IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 2769 of 2019

Santosh Kumar Lahoti

Vs

The Registrar of Companies, West Bengal.

For the Petitioner	: Mr. Abhrojit Mitra, Sr. Adv., Mr. Somopriyo Chowdhury, Mr. Debapratim Guha, Mr. Anirudhya Dutta, Ms. Anchita Sarkar.
For the Opposite Party	: Mr. Sailendra Kr. Tiwari.
Hearing concluded on	: 07.02.2024
Judgment on	: 02.04.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of complaint and proceeding being complaint no. 35/2019 pending before the Learned, 2nd Special Court, Calcutta at West Bengal under Section 448 of the Companies Act, 2013 for alleged violation of Section 233 of the Companies Act, 2013.

FACTS:-

2. The petitioner's case is that he is the Company Secretary of Jayshree Chemicals Limited, a company incorporated under the provisions of the Companies Act, 1956 ("hereinafter referred to as the Act"), having its registered office at 31, Chowringhee Road, Kolkata-700 016, West Bengal and whose shares are listed on the BSE Limited (hereinafter referred to as the 'Company'), and appointed in terms of Section 203 of the Act, and has been associated with Company since 9th February, 2016.

3. The Company is a widely held public limited company incorporated on 17th April, 1962 and is engaged in the business of Wind Power and Electric.

4. The petitioner has been arrayed as accused person in complaint no. 35/2019 pending before the Learned 2nd Special Court, Calcutta which was initiated on the basis of a complaint filed by the opposite party

under Sections 447 and 448 of the Companies Act, 2013 for alleged violation of Section 233(1)(b) of the Companies Act, 2013.

5. The allegations contained in the said complaint are reproduced below:-

> *"It is observed from the applications and other documents that total number of shares of the company (M/s Jayshree Chemicals Limited) on cut-off date (14.08.2018) for the general meeting was 2,93,26,457 while for 1,35,90,589 shares votes were given favoring the Scheme. Therefore, in respect of less than 90% of total shares votes were cast in favour of the Scheme. But the Company Secretary Shri Santosh Kumar Lahoti gave false declaration to get the Application under Section 233 of the Companies Act, 2013 approved, by suppressing real facts and thereby attracting the provision of Section 448 of the Companies Act, 2013."*

6. The petitioner submits that the opposite party as the complainant had issued a Show Cause Notice bearing No. ROC/KOL/S-233/SCN/6435 dated 25.03.2019 alleging contravention of Section 233(1)(b) of the Companies Act, 2013. By a letter dated 02.04.2019 seeking extension of time for filing reply and by another letter dated 15.04.2019, the petitioner replied to the purported Show Cause Notice bearing No. ROC/KOL/S-233/SCN/6435 dated 25.03.2019.

7. The petitioner states that the complaint case which has been filed by the opposite party as the complainant against the petitioner for alleged violation of Section 233(1)(b) of the Companies Act, 2013 is misconceived, without any basis and contrary to law.

8. It is submitted, that the ingredients of the offence as alleged in the Complaint Petition are not attracted at all. Further, the alleged violation of Section 233(1)(b) of the Act, 2013 in relation to the Scheme of Amalgamation of Fort Gloster Electric Limited (Transferor Company), the wholly owned subsidiary of the Company with the Company (Transferee Company) (hereinafter referred to as the Scheme) is without any substance or merit. The Scheme was approved by eighty shareholders of the Transferee Company holding one hundred per cent of the total number present and voting at the meeting of the shareholders of the Transferee Company held on 21st August, 2018, wherein the shareholders were also given the option of e-voting from 18th August, 2019 to 20th August, 2019.

9. It is further stated that a scheme of amalgamation of the wholly owned subsidiary namely, Fort Gloster Electric Limited with the holding company being the transferee company, namely, Jayshree Chemicals Limited was presented for approval before the Hon'ble Regional Director, Eastern Region, Ministry of Corporate Affairs, under the provisions of Section 233 of the Companies Act, 2013. Thereafter, notices were issued upon the concerned sectorial authorities for the purpose of approval which were required in relation to the scheme of amalgamation as propounded. A meeting of the shareholders of the transferee company (holding company) was thereafter convened on August 21, 2018. Further

meetings were also held of the creditors of both the transferor company and the transferee company.

