regional Forensic Science Laboratory confirms that the degrees of the University bear genuine signatures of its officials. It is also averred that this Court vide its Order dated 15.10.2014, wrongly held that the Petitioner is an Official of the said University, when in fact he has no hand in the affairs thereof. Pausing here, it would be relevant to point out that although the Petitioners had approached the Hon'ble Supreme Court against the said Order, no argument was raised on this point as is evident from the Order dated 1.12.2014 of the Hon'ble Supreme Court, already extracted hereinabove and agitating it before this forum is inappropriate.

**12.** The State-Respondents, thereafter, filed their response denying and disputing the grounds put forth in the Petition and averred that the instant matter was heard by this Court and vide its



Judgment dated 15.10.2014, was pleased to dismiss the Petitions of Vinay Rai and others with the following observations;

“ .....

*"15. Thus, there appears to be sufficient materials against the Petitioners to continue the criminal prosecution against them.*

.....

*19. I am of the view that prima facie there is sufficient material to continue with the proceedings against the accused persons.*

*20. The Petitions, therefore, are liable to be dismissed and are hereby dismissed.*

.....”

**13.** That, the instant Petition being similar to the previous Petitions disposed of by this Court, deserves dismissal.

**14.** Learned Counsel for the Petitioner while advancing his arguments before this Court, reiterated the submissions in the pleadings and sought to clarify that the Petitioner has been made vicariously liable in the FIR, as alleged Founder and Chairman of the Sponsoring Body and President of the Rai Foundation, as would be evident even from the Charge-Sheet. The Petitioner is nowhere involved in the running of the EIILM University, wherein the Malvika Foundation is the Sponsoring Body. Referring to Annexure P-2 dated 22.3.2004, it was urged that the Petitioner had tendered his resignation from the post of Trustee of the Malvika Foundation and Annexure P-3, the Minutes of the Meeting of the Board of Trustees held on 22.3.2004, would testify to this fact. The EIILM University was established in the year 2006, subsequent to his resignation, thus, no question of his involvement arises. Further, the Petitioner's

name does not figure in the list of Trustees dated 31.3.2005 of the Malvika Foundation.

**15.** It was next urged that Annexure P-6 dated 9.11.2001, would also clearly reveal that the Petitioner had resigned from the Board of Trustees of the Rai Foundation, while Annexure P-7 the Minutes of the Meeting of the Board of Trustees held on 9.11.2001, establishes acceptance of his resignation. That, Annexure P-8 the Income Tax Returns of the Rai Foundation, does not bear the Petitioner's name as a Trustee. That, Annexure P-9 would indicate that his email was [vinay.ra@raifoundation.org](mailto:vinay.ra@raifoundation.org).

**16.** It was further canvassed that the occupation of the Petitioner as per the FIR is Chairman ASSOCHAM, with no association with Malvika Foundation or the EIILM University, apart from which no allegations have been made individually against the Petitioner in the FIR. Drawing the attention of this Court to Annexure P-12, learned Counsel would argue that that Mrs. Deepa Basnett, Director, Higher Education, Human Resource Development Department, had attended the Board of Governors Meeting held on 30.7.2012, at Uttarakhand, where the Petitioner was referred to as the Founder and Chairperson of EIILM University but at the relevant time he was not associated with the EIILM University and had merely gone to deliver a welcome address. Besides, Annexure P-17, Prospectus of the Distance Education Programme, does not bear his name. Clarifying the naming of the Petitioner in the Section 161 Cr.P.C. statement of Col. (Retd.) Alok Bhandari, as the 'Advisor' and

'overall In-Charge' of the EIILM University, it was contended that no such designations exist but being a Member of the ASSOCHAM, he used to advise the University. As per learned Counsel, in the statement of O.B. Vijayan, it is apparent that the Police have inserted the word 'owner' subsequently, following the Petitioner's name, to his detriment, when in fact he is not the owner.

