

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

THE HONOURABLE MR.JUSTICE V.G.ARUN

Tuesday, the 30th day of March 2021/9th Chaithra, 1943

Cr.L.M.Appl/1/2021 IN Cr.L.MC/1942/2021

CC No.1/2021 of the ADDITIONAL DISTRICT & SESSIONS COURT - VII, ERNAKULAM(Special Court under Companies Act, 2013)

PETITIONERS/ACCUSED 1 TO 6

1.DR.P.P.JOSEPH,AGED 87 YEARS

ERSTWHILE DIRECTOR, COSMOPOLITAN HOSPITAL PVT LTD., NO.II HOUSING BOARD COLONY, PONGUMOODU, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM-11

2.S.GOMATHY

DIRECTOR, COSMOPOLITAN HOSPITAL PVT LTD., SIVAPRIYA, TAGORE GARDENS, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM-11

3.K.M.LEKSHMI DEVI

ERSTWHILE DIRECTOR, COSMOPOLITAN HOSPITAL PVT LTD., 103 PRASANTH NAGAR, ULLOOR, THIRUVANANTHAPURAM-11

4.SUSAN THOMAS,

ERSTWHILE DIRECTOR, COSMOPOLITAN HOSPITAL PVT LTD., SAMARIAM, M-2,R P LANE, KOWDIAR, THIRUVANANTHAPURAM-3

5.DR.BABU SUBASH VELAYUDHAN

DIRECTOR, COSMOPOLITAN HOSPITAL PVT LTD.,LEKSHMI NIVAS, NEAR R.C.-JN .KUNNUKUZHY, THIRUVANANTHAPURAM-695 037

6.CHANDRIKA MENON

DIRECTOR, COSMOPOLITAN HOSPITAL PVT LTD., 2/1025, PAZHAYA ROAD, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM-11

RESPONDENTS/RESPONDENT

1.THE STATE OF KERALA

REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM,KOCHI-682 021

2.B.K.N.PILLAI @ B.K.NARAYANA PILLAI

LAXMI VILAS, KRVA-071, CHAMPION BHASKARAN ROAD, KUNNUKUZHI, THIRUVANANTHAPURAM-695 035

Petition praying that in the circumstances stated therein the High Court be pleased to stay all further proceedings in C.C.NO.1/2021 of the files of Additional district and Sessions Court VII, Ernakulam pending disposal of the above Criminal Case.

This petition coming on for admission upon perusing the petition and upon hearing the arguments of M/S. M.P.SHAMEEM AHAMED, ABID MILLATH, AMEERUL MILLATH SYED MOHAMED and CYRIAC TOM, Advocates for the petitioner and the PUBLIC PROSECUTOR for the 1st respondent, the court passed the following:

ORDER

There shall be an interim stay of further proceedings in C.C.No.1/2021 on the files of the Addl. District and Sessions Court-VII, Ernakulam (Special Court under Companies Act, 2013) for two months.
30-03-2021

/true copy/

Sd/-

V.G.ARUN,JUDGE

ASSISTANT REGISTRAR

MLG/31/3/21

Presented On:-

Sub: Sec 482 Cr. PC & Sec 447 of Companies Act 2013 - Special Court under the Companies Act 2013 has taken cognizance on the basis of private complaint filed by 2nd Respondent for the offence of 'fraud' punishable under Sec 447 of Companies Act 2013 - As per second proviso to Sub Sec (6) of Sec 212 of Companies Act, there is an express bar in taking cognizance based on private complaint.

BEFORE THE HONOURABLE HIGH COURT OF KERALA AT ERNAKULAM

Crl.MC No. /2021

(To quash all proceedings in C.C No. 1/ 2021 of Addl. District & Sessions Court, Ernakulam (Special Court under Companies Act, 2013)

Dr. PP. JOSEPH& OTHERS

: Petitioners

THE STATE OF KERALA & Another

: Respondents

COURT FEE RS.....PAID.