10. That form CAA-11 along with its attachments were filed by Shri Atul Kumar Labh, Company Secretary as the authorized representatives of the transferee company in terms of Section 233(2) of the Companies Act, 2013 read with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules 2016.

11. The said Form CAA-11 had contained a declaration of the petitioner who is also the Company Secretary of the transferee company to the extent that the scheme was approved by requisite majority of shareholders in accordance with Section 233(1)(b) of the 2013 Act. Such declaration was given by the petitioner on the basis of the reasonable interpretation with respect to the provisions of Section 233(1)(b) of the Companies Act, 2013. Section 230(6) which also provides for the compromise or arrangement between members and creditors which requires the consideration of the Hon'ble National Company Law Tribunal postulates that majority of persons representing three fourth in value of the members and creditors as the case may be should have agreed to the compromise and arrangement. Further upon giving a reasonable interpretation of sub-section (2) of Section 233 it would transpire that the provisions set out for obtaining approval are more or less similar in both the scenario i.e., one before the National Company Law Tribunal and the other before the Regional Director.

12. However, the opposite party has mischievously and erroneously filed the purported complaint petition against the petitioner invoking Section 447 of the Companies Act, 2013 for alleging violation of Section 448 read with Section 233(1)(b) of the Companies Act, 2013 on the ground that the declaration given by the petitioner in Form CAA-11 signifying that the scheme has been approved by the requisite majority of the members and creditors under Section 233 (1)(b) of the Act was false as ninety percent of the members or class of members of the transferee company did not approve the scheme of amalgamation. The opposite party while construing and interpreting Section 233(1)(b) of the Companies Act, 2013 gave a restrictive interpretation to the said sub-section as if to contend that the approval of ninety percent of the members should have been ninety percent of the total members of the company and not ninety percent of the members present and voting on the date of the meeting. The intention of the legislature both contained in Section 230 and Section 233 of the Companies Act, 2013 has to be read harmoniously and not in a restricted manner as has been sought to be done by the opposite party which demonstrates that the opposite party has acted in a vindictive manner and also contrary to law.

13. The Complainant/opposite party herein has specified its case as follows in Para 10 of the petition of complaint:-

> *"The aforesaid reply of the accused was examined by the office of Complainant and a report in this regard was forwarded to the Regional Director (Eastern Region), Ministry of Corporate Affairs, Government of India, Kolkata vide Letter*

No. ROC-WB/S-233/2019/182 dated 02.05.2019. In para-3 of the aforesaid report, the following was observed:-

> *"It is submitted that at Sl. No. 6(a)(iv)of CAA-11 shows that approval of 13590589 equity shares who were present and voting but not 90% of the total number of shares thus, there is misstatement has been made by CS at Sl. No. (iii) of the declaration."*

Hence, the accused herein has made a false declaration in the From CAA-11 knowing it to be false, to get the Application under Section 233 of the Companies Act, 2013 approved, and therefore the statement made by the accused is a false statement within the meaning of Section 448 of the Companies Act, 2013, for which he is liable under Section 447 the Companies Act, 2013."

14. Written notes of Argument has been filed by the petitioner stating therein that:-

i) No objection/suggestion was received from the ROC or the OL [Rule 25(5) of Compromise Rules, 2016]. Thereafter, RD by an order dated 25th October, 2018 in Form CAA.12 confirmed the scheme.

ii) In other words, the Form No. CAA.11 filled up and signed by the petitioner was scrutinized by the ROC, OL as well as the RD and none of them had any objection with regard to any statement made therein.

iii) The Deputy ROC after 5(five) months issued the impugned show cause notice dated 25th March, 2019 for an alleged false declaration by the petitioner in Form No. CAA.11.

15. It is stated by the petitioner that the essential ingredients of making a complaint under Section 447 for violation of Section 448 read with Section 233(1)(b) are as follows:-

a) There has to be a statement which is false;

b) Person making the false statement must know it to be false thus having 'Mens Rea'.

16. The alleged false statement as claimed by the opposite party/complainant is to be found in the Declaration which must be read along with paragraph 6(a)(iv) in Form No. CAA.11 signed by the petitioner as the Company Secretary, which is as follows:-

> *6(a)(iv):Approved by majority of 80 shareholders comprising of 1,35,90,589 Equity Shares constituting 100% of the total shares attended by the members.*

17. It is stated by the petitioner that the above is **not a false statement** since Section 233(1)(b) unlike Section 101(1) Proviso does not require 90% of the members "entitled to vote" at the general meeting concerned to have approved the scheme. On the contrary, the expression is **"members at a general meeting".** In order words, unlike Section 101(1) Proviso, it is not 90% of the members entitled to vote in the context of the total of the paid up share capital of the company, who are to approve the scheme but 90% of the members present at the annual general meeting.