**17.** That, although in Annexure P-III, the Petitioner has been addressed as Founder Chairman of the Sponsoring Body, it would not imply that the position would subsist for his life time, thus the statement of Mrs. Deepa Basnett is highly prejudicial to him. Annexure R-6 relied, on by the State-Respondent showing payment of Rs.6,00,00,000/- (Rupees six crores) only, to Malvika Foundation, does not bear the Petitioner's name and the only payment that has been made to him is Rs.79,74,258.73 (Rupees seventy-nine lakhs, seventy-four thousand, two-hundred fifty-eight and seventy-three paise) only, on 7.2.2012 as consultancy fees by the Rai Foundation over a period of time. An amount of Rs.5,42,808.73 (Rupees five lakhs, forty-two thousand, eight-hundred-eight and seventy-three paise) only, also pertains to monthly amounts deposited in his name for his works as Advisor to Rai Foundation. To buttress his submissions on vicarious liability in criminal proceedings, learned counsel for the Petitioner has placed reliance on ***Sunil Bharti Mittal vs. Central Bureau of Investigation***<sup>1</sup>, ***Thermax Limited and others vs K.M. Johnny and others***<sup>2</sup>, ***R. Kalyani vs Janak C. Mehta and Others***<sup>3</sup> and

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<sup>1</sup> 2015(1) SCALE 140

<sup>2</sup> (2011) 13 SCC 412

***Madhavrao Jiwajirao Scindia and Others vs. Sambhajirao Chandrojirao Angre and Others***<sup>4</sup>. Reliance was also placed on ***State of Haryana and others vs Bhajan Lal and Others***<sup>5</sup>, ***Satish Mehra vs. State of N.C.T. of Delhi & Ano.***<sup>6</sup> and ***Anwar P.V. vs P.K. Basheer & Others***<sup>7</sup>. To prove that he has not caused any disappearance of evidence, he has relied on ***V. L. Tresa vs. State of Kerala***<sup>8</sup>, That, Section 161 Cr.P.C. has no value and it can only be used for the purposes of corroboration, reliance was placed on ***Ashok Tshering Bhutia vs. State of Sikkim***<sup>9</sup>.

**18.** The contra, arguments advanced by learned Additional Public Prosecutor for the State Respondent was that although the Petitioner claims to have resigned from the University, the Section 161 Cr.P.C. statement of O.B. Vijayan, Vice Chancellor, recorded on 7.5.2013, would reveal that the Petitioner is the owner/Advisor of EIILM University, while the Statement of Alok Bhandari, Registrar, places the Petitioner as the Advisor and In-Charge of the EIILM University. According to Vinod Kumar Dahiya, Controller of Examination, the Petitioner is the overall In-Charge and Advisor of EIILM University and the Section 164 Cr.P.C. statement of R.P. Banerjee, Member of EIILM University, indicates that the Petitioner was the Chairman of the University, besides, the Respondent asserts

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<sup>3</sup> (2009) 1 SCC 516

<sup>4</sup> (1988) 1 SCC 692

<sup>5</sup> 1992 Supp (1) SCC 335

<sup>6</sup> 2013 CRI. L.J. 411

<sup>7</sup> (2014) 10 SCC 473

<sup>8</sup> (2001) 3 SCC 549

<sup>9</sup> (2011) 4 SCC 402

that rupees six crores has been collected by the Petitioner through various illegal methods. Learned Additional Public Prosecutor sought to convince this Court that the Rai Foundation consists of the Petitioner and his sister, his sons and other family members, as also the Malvika Trust and the Integrated Institute of Excellence Society and Rai Business School. The Petitioner is the owner of the Malvika Trust, Sponsoring Body of the EIILM University, substantiated by the Statement of witness Tempo Gyamtso, Special Secretary, Technical Education, Human Resource Development Department, Sikkim, who stated that the Petitioner introduced himself as Chairman and Founder of the Sponsoring Body. It was put forth that the modus operandi of the EIILM University was brought to light by one Mohabbat Hussain, a resident of Jalpaiguri District, West Bengal, who having enrolled in EIILM University, went to the University Distance Education Programme at Badarpur, Delhi, but was told by the Security Guard that no such office existed at the said place. The emails between Henok Guangul and the Petitioner indicate that he was still a part of the EIILM University in 2008. He was also using an email ID of Rai Foundation which substantiates the fact that he continued to be a part of the Rai Foundation despite his claim of resignation. To buttress his submissions, reliance was placed on ***Suresh alias Pappu Bhudharmal Kalani vs. State of Maharashtra<sup>10</sup>, Om Wati (Smt) and Another<sup>11</sup>, Mosiruddin Munshi vs. Mohd. Siraj and Another<sup>12</sup>***.