COUNSEL FOR THE PETITIONER

SHAMEEM AHAMED M.P [S – 2987] [K/2626/1999]

S.M. AMEERUL MILLATH [A-1431] [K/17/2013]

ABID MILLATH [A-1432] [K/794/2013]

CYRIAC TOM [C-234] [830/2011]

M/s AHMED& AHMED

ADVOCATES

36/ 3117 –C, CHOONDANI BUILDING,
KATHRIKADAVU JUNCTION,
ERNAKULAM 682017.

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

Crl M.C No. /2021

Dr. PP. JOSEPH & OTHERS : Petitioners

THE STATE OF KERALA & Another : Respondents

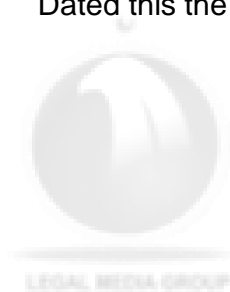
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Dated this the ----- day of March 2021

Counsel for the Petitioner



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

Crl M.C No. /2021

Dr. PP. JOSEPH& OTHERS : Petitioners

THE STATE OF KERALA & Another : Respondents

SYNOPSIS

1. By way of this Criminal MC, the petitioners invoke the power of this Hon'ble High Court u/s 482 of the Code of Criminal Procedure, 1908, to quash all proceedings against the petitioners in CC No. 1/2021 on the files of Additional District and Session Court VII, Ernakulam ("Special Court under the Companies Act, 2013). The Special Court has taken cognizance based on Annexure 1 complaint filed by the 2nd Respondent for the offence of 'fraud' punishable under Section 447 of the Companies Act 2013. The specific allegations against the petitioners are that they were the directors of the company by name Cosmopolitan Hospitals Private Limited and the 6th petitioner herein was the Managing Director of the said company during the period up to September 2015. It is the case of a petitioner that the 6th petitioner had continued as the Managing Director in spite of attaining disqualification under Sec 196 (3). It is alleged that the 6th Petitioner attained the age of 70, and therefore, she could not have continued as a Managing Director, but she had drawn salary and gratuity, to which she is not eligible. Since the payment gratuity is authorized by the board of directors, the receipt of salary and

gratuity by 6th Petitioner is 'fraud' done in collusion with the other petitioners, which is punishable under **Section 447 of the Companies Act.**

2. It is submitted that, the allegations raised in Annexure 1 complaint has no legal basis and even assuming that such allegations are correct, the Special Court under the Companies Act cannot take cognizance for an offence under Section 447 of the Companies Act except on a complaint in writing made by the Director, Series Fraud Investigation Office or by other authorized officers of the Central Government as per the express provisions contained in 2nd proviso to sub section (6) of Section 212 of the Companies Act. Thus, there is an express bar in taking cognizance by Special Court upon private complaint for the offences punishable under Section 447 of the Companies Act. The Special Court has taken cognizance and had issued Annexure 9 summonses without considering the express provisions of to sub section (6) of Section 212 of the Companies Act. The entire proceedings in CCNo 1/2021 pending on the files of Additional District and Sessions Court VII, Ernakulam is therefore liable to be quashed.

Hence this Criminal Miscellaneous case

Counsel for the Petitioners

DATES AND EVENTS

Dates	Events
26.09.2015	The 6 th petitioner stepped down as a Managing Director of Cosmopolitan Hospitals Private Limited in the 36 AGM.
04.12.2015	Board of Director approved the payment of INR 9,88,615 as gratuity the 6 th petitioner for her service of 28 years, 4 months and 25 days as Managing Director and employee.
23.05.2016	SC No.1401/2016 filed before Sessions Court, Thiruvananthapuram by the 2 nd Respondent.

17.03.2017	CrI.MC 2343/2017 filed by the petitioners for quashing-off Criminal proceedings.
18.02.2020	CrI.MC 2343/2017 disposed off directing the 2 nd Respondent to take steps to transfer the complaint to Special Court.
20.01.2021	The Additional District and Sessions Court VIII took cognizance of Annexure 1 complaint and issued summons to the petitioners inspite of the express bar.