18. The following rulings have been relied upon by the petitioner:-

i) *IDFC Limited vs The Regional Director, Southern Region, Chennai.*

ii) *Andrew Yule & Company Ltd. & Anr. vs Hooghly Printing Company Ltd.*

iii) *Apollo Hospitals Enterprise Limited (Transferee Company) sanctioned by Regional Director, Southern Region on 28th June, 2021.*

iv) *Quess Corp Limited sanctioned by Regional Director, South East Region on 15th November, 2019.*

v) *Sastasundar Venture Limited (Transferee Company) with Myjoy Tasty Food Private Limited and Myjoy Hospitality Private Limited sanctioned by Regional Director, Eastern Region on 9th January, 2018.*

vi) *Health Care Global Enterprises Limited (Transferee Company) with HCG Pinnacle Oncology Private Limited sanctioned by Regional Director, South East Region on 30th January, 2018.*

vii) *Narayana Hrudayalaya Limited (Transferee Company) with Newrise Healthcare Private Limited sanctioned by Regional Director, South East Region on 4th October, 2017.*

viii) *Usha Martin Telematics Limited & Ors. -vs- Registrar of Companies West Bengal -SCC Online Calcutta 1792.*

ix) *Deba Prasad Roy -vs- Regional Director, Deptt. Of Company Affairs (2007)4 CHN 238.*

19. In ACCEL IT Service Ltd., the NCLT, DB-II Chennai held:-

> *"**11.** In the Additional Report dated 27.12.2022 of the Regional director it was expressed as follows:-*
>
> *".....*
>
> *3) It is submitted that the Petitioner/Transferee Company has filed the above petition before this Hon'ble Tribunal under Sec. 233(6) against the order of rejection of the Scheme by the Regional Director (Southern Region). The Regional Director is of the view that the Petition may be considered in terms of Sec. 230(6) of the Companies Act, 2013 on merits, as there is approval of the scheme by the majority of members of the Transferee Company in the Extraordinary General Meeting held on 09.12.2020 and the Transferee Company being the holding company of the Transferor Company - 1 and Transferor Company - 2, has also given its consent by way of affidavits and also submitted that the majority of the Creditors of the Transferor Companies and the Transferee Company, who have attended the meetings have also given their consent approving the scheme of amalgamation.*
>
> *4) It is submitted that **the undersigned has no objection, if the scheme is approved by this Hon'ble NCLT, Chennai under Sec. 230(6) of the Companies Act, 2013** and prays for passing suitable orders as deemed fit and proper in the circumstances of the case.*
>
> *....."*

20. In ***IDFC Limited vs The Regional Director, Southern Region, Chennai (Supra),*** the following argument was noted by the tribunal:-

> ***"6.** It was argued by the Ld. Counsel for the applicant that in Section 233(1)(b);*
>
> ***"Section 233(1):***
>
> *.....*
>
> *(b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a **general meeting holding at least ninety per cent of the total number of shares;***

……."

the absence of use of the words "total number of shares of the company" would mean the total number of shares of members attending/voting at a general meeting not members holding 90% of the paid-up share capital of the Company, in support of this plea he relied on earlier decisions Regional Director of South and other jurisdictions. It was further argued that under Section 233 of the Companies Act, 2013 the Respondent has no power to reject the Scheme, it can only approach this Tribunal to get appropriate orders."

21. The further argument in Para 6 of the said judgment, that under Section 233 of the Companies Act, 2013, the respondent has no power to reject the scheme, it can only approach the tribunal to get appropriate orders also found support from the tribunal in the said case.