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<sup>10</sup> (2001) 3 SCC 703

<sup>11</sup> (2001) 4 SCC 333

<sup>12</sup> (2014) 14 SCC 29

**19.** The rival contentions advanced were heard at length. The Judgments relied on as also the Order of this Court dated 15.10.2014 and all documents on record, including the emails dated 8.10.2008, received from Henok Guangul, Addis Ababa, Ethiopia and the response dated 9.10.2008, from the Petitioner from his email [vinay.rai@raifoundation.org](mailto:vinay.rai@raifoundation.org), were carefully perused. What requires examination by this Court is whether in the said facts and circumstances, the powers under Section 482 of the Cr.P.C. are to be exercised.

**20.** Dealing first with the parameters of Section 482 of the Cr.P.C, it may be stated that it is a well established principle that the Court has inherent powers to act *ex debito justitiae* to do real and substantial justice and to prevent abuse of the process of the Court. But, the power being extraordinary ought to be reserved as far as possible for extraordinary cases.

**21.** In *Mosiruddin Munshi vs. Mohd. Siraj and Another (supra)*, it was held as follows;

“6. The legal position with regard to exercise of jurisdiction by the High Court for quashing the first information report is now well settled. It is not necessary for us to delve deep there into as the propositions of law have been stated by this Court in *R. Kalyani v. Janak C. Mehta* [(2009) 1 SCC 516] in the following terms;

“15. Propositions of law which emerge from the said decisions are:

- (1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct if their entirety, disclosed no cognizable offence.

- (2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon the defence.
- (3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any *mens rea* or *actus reus*.
- (4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

7. Yet again in Mahesh Chaudhary v. State of Rajasthan [(2009) 4 SCC 439] this Court stated the law thus:

"The principle providing for exercise of the power by a High Court under Section 482 of the Code of Criminal Procedure to quash a criminal proceeding is well known. The Court shall ordinarily exercise the said jurisdiction, inter alia, in the event the allegations contained in the FIR or the complaint petition even if on face value are taken to be correct in their entirety, does not disclose commission of an offence."

**22.** This Court in its Order dated 15.10.2014, has already referred to the categories of cases where inherent powers under Section 482 of the Cr.P.C. can be invoked. That in ***State of Haryana and others vs Bhajan Lal and Others (supra)***, it was held as follows;

"(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 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 male 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."

**23.** On the anvil of the principles enunciated hereinabove while considering the investigation undertaken pursuant to the FIR No. 51/2012, it is, *inter alia*, revealed that after the EIILM University came into existence by the EIILMU Act, 2006. The UGC vide its letter dated 22.7.2008, allowed the University to award degrees, as specified by the UGC, under Section 22 of the UGC Act, 1956, with the approval of the Statutory Council wherever required. The University was allowed to conduct a total of 46 (forty-six) programmes but had been conducting around 74 courses in the Distance Education Mode without any authority from the concerned bodies as enumerated in the Charge-Sheet. Section 10 of the