MAIN POINTS URGED

The Special Court under Companies Act cannot take cognizance of offence punishable under Section 447 on private complaint.

STATUTES, AUTHORITIES & CITATIONS

Section 447 of Companies Act & 2nd proviso to Sub-section 6 of Section 212.



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BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

Crl. M.C No. /2021

PETITIONERS /ACCUSED 1 TO 6

1. Dr. PP. JOSEPH
Erstwhile Director, Cosmopolitan Hospital Pvt.
Ltd, No.II Housing Board Colony,
Pongumoodu, Medical College
P.O Thiruvananthapuram -11.
2. S. GOMATHY
Director, Cosmopolitan Hospital Pvt.
Ltd. Sivapriya, Tagore Gardens,
Medical College P.O., Thiruvananthapuram -11.
3. K.M. LEKSHMI DEVI
Erstwhile Director, Cosmopolitan Hospital Pvt.
Ltd 103 Prasanth Nagar,
Ulloor, Thiruvananthapuram -11.
4. SUSAN THOMAS
Erstwhile Director, Cosmopolitan Hospital Pvt.
Ltd Samariam, M-2, R P Lane, Kowdiar
Thiruvananthapuram -3.
5. Dr. BABU SUBASH VELAYUDHAN
Director, Cosmopolitan Hospital Pvt. Ltd
LekshmiNivas, Near R.C.-Jn.
Kunnukuzhy, Thiruvananthapuram-695037.
6. CHANDRIKA MENON
Director, Cosmopolitan Hospital Pvt.
Ltd 2/1025, Pazhaya Road,
Medical College.P.O, Thiruvananthapuram-11.

RESPONDENTS/RESPONDENT

1. THE STATE OF KERALA
Represented by Public
Prosecutor High Court of Kerala,
Ernakulam Kochi- 682021
2. B.K.N. PILLAI @ B.K. NARAYANA PILLAI
Laxmi Vilas, KRVA- 71, Champion Bhaskaran
Road Kunnukuzhi, Thiruvananthapuram- 695035

**MEMORANDUM OF CRIMINAL MISCELLANEOUS CASE FILED UNDER
SECTION 482/CODE OF CRIMINAL PROCEDURE 1973**

The address for service of all notices on the Petitioner is that of their Counsels Shameem Ahamed, Hashick P.P and Cyriac Tom Advocates of M/s “AHMED & AHMED”, 1st Floor, Choondani Building, Kathrikadavu Junction, Ernakulam, 682017. All notices / process on the Respondents may be served on the address shown above.

STATEMENT OF FACTS

1. By way of this Criminal Miscellaneous Case, the petitioners invoke the jurisdiction of this Hon'ble High Court u/s 482 of Code of Criminal Procedure 1908, to quash all proceedings in CC1/2021 pending on the files of The Additional District and Session Court VII, which is designated as the Special Court under the Companies Act, 2013 (“The Special Court”), in which the petitioners are arrayed as accused No. 1 to 6. The current case being C.C No. 1/2021 is registered based on a private complaint filed by the 2nd Respondent for the offence punishable under Section 447 of the Companies Act 2013 (“The Companies Act”). The Special Court has taken cognizance of the offence punishable under Sec 447 of the Companies Act 2013 and have issued summons to each of the Petitioners/ Accused. Certified copy of the complaint filed by the 2nd Respondent against petitioners is produced and marked as **Annexure1.**
2. The specific allegations made out in the Annexure 1 complaint against the petitioners are that, the petitioners were acting as Directors of a Private Limited company by name ‘Cosmopolitan Hospitals Private Limited’ (“The Company”) and the 6th Petitioner was acting as the Managing Director of the company till September 2015. The 6th Petitioner was forced to step down from the position of Managing Director of the company, when she came to know that the shareholders of the company will not accept the proposal of the Board of Directors to re-elect

her as the Managing Director for another period of 5 years from 10.08.2015. It is further alleged that, as per the provisions of Companies Act 2013, a person who attained the age of 70 years, cannot be appointed as a Managing Director of the company, but the 6th Petitioner who attained the age of 70 years, had intentionally concealed the said fact, and continued as the Managing Director and collected remuneration during the said period which was done to make unlawful gain to her and against the interest of the company and the shareholders.