22. In ***Andrew Yule & Company Ltd. & Anr. (Supra),*** the tribunal clearly held:-

*"**15.** In the present case, we are in respectful agreement with a view of the larger bench of the Hon'ble Punjab & Haryana High Court in Swift Formulation Private Limited (supra). We also find merit in the contentions of Mr. Jishnu Chowdhury, Ld. Counsel for the petitioning companies that the literal and logical meaning of section 233(1)(d) can only be that the scheme should be approved by majority representing 9/10th in value of the creditors present in such meeting, and not 9/10th of the total value of debt."*

23. This too supports the petitioner's case herein.

24. On the other hand the opposite party (Registrar of Companies) has relied upon the ruling in:-

2019 SCC online NCLT 14115 – wherein it has been held:-

i) *It is submitted that* ***the Ministry of Corporate Affairs, New Delhi vide its letter No. 2/31/2013-CAA-CL-V-Pt-2 dated 24.08.2017*** *(Annexure–G of the application) has stated as under:-*

> *"sanctioning of scheme of merger or amalgamation under Section 233 of the Companies Act, 2013 by the Central Government, approval of members or class of members at a general meeting holding at least ninety percent of total number of shares and also of majority representing nine-tenth in value of total creditors or class of creditors is required and* ***not of ninety percent of member or nine-tenth creditors present and voting."***

ii) *It is submitted that the RD is of the opinion that the present scheme of amalgamation is not in the interest of creditors and members as the present scheme is not approved by the requisite majority in terms of Section 233(1)(b) and (d) of the Act. It is stated that the Tribunal may consider the present application under Section 232 of the Act on merits and/or may pass such necessary orders as the Tribunal may deem fit.*

iii) *We have carefully considered the submissions of the learned counsel for the Transferor and Transferee Companies and have also perused the record. The provisions of Section 233(1) of the Act are as follows:-*

(1) Notwithstanding the provisions of section 230 and Section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:-

(a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;

(b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety percent of the total number of shares;

(c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar or the place where the registered office of the company is situated; and

(d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective

companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing"

iv) Section 233(1)(b) of the Act requires that the scheme is approved by the respective members or class of members at a general meeting holding at least 90% of the total number of shares. Section 233(1)(d) of the Act requires that the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors in a meeting convened by the company.

v) Therefore, for the purpose of fast track approval of merger or implementation, the approval of the scheme is required from at least 90% of the total number of shares and also from a majority representing nine-tenth in value of the creditors or class of creditors.

vi) Therefore, for the purpose of fast track approval of merger or implementation, the approval of the scheme is required from at least 90% of the total number of shares and also from a majority representing nine-tenths in value of the creditors or class of creditors.

vii) The voting details have already been extracted above and clearly show that the requirements of Section 233(1)(b) and (d) of the Act are not complied with, since the scheme is not approved by the required percentage of the total number of shares and

also by majority representing nine-tenths in value of the secured and unsecured creditors.

viii) *The learned counsel for the applicant companies has pleaded that under Section 233(5) of the Act, the Central Government/RD can file an application before the Tribunal stating its objections only if the scheme is not in public interest or in the interest of creditors. In the present case, the scheme cannot be said to be in the interest of the creditors since the approval of the requisite majority representing nine-tenths in value of the secured creditors and unsecured creditors was not obtained in the meetings convened.*

ix) ***As per Section 233(5) of the Act, the RD may request the Tribunal to consider the scheme under Section 232 of the Act. The learned counsel for the applicant companies has also requested that the meetings of the shareholders, secured creditors and unsecured creditors be convened once again.***

x) ***After taking into consideration the above discussion and in view of the provisions of Section 233(6) of the Act, we are of the opinion that the scheme should be considered as per the procedure laid down in Section 232 of the Act and accordingly direct that necessary further action be***

taken by both the companies under Section 232 of the Act.

FINDINGS:-

25. Thus the circular/letter referred to in Para 3 of the said judgment has clarified the position of Section 233(1)(b) of the Companies Act, 2013 which is being reproduced here for convenience:-

> ***Para 3.*** *It is submitted that the* ***Ministry of Corporate Affairs, New Delhi vide its letter No. 2/31/2013-CAA-CL-V-Pt-2 dated 24.08.2017 (Annexure–G of the application) has stated as under:-***
>
> > ***"sanctioning of scheme of merger or amalgamation under Section 233 of the Companies Act, 2013 by the Central Government, approval of members or class of members at a general meeting holding at least ninety percent of total number of shares and also of majority representing nine-tenth in value of total creditors or class of creditors is required and not of ninety percent of member or nine-tenth creditors present and voting."***

26. Section 233(1)(b) of the Companies Act, 2013 is reproduced for convenience:-

> *"233(1) Notwithstanding the provisions of Section 230 and Section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following namely:-*

(a) ……..