EIILMU Act permitted the University to conduct the programmes as listed in the Charge-Sheet subject to approval from the concerned national accreditation bodies, the University, however, obtained approval only from the Distance Education Council which allowed it to conduct three courses being B.A. (Hospitality & Tourism), M.B.A. and B.C.A. for the academic session 2009-10. In May 2012, the DEC vide a written communication addressed to the Vice Chancellor of EIILM University, O.B. Vijayan, barred it from conducting any courses in distance mode which it ignored and continued enrolling students. The DEC in August 2008 decided not to grant permission to any Institution to conduct B.Tech./B.E. Programmes in the light of the directives of the Ministry of Human Resource Development, Government of India, this decision would continue till clearance by the All India Council of Technical Education (for short 'AICTE'). In violation thereof, the EIILM University continued to offer such courses by Distance Education Mode and award degrees for wrongful gains. It also transpired that the EIILM University has 17 national coordinators, each having over 300 admission centres and more than 4000 admission centres functioning all across the country, from where students were being admitted, degrees and diplomas signed and issued by the University authorities even for unauthorised courses. The students who were enrolled thereof were paying large amounts as fees in the belief that their degrees and diplomas were genuine. That, an additional category Collaborative Industry Based Education (CIBE) was being offered by the EIILM University in collaboration with National Centre for Internship Studies (NICS),

thereby luring students into programmes without approval of any accreditation bodies. The investigation further revealed that the study material for the courses, the conduct of examination, checking of question papers, issue of mark Sheets, degrees was all done by the University but the University had failed to comply with any of the directions/requirements of the AICTE, UGC and other national accreditation bodies which are essential pre-requisites for providing quality education to students. It was also found that the faculty members for the teaching courses were short of the requirement. Investigation also brought to light that Malvika Trust was set up by late Kulwant Rai, father of Vinay Rai and the Trust is the Sponsoring Body of EIILM University, Kolkata and consequently became the Sponsoring Body of the EIILM University, Sikkim. Along with Malvika Foundation, Rai Foundation and Integrated Institute of Excellence Society was set up by late Kulwant Rai along with his son, Vinay Rai. Funds collected from students of EIILM University have been transferred to the account of the Rai Foundation and huge sums of money were removed from the account of EIILM University into the accounts of Integrated Institute of Excellence Society, Rai Tech and Rai Business School. Money was also directly put into the account of the Petitioner from Rai Foundation (Annexure C-7). There is a common thread between all the Trusts i.e. Malvika Trust, Rai Foundation and Rai Business School, which were all started by late Kulwant Rai with his family members as Trustees, while the Petitioner is the founding Member/Trustee of Rai Foundation and the Founder and Chairman of Malvika Trust, apart from which the

Sections 161 and 164 Cr.P.C. statement of witnesses' fortify the Prosecution case. Thus, it was found that on the basis of the circumstantial facts and material evidence, *prima facie* case under Sections 406/420/467/120B/34 of the IPC existed against the Petitioner.

**24.** In *Thermax Limited and others vs K.M. Johnny and others (supra)* relied on by the Petitioner, the Supreme Court held that in view of the infirmities in the case and in the light of Section 482 of the Code, the High Court ought to have quashed those proceedings to safe guard the rights of the appellants. The order passed by the Judicial Magistrate 1<sup>st</sup> Class, Pimpri on 20.8.2007 and the Judgment of the High Court dated 11.1.2008 in the Criminal Writ Petition were set aside. It would be necessary to point out that in the said matter the Respondent No.1/Complainant had stated that he had carried out several fabrication jobs for the Accused/Appellant and a sum of Rs.91,95,054/- (Rupees ninety-one lakhs, ninety-five thousand and fifty-four) only, was outstanding from the Appellant. In spite of several requests of the Complainant, the Accused being influential, no cognizance was taken of the complaints lodged by the Complainant. The learned Magistrate called for a report under Section 156(3) of the Cr.P.C. from the Crime Branch, Pune. In appeal by the Appellant Company, the High Court remitted it back to the Magistrate for reconsideration of the entire prayer made by the Complainant and to pass fresh orders after giving adequate opportunity of hearing to both sides and to decide afresh the application seeking direction under Section 156(3) of the Cr.P.C. by