3. The further allegation to support the offence of fraud under Sec 447 of the Companies Act, 2013 is that the Board of Directors in a Board Meeting convened on 4.12.2015, had sanctioned the payment of gratuity of INR 9,88,615 to the 6th Petitioner which was received by her in her bank account. As per the averments in Annexure A1 complaint, the Managing director is an employer and not an employee and therefore she was not entitled to receive any gratuity under the provision of gratuity act. Further, a hospital is not covered under the provisions of Payment of Gratuity Act. Thus, according to the 2nd Respondent, the intentional act of all the accused had caused loss to shareholders and wrongful game to the 6th accused. Based on these grounds, it is alleged that the all the Petitioners, who formed the Board of Directors had committed an offence of fraud punishable under Section 447 of the Companies Act.
4. The Petitioners submits that the Annexure A1 complaint has no force, and the Special Court cannot take cognizance based on the Annexure A1 complaint against the petitioners herein, in view of the express bar contained in second proviso to Sub Sec (6) of Sec 212 of the Companies Act.
5. The Petitioners submits that the 6th Petitioner was the Founder/Promoter Director of the Company and she was continuing as Chairperson and the Managing Director ever since the company was incorporated in the year 1979. The 6th petitioner was re-elected as the Director and as Managing Director every 3 years with the unanimous support and consent of all the shareholders and all the Directors.

6. The Petitioners submits that, the 2nd Respondent is also a shareholder of the Company and he was also elected as a director on 28.09.2002 and continued as such till the Annual General Meeting (AGM) held on 27.09.2014. However, in the AGM conducted on 27.09.2014, the 2nd Respondent lost the election and his second attempt to get appointed as a director in the AGM conducted on 26.09.2015, was also not successful as he could not win required majority of votes in his favor.
7. The Petitioners submit that, ever since the 2nd Respondent had lost directorship, he has been making false and frivolous allegations against the board of directors and has been filing numerous cases before various forums.
8. The petitioners submit that, Section 196 of the Companies Act, 2013 talks about the appointment of whole time Director, Managing Director and Manager and the said provisions came into force on 1.04.2014, at a time when the 6th Petitioner was continuing as a Managing Director and when she had her tenure till September 2014. The said provisions contain certain restrictions on appointment of Managing Director, Whole time Director and Managers like, their appointment cannot be for a period exceeding 5 years at a time and their age cannot be less than 21 years or more than 70 years etc. However, these are not absolute bar, but the company has the power to pass special resolutions to get the relaxation in terms of age.
9. The Petitioners submit that, as stated above, the 6th Petitioner's tenure as a Director was coming to an end in the AGM to be held in on 27.09.2014 and she had the option to offer herself for re-appointment. She exercised her option and the members of the Company, elected her as a director once again in the said AGM conducted on 27.09.2014. Since she had attained the age of 70 years, there was a discussion among the members of the Company and also among the board of directors as to the requirement of passing special resolution for her continuance as Managing Director in the light of the newly introduced Companies

Act. The company received a written note from its consultant Company Secretary, Mr. G Raman Pillai in which it was clarified that the required Special resolution as per Section 196 of the Companies Act will be moved at the next General Meeting for approval. A copy of the written note dated 24.10.2014 given by GRaman Pillai the Company Secretary is produced and marked as **Annexure 2.**

10. The Petitioner submits that, based on the Annexure A2 note given by the Company Secretary, the Board of Directors in its meeting held on 28.11.2014 had passed a resolution authorizing the 6th Petitioner to continue to hold the office of the Managing Director subject to taking approval of the shareholders in the next AGM. A copy of the minutes of Board Meeting held on 28.11.2014 is produced and marked as **Annexure 3.**