(b) The objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting ***holding at least ninety per cent of the total numbers of shares****"*

27. The relevant part of Section 233(1)(b) of the Act is "**holding at least ninety percent of the total numbers of shares**".

28. Thus it is clear that the petitioners herein do not have the required percentage as per the circular dated 24.08.2017 of Ministry of Corporate Affairs, New Delhi vide its letter No. 2/31/2013-CAA-CL-V-Pt-2.

29. But the petitioner's Company/Companies is at liberty to take recourse to Section 233(5), 233(6), and under Section 232, of the Companies Act, 2013.

30. The next contention is as to whether the petitioner is liable for offence punishable under Section 447 and Section 448 of the Companies Act.

31. Section 447 of the Companies Act, 2013, lays down:-

*"****447. Punishment for fraud.****- Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud [involving an amount of at least ten lakh rupees or one per cent of the turnover of the company, whichever is lower], shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:*

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years:

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

Explanation.- For the purposes of this section-

(i) "fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

(ii) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;

(iii) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled."

32. Section 448 of the Companies Act, 2013, lays down:-

"448. Punishment for false statement.- *Save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,-*

(a) which is false in any material particulars, knowing it to be false; or

(b) which omits any material fact, knowing it to be material, he shall be liable under Section 447."

33. In the present case, it is clear that till the circular by the Ministry of Corporate Affairs, New Delhi vide its letter No. 2/31/2013-CAA-CL-V-Pt-2 dated 24.08.2017, there was an ambiguity in respect of Section 233(1)(b) of the Act.

34. Annexure "H" at page 82 of the revisional application is Form no. CAA-12. Confirmation order of scheme of amalgamation between M/s Fort Gloster Electric Limited with M/s Jayshree Chemicals Private Ltd., is as follows:-

> *"Pursuant to the provision of Section 233 of the Companies Act, 2013, the Scheme of compromise, arrangement or merger for transfer of M/s Fort Gloster Electric Limited (Transferor Company) with M/s Jayshree Chemicals Limited (Transferee Company) approved by their respective members and creditors as required under Section 233(1)(b) and (d) of the Companies Act, 2013 is hereby confirmed and the scheme shall be effective from the date of this confirmation.*
>
> *A copy of the approved scheme is attached to this order.*
>
> ***Sd/-***
> ***Regional Director (ER)"***

35. The said order has been issued by the Regional Director.

36. Next is the order taking cognizance by the Judge, 2nd Special Court, Calcutta. The relevant portion of order is reproduced here:-

> *".....Perused the documents on record. It appears that the complainant has a prima facie case against the accused persons.*
>
> *Cognizance is taken.....*

Sd/-
Judge
Cal. 2nd Special Court
Calcutta"

37. In ***S.R. Sukumar Vs S. Sunaad Raghuram, AIR 2015 SC 2757, decided on 2 July, 2015,*** the Supreme Court held:-

> ***"8.*** *Section 200 Cr.P.C. provides for the procedure for Magistrate taking cognizance of an offence on complaint. The Magistrate is not bound to take cognizance of an offence merely because a complaint has been filed before him when in fact the complaint does not disclose a cause of action. The language in Section 200 Cr.P.C. "a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any…" clearly suggests that for taking cognizance of an offence on complaint, the Court shall examine the complainant upon oath. The object of examination of the complainant is to find out whether the complaint is justifiable or is vexatious. Merely because the complainant was examined that does not mean that the Magistrate has taken cognizance of the offence. Taking cognizance of an offence means the Magistrate must have judicially applied the mind to the contents of the complaint and indicates that Magistrate takes judicial notice of an offence.*
>
> ***9.*** *Mere presentation of the complaint and receipt of the same in the court does not mean that the Magistrate has taken cognizance of the offence. In Narsingh Das Tapadia vs. Goverdhan Das Partani & Another., AIR 2000 SC 2946, it was held that the mere presentation of a complaint cannot be held to mean that the Magistrate has taken the cognizance. In Subramanian Swamy vs. Manmohan Singh & Another, (2012) 3 SCC 64, this Court explained the meaning of the word 'cognizance' holding that "…In legal parlance cognizance is taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially".*