giving cogent reasons for such conclusion. Pursuant thereto, an application filed under Section 91 of the Cr.P.C. by the Appellant Company was rejected, order which was upheld by the High Court. The Hon'ble Apex Court after analysing a catena of cases for the purpose and the provisions of Sections 405, 406, 420 and 34 of the IPC, came to the conclusion that the principles enunciated from the decisions quoted, clearly show that for proceeding under Section 156(3) of the Cr.P.C., the Complaint must disclose relevant material ingredients of Sections 405, 406, 420 read with Section 34 of the IPC. That, if there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding and if there is a huge delay, criminal proceedings cannot be resorted to in order to avoid the period of limitation. The Court also arrived at a finding that the Respondent No.1 had roped all the Appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with the Appellant Company by initiating criminal prosecution. That, the Appellants 2 to 8 are the Ex-Chairperson, Ex-Directors and Senior Managerial personnel of Appellant No.1 Company, who do not have any personal role in the allegations and claims of Respondent No.1, neither were there specific allegations with regard to their role. Thus, the Respondent No.1 was trying to circumvent the jurisdiction of the Civil Court which estopped him from proceeding on account of the Law of Limitation, hence the above orders. The facts of the case at hand are clearly distinguishable, the matter does not comprise only of civil wrongs, neither are the ingredients of criminal offences found

wanting, requiring exercise of powers under Section 482 of the Cr.P.C.

**25.** Now addressing the argument of the Petitioner pertaining to cognizance and absence of application of judicial mind, I deem it essential to refer to the Order of this Court in I.A. No. 1 of 2016 arising out of Crl. M.C. No. 20 of 2014, dated 19.8.2016, wherein the Petitioner had prayed that the matter be remanded back to the learned Magistrate with a direction to issue a speaking and reasoned order while taking cognizance, if any, duly affording the Petitioner an opportunity of making submissions before cognizance and that liberty be granted to the Petitioner to urge all other pleas raised in Crl. M.C. No. 20 of 2014, before the learned Magistrate at the time of hearing on cognizance. This Court rejecting the Petition concluded as follows;

**"10.** Thus, it does not involve any formal action, but occurs as soon as the Magistrate applies his mind to the suspected commission of the offence. The Court at that stage is not required to undertake an elaborate enquiry neither is he required to mention the documents which he took into consideration for satisfying himself to take cognizance. Although it has been argued by Counsel for the Petitioner that the matter be remanded back to the Magistrate for passing a speaking order duly allowing the Petitioner to present his case, in my considered opinion, this is a concept alien to the Cr.P.C. and is not tenable since Section 190 of the Cr.P.C. nowhere envisages such license to the Petitioner. The Section is confined to the duty of a Magistrate and cannot be expanded to allow the Petitioner to make any submissions at this stage. The Petitioner shall be given ample opportunity to make any submissions at the stage of hearing on Charge."

In this context, we may also notice the decisions of the Hon'ble Apex Court.

**26.** In *Bhushan Kumar and Another vs. State (NCT of Delhi) and Another*<sup>13</sup>, the Hon'ble Supreme Court held as follows;

"11. In Chief Enforcement Officer v. Videocon International Ltd. [(2008)2 SCC 492] (SCC p.499, para 19) the expression "cognizance" was explained by this Court as "it merely means 'become aware of' and when used with reference to a court or a Judge, it connotes 'to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone." It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code."

**27.** In *Sushil Bharti Mittal vs. Central Bureau of Investigation* (*supra*), the Hon'ble Supreme Court observed as follows;

"42. ....

*Sine Qua Non* for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the Court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a *prima facie* case or not."

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<sup>13</sup> (2012) 5 SCC 424

It is evident that the Charge-Sheet was perused by the Magistrate who then took cognizance of the matter. It cannot be said that there was no application of judicial mind. This point has in fact been elaborately discussed in the Order of this Court in I.A. No. 1 of 2016 arising out of Crl. M. C. No. 20 of 2014, mentioned *supra*.