11. The Petitioners further submit that, the AGM for the year 2014-15 (36th AGM) was scheduled on 26.9.2015 and the appointment of 6th Petitioner as a Managing Director was specifically included as an agenda in the said AGM. The item regarding the appointment of 6th Petitioner was included in the agenda after taking written opinion from the consultant Company Secretary, Mr. G Raman Pillai. The Written Opinion stated that since the 6th Petitioner was appointed a director only in the AGM held on 24.10.2014, her appointment as Managing Director could not be included in the said AGM dated 24.10.2014, as her appointment as Director was not certain at that point of time. Further, the question of moving special resolution is a condition subsequent but not a condition precedent. A copy of the opinion dated 18.9.2015 given by Mr. G Raman Pillai is produced and marked as

Annexure 4

12. The petitioner submits that, even though the appointment of 6th Petitioner as a Managing Director was included in the agenda of the AGM Scheduled on 26.09.2015, the 6th Petitioner had expressed her desire for resigning from the post of Managing Director. Therefore, the said agenda was not taken in the AGM held on 26.09.2015 and thus the 6th Petitioner stepped down from the position of Managing Director with effect from 26.09.2015. As stated earlier, the 2nd

Respondent, had made his second attempt to become a director in the AGM held on 26.09.2015, but he could not gain majority votes in his favour. Copy of the minutes of 26th AGM held on 26.09.2015 is produced and marked as

Annexure 5.

13. The Petitioners submits that, after the resignation of the 6th Petitioner, the Board of Directors in its meeting held on 04.12.2015 had passed a resolution to approve the payment of INR 9,88,615 as gratuity to the 6th Respondent computed as per the provisions of Payment of Gratuity Act 1972 considering her services of 28 years, 4 months, and 25 days as Managing Director and Employee. A copy of the Minutes of the Board Resolution held on 04.12.2015 is produced and marked as

Annexure 6.

14. The Petitioners submits that, as it could be seen from the above, the board of directors had acted in good faith and all decisions were recorded in the statutory records and as per the expert opinion received by it. There is absolutely no basis for the allegations that the 6th Petitioner is not entitled to salary or to receive gratuity and the case put forward by the 2nd Respondent in his Annexure A1 complaint that, the Managing Director is the employer and not the employee has no legal basis, and such grounds has been raised without proper understanding of the provisions of the Companies Act. The Companies Act contains special provisions for appointment and payment of remuneration including perquisites and gratuity to managing Director, which are provided in Sec 196,197 read with Schedule V, Part II of the Companies Act.

15. It is submitted that the Managing Director is appointed by the company and there are no restrictions under the Companies Act in drawing salary by the Managing Director. On the other hand, there are express provisions under the Companies Act which deals with the payment of remuneration to the Managing Director appointed by the company. In this regard, references are made to Section 196, 197 r/w schedule 5 Part ii of the Companies Act.

16. It is submitted that, as per the Section 197 which is applicable to public companies, read with Schedule V of the Companies Act, remuneration can be paid even in respect of companies not making any profit or making inadequate profit. As far as the private companies are concerned, the remuneration of directors including Managing Director is governed purely by the Articles of Association. Therefore, there is absolutely no basis for the contention that the Managing Director is an employer and not an employee and hence no remuneration can be paid to the

Managing Director as contended by the 2nd Respondent. The 6th Petitioner has been a Managing Director since the inception of the company, and she has been paid salary from 01.05.1997 with employee code E0001. Copy of the pay slips for the months of January 2013, February 2013, January 2014, and February of 2014 is produced and marked as Annexure 7. Further the company has also been deducting TDS on the salary paid to 6th Respondent. It is a settled law that a Managing Director can act in dual capacity, one as Director/managerial person and the other as an employee of the company.

17. The other contention of the 2nd Respondent is that the Hospitals are not covered the payment of Gratuity Act is also made without any basis. A Division Bench of the High Court, in the case of **Lourdes Hospital Vs Dr. Abraham Mathew and another in WA No.1737 of 2013 dated 20.12.2018** has already upheld the legal position that the Hospitals are covered under Payment of Gratuity Act.