10. *Section 200 Cr.P.C. contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present, if any. Then normally three courses are available to the Magistrate. The Magistrate can either issue summons to the accused or order an inquiry under Section 202 Cr.P.C. or dismiss the complaint under Section 203 Cr.P.C. Upon consideration of the statement of complainant and the material adduced at that stage if the Magistrate is satisfied that there are sufficient grounds to proceed, he can proceed to issue process under Section 204 Cr.P.C. Section 202 Cr.P.C. contemplates 'postponement of issue of process'. It provides that the Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance may, if he thinks fit, postpones the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or have an inquiry made by any Magistrate subordinate to him, or an investigation made by a police officer, or by some other person for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds no sufficient ground for proceeding, he can dismiss the complaint by recording briefly the reasons for doing so as contemplated under Section 203 Cr.P.C. A Magistrate takes cognizance of an offence when he decides to proceed against the person accused of having committed that offence and not at the time when the Magistrate is just informed either by complainant by filing the complaint or by the police report about the commission of an offence.*

11. "Cognizance" therefore has a reference to the application of judicial mind by the Magistrate in connection with the commission of an offence and not merely to a Magistrate learning that some offence had been committed. Only upon examination of the complainant, the Magistrate will proceed to apply the judicial mind whether to take cognizance of the offence or not. Under Section 200 Cr.P.C., when the complainant is examined, the Magistrate cannot be said to have ipso facto taken the cognizance, when the Magistrate was merely gathering the material on the basis of which he will decide whether a prima facie case is made out for taking cognizance of the offence or not. "Cognizance of offence" means taking notice of the accusations and applying the judicial mind to the contents of the complaint and the material filed

therewith. It is neither practicable nor desirable to define as to what is meant by taking cognizance. Whether the Magistrate has taken cognizance of the offence or not will depend upon facts and circumstances of the particular case.

12. *In S.K. Sinha, Chief Enforcement Officer vs. Videocon International Ltd. And Ors., (2008) 2 SCC 492, considering the scope of expression "cognizance" it was held as under:-*

"The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. 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."

13. *A three Judge Bench of this Court in the case of R.R. Chari vs. State of Uttar Pradesh, 1951 SCR 312, while considering what the phrase 'taking cognizance' mean, approved the decision of Calcutta High Court in Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Abani Kumar Banerjee, AIR 1950 Cal. 437, wherein it was observed that:*

"…What is "taking cognizance" has not been defined in the Criminal Procedure Code and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under S.190(1)(a), Criminal P.C., he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter,– proceeding under S. 200, and thereafter sending it for enquiry and report under S. 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence…" (Underlining added) The same view was reiterated by this Court in Jamuna Singh & Ors. vs. Bhadai Sah, (1964) 5 SCR

37 and Nirmaljit Singh Hoon vs. State of West Bengal & Anr., (1973) 3 SCC 753.

14. *Elaborating upon the words expression "taking cognizance" of an offence by a Magistrate within the contemplation of Section 190 Cr.P.C., in Devarapally Lakshminarayana Reddy & Ors. vs. V. Narayana Reddy & Ors., AIR 1976 SC 1672, this Court held as under:-*

"…But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV to the Code of 1973, he is said to have taken cognizance of the offence within the meaning to Section 190(1)(a). It, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence."

38. In ***Dayle De' Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in Criminal Appeal No. …. of 2021 (arising out of SLP (CRL.) No. 3913 of 2020), decided on October 29, 2021,*** the Supreme Court held:-

*"**30.** At the same time, initiation of prosecution has adverse and harsh consequences for the persons named as accused. In **Directorate of Revenue and Another v. Mohammed Nisar Holia, 2008 (2) SCC 370,** this Court explicitly recognises the right to not to be disturbed without sufficient grounds as one of the underlying mandates of Article 21 of*

the Constitution. Thus, the requirement and need to balance the law enforcement power and protection of citizens from injustice and harassment must be maintained. Earlier in ***M/s. Hindustan Steel Ltd. v. State of Orrisa, 1969 (2) SCC 627,*** *this Court threw light on the aspect of invocation of penalty provisions in a mechanical manner by authorities to observe:*

"8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasicriminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