**28.** So far as the arguments on Statements under 161 Cr.P.C. is concerned, in the first instance, it may be pointed out that Section 161 Cr.P.C. deals with examination of witnesses by the Police, where any police officer making an investigation examines any person who is supposed to be acquainted with the facts and circumstances of a case. The provision authorises the police officer to reduce in writing such statement made by a witness. At the same time there is no obligation on the part of the accused person to make any statement to the police. The fundamental principle of procedural law is that a statement under Section 161 Cr.P.C. cannot be considered as substantive evidence, this is to be used for confronting the witness to impeach his credibility. Should the witness make contradictory statements, then a suspicion can arise against the witnesses' credibility. In ***Ashok Tshering Bhutia vs. State of Sikkim*** (*supra*) relied on by the Petitioner, the Hon'ble Apex Court held that any information or statement made before the investigating officer under Section 161 Cr.P.C., requires corroboration by sufficient evidence. In the absence of any corroboration thereof it would merely be a case where some witnesses had stated a particular fact before the investigating officer and the same remained inadmissible in law, in view of the provisions

of Section 162. In **Baldev Singh vs. State of Punjab**<sup>14</sup>, it was held that the statement recorded under Section 161 of the Cr.P.C. shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162 (1). Addressing the arguments concerning statements recorded under Section 164 of the Cr.P.C., such statements or confessions can never be used as substantive evidence but may be utilised for contradiction or corroboration of the witness who made it. In the case at hand, in light of the above discussions, as the statements under Sections 161 and 164 of the Cr.P.C. have not been tested as required under the law as elaborated hereinabove, therefore this argument of the Petitioner is not tenable being premature.

**29.** Urging that there is no concept of vicarious liability in criminal law, learned Counsel for the Petitioner relied on **Sunil Bharti Mittal vs. Central Bureau of Investigation** (*supra*). The matter therein arose as the Appellants were issued summons by the Special Judge, although their names did not figure in the Charge-Sheet. The learned Magistrate after examining the file pertaining to the matter reached the following finding;

“.....  
**4.** I also find at the relevant time, Shri Sunil Bharti Mittal was Chairman-cum-Managing Director of Bharti Cellular Limited, Sh. Asim Ghosh was Managing Director of Hutchison Max Telecom (P) Limited and Sh. Ravi Ruia was a Director in Sterling Cellular Limited, who used to chair the meetings of its Board. In that capacity, they were/are prima facie, in control of affairs of the respective companies. As such, they represent the directing mind and will of each company and

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<sup>14</sup> (1990) 4 SCC 692



their state of mind is the state of mind of the companies. .... Consequently, I find enough material on record to proceed against them also. .... It will also be pertinent to mention here that the appellants were not implicated as accused persons in the Charge-Sheet."

The Hon'ble Supreme Court set aside the Order on the ground that the Magistrate had not recorded his satisfaction by mentioning the role played by the Appellants which would bring them within the criminal net. The facts in the said matter and the case at hand are clearly distinguishable inasmuch as the Petitioner's name appears in the Charge-Sheet and his role therein has already been reflected hereinabove.

**30.** Reliance was also placed on *State (Government of NCT of Delhi) vs. Nitin Gunwant Shah*<sup>15</sup> to establish that to prove conspiracy it must be borne in mind that meeting of mind is essential and mere knowledge or discussion would not be sufficient. On this count, it may appropriately be pointed out that at this stage, it is not necessary for the learned Trial Court to delve deeply into each ingredient of the provisions under which the accused has been booked.

**31.** Having carefully examined the facts placed before this Court pertaining to the matter at hand and also having meticulously examined all documents on record, I am of the considered opinion that there are sufficient prima facie materials to proceed against the petitioner, as it is apparent that there is a predominance of criminality in the acts of the Petitioner which cannot be categorised

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<sup>15</sup> 2016 II AD (CRI.) (SC) 1

as essentially of a civil nature, although civil wrongs cannot be ruled out. Thus, it does not call for the exercise of the powers under Section 482 of the Cr.P.C. by this Court.

**32.** The Criminal Miscellaneous Petitions are liable to be and are accordingly dismissed.

**33.** No order as to cost(s).

Sd/-

**( Meenakshi Madan Rai )**  
**Judge**  
**11.08.2017**

Approved for reporting : **Yes**  
Internet : **Yes**

bp