Almost every statute confer operational power to enforce and penalise, which power is to be exercised consistently from case to case, but adapted to facts of an individual case. The passage from ***Hindustan Steel Ltd.*** *(supra) highlights the rule that the discretion that vests with the prosecuting agencies is paired with the duty to be thoughtful in cases of technical, venial breaches and genuine and honest belief, and be firmly unforgiving in cases of deceitful and mendacious conduct. Sometimes legal provisions are worded in great detail to give an expansive reach given the variables and complexities involved, and also to avoid omission and check subterfuges. However, legal meaning of the provision is not determined in abstract, but*

only when applied to the relevant facts of the case20 . Therefore, it is necessary that the discretion conferred on the authorities is applied fairly and judiciously avoiding specious, unanticipated or unreasonable results. The intent, objective and purpose of the enactment should guide the exercise of discretion, as the presumption is that the makers did not anticipate anomalous or unworkable consequences. The intention should not be to target and penalise an unintentional defaulter who is in essence law-abiding.

31. *There are a number of decisions of this Court in which, with reference to the importance of the summoning order, it has been emphasised that the initiation of prosecution and summoning of an accused to stand trial has serious consequences. They extend from monetary loss to humiliation and disrepute in society, sacrifice of time and effort to prepare defence and anxiety of uncertain times. Criminal law should not be set into motion as a matter of course or without adequate and necessary investigation of facts on mere suspicion, or when the violation of law is doubtful. It is the duty and responsibility of the public officer to proceed responsibly and ascertain the true and correct facts. Execution of law without appropriate acquaintance with legal provisions and comprehensive sense of their application may result in an innocent being prosecuted.*

32. Equally, it is the court's duty not to issue summons in a mechanical and routine manner. If done so, the entire purpose of laying down a detailed procedure under Chapter XV of the 1973 Code gets frustrated. *Under the proviso (a) to Section 200 of the 1973 Code, there may lie an exemption from recording presummoning evidence when a private complaint is filed by a public servant in discharge of his official duties; however, it is the duty of the Magistrate to apply his mind to see whether on the basis of the allegations made and the evidence, a prima facie case for taking cognizance and summoning the accused is made out or not. This Court explained the reasoning behind this exemption in* ***National Small Industries Corporation Limited v. State (NCT of Delhi) and Others, (2009) 1 SCC 407:***

"12. The object of Section 200 of the Code requiring the complainant and the witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of

> ***process on complaints which are false or vexatious or intended to harass the persons arrayed as accused.*** *(See Nirmaljit Singh Hoon v. State of W.B.) Where the complainant is a public servant or court, clause (a) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process."*
>
> ***The issue of process resulting in summons is a judicial process that carries with it a sanctity and a promise of legal propriety.***
>
> ***33.*** *Resultantly, and for the reasons stated above, we would allow the present appeal and quash the summoning order and the proceedings against the present appellant."*

39. It is thus mandatory that at the time of taking cognizance the judge has to apply his Judicial mind and if required can have an enquiry conducted or conduct an enquiry himself.

40. In the present case it is evident that the trial Judge has taken cognizance without any application of judicial mind. The order taking cognizance in this case has been only a formality.

41. There is absolutely no application of mind. Cognizance has been taken casually without any prima facie findings.

42. Thus the cognizance taken is prima facie bad in law.

43. There is also no reason for the petitioner to commit fraud by making a false statement as the petitioner has the option to take recourse to Sections 233(5), 233(6) and Section 232 of the Companies Act.

44. The Companies are also at liberty **to once again convene a meeting** of the shareholders, secured creditors and unsecured creditors to comply with the provision of Section 233(1)(b) of the Act, as per the circular/letter no. 2/31/2013-CAA-CL-V-Pt-2 dated 24.08.2017 of the Ministry of Corporate Affairs, New Delhi.

45. It is further seen that the petitioner herein has been made an accused as the Company Secretary of the company M/s Jayshree Chemicals Limited.

46. The said Company was merged with M/s Fort Gloster Electric Limited and in respect of the scheme of amalgamation the approval under Section 233(1)(b) of the Act was confirmed in a meeting of share holders.

47. It is this report against which the present proceeding has been initiated.

48. In paragraph 5 of the petition of complaint the complainant has stated as follows:-

> *"That the transferee company M/s Jayshree Chemicals Limited* ***through its Company Secretary*** *has filed the notice of approval of the scheme of merger in the prescribed* ***Form CAA-11*** *dated 24.08.2018 with the Central Government as required under Section 233(2) of the Companies Act, 2013 read with Rule 25(4) of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016."*

49. It is thus clear that the petitioner has been made an accused for acting in discharge of duties of the company.

50. The Supreme Court in ***Shiv Kumar Jatia vs. State of NCT of Delhi, AIR 2019 SC 4463, Criminal Appeal nos. 1263, 1264 and 1265-1267 of 2019, decided on 23 August, 2019,*** held:-

> *"**27.** The liability of the Directors/the controlling authorities of company, in a corporate criminal liability is elaborately considered by this Court in the case of **Sunil Bharti Mittal**. In the aforesaid case, while considering the circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person, this Court has held, 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. At the same time it is observed that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless **the Statute specifically provides for**. It is further held by this Court, an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Further it is also held that an individual can be implicated in those cases where statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*
>
> ***29.** By applying the ratio laid down by this Court in the case of **Sunil Bharti Mittal** it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in the case of **Maksud Saiyed vs. State of Gujarat & Ors.** this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, 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 a Company. ***It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the Statute****. It is further held that Statutes indisputably must provide fixing such vicarious liability. It is also held that, 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.*

30. *In the judgment of this Court in the case of* ***Sharad Kumar Sanghi vs. Sangita Rane*** *while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 of Cr.P.C. In the case on hand principally the allegations are made against the first accused-company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is accused no.2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures.* ***Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are incharge of day to day affairs of the company****. In absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned."*

51. In ***Dayle De' Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in Criminal Appeal No. .... of 2021 (arising out of SLP (CRL.) No. 3913 of 2020), decided on October 29, 2021,*** the Supreme Court held:-

*"**24.** In **Sharad Kumar Sanghi v. Sangita Rane, (2015) 12 SCC 781** this Court observed that:-*

"11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. in the context of the Negotiable Instruments Act, 1881.

xx xx xx

13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant."

25. *This position was again clarified and reiterated by this Court in* ***Himanshu v. B. Shivamurthy and Another, (2019) 3 SCC 797.*** *The relevant portion of the judgment reads thus:*

"6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the

company could be impleaded/arraigned at this stage is erroneous.

7. The first submission on behalf of the appellant is no longer res integra. A decision of a three-Judge Bench of this Court in Aneeta Hada v. Godfather Travels & Tours (P) Ltd. governs the area of dispute. The issue which fell for consideration was whether an authorised signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three-Judge Bench held thus: (SCC p. 688, para 58)

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

In similar terms, the Court further held: (SCC p. 688, para 59)

"59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself."

xx xx xx

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to

the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused."

***26.** Applying the same proposition of law as laid down in **Aneeta Hada** (supra), this Court in **Hindustan Unilever Limited v. State of Madhya Pradesh, (2020) 10 SCC 751** applying pari materia provision in Prevention of Food Adulteration Act, 1954, held that:*

"23. Clause (a) of sub-section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the company as well as the nominated person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the company, the nominated person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant-nominated person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the nominated person as unsustainable."

***27.** In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment*

has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well."

52. In ***Sunil Bharti Mittal Vs Central Bureau of Investigation, (2015) 4 SCC 609, decided on January 9, 2015,*** the Supreme Court held:-

"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.*

44. *When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."*

53. It is clear from the petition of complaint that neither the Company nor the persons, who were in-charge of the day affairs of the company, have been made parties in the case. Without the Company and the persons responsible for the day to day affairs of the Company, the prosecution of the petitioner alone, who acted on behalf of the company is bad in law and thus clearly an abuse of the process of law.

54. In the petition of Complaint all the allegations in respect of the offence alleged are in respect of the company, and acts done on behalf of the Company. But the Company and the persons responsible for the affairs of the Company have not been made parties.

CONCLUSION:-

55. Thus in view of the findings above, the proceedings being Case No. Comp. 35/2019 pending before the Learned, 2nd Special Court, Calcutta at West Bengal under Section 448 of the Companies Act, 2013 for alleged violation of Section 233 of the Companies Act, 2013, is bad in law and thus liable to be set aside.

56. CRR 2769 of 2019 is allowed.

57. The complaint and proceeding being complaint no. 35/2019 pending before the Learned, 2nd Special Court, Calcutta at West Bengal under Section 448 of the Companies Act, 2013 for alleged violation of Section

233 of the Companies Act, 2013, **is hereby quashed in respect of the petitioner.**

58. All connected applications, if any, stand disposed of.

59. There will be no order as to costs.

60. Interim order, if any, stands vacated.

61. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

62. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)