18. The 2nd Respondent, a disgruntled member of the Company being lost twice in the election to the post of Director, has been filing false and frivolous cases against the board of directors ever since he lost the election. In this regard, it is pertinent to note that initially he filed a civil suit, being OS 310/2016 before the 3rd Additional Munsiff, Thiruvananthapuram seeking recovery of the excess remuneration and gratuity received from 6th Petitioner by the company. Copy of the Complaint in OS No.310/2016 is produced and marked as **Annexure 8.**

19. Later he filed a complaint being SC No.1401/2016 before the Sessions Court, Thiruvananthapuram against the petitioners herein under Section 200 of CRPC R/w Sec 436(d), 439(2) and 440 of the Companies Act for the offence punishable under Section 447 of the Companies Act. The petitioners herein filed Crl.MC No.2343/2017 for quashing the proceedings in SC No.1401/2016 on the ground that, as per Section 435 of the Companies Act, the offences under the Companies Act can be tried only by a Special Court and therefore the complaint filed before the Sessions Court, Thiruvananthapuram is not maintainable.
20. It is submitted that, while disposing off the said Crl.MC, this Court took note of the transitional provisions contained in Section 440 and held that, till the Special Court is established, the Court of Sessions can exercise jurisdiction. The Crl.MC No.2343/2017 was thus disposed off with a direction to the 2nd Respondent to move the Court at Thiruvananthapuram to handover the case to the designated Court. A copy of the Order dated 18.02.2020 in Crl.MC 2343/2017 is produced and marked as **Annexure 9.**
21. The Petitioners further submit that, the 2nd Respondent had later taken steps to transfer the complaint filed before the Sessions Court, Thiruvananthapuram to the Special Court under the Companies Act, which is The Additional District & Sessions Court - VII for the offence alleged under Section 447. The Special Court has taken cognizance of the complaint filed by the 2nd Respondent and had issued summons directing the petitioners herein to appear before the Special Court on 06.04.2021. Copy of the summons issued to the petitioners are produced and marked as **Annexure 10. (Colly)**
22. The petitioner submits that, the Annexure 1 complaint filed by the 2nd Respondent against the petitioners herein, for the offence alleged under Section 447 are not maintainable and the Special Court could not have taken cognizance based on the said complaint in view of the express provisions contained in the Companies Act 2013.

23. It is submitted that, Section 435 of the Companies Act provide for establishment of Special Court and Section 436 provides for the offences which are triable by the Special Court. Section 439 of the Companies Act reads as below:

439. Offences to be non-cognizable:

(1) Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act, **except the offences referred to in sub-section (6) of section 212** shall be deemed to be non-cognizable within the meaning of the said Code.

(2) No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder of the company, or of a person authorised by the Central Government in that behalf:

Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India:

Provided further that nothing in this sub-section shall apply to a prosecution by a company or any of its officers.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, where the complainant under sub-section (2) is the Registrar or a person authorised by the Central Government, the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial.

(4) The provisions of sub-section (2) shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies.

Explanation.—The liquidator of a company shall not be deemed to be an officer of the company within the meaning of sub-section (2).

24. The petitioners submits that, as it could be seen from the above provisions, the offence referred to in Sub-section (6) of Section 212 has been kept outside the purview of Section 39. In other words, all offences other than the offence referred to in sub section (6) of Sec of Section 212 are non-cognizable and are governed by the provisions of Section 439.
25. The petitioner submits that, the Companies Act contains special and stringent provisions to deal with the allegations of 'fraud' punishable under Section 447 of the Companies Act which are exhaustively covered in Section 212 of the Companies Act 2013. The legislative intent is made clear that, the offence of fraud under Sec 449, being serious in nature, cannot be misused by any one and there is a detailed procedure to deal with the cases falling under Sec 449 of the Companies Act.
26. It is submitted that, before any investigation with respect to allegation of fraud is concerned, the Central Government has to form an opinion that, it is necessary to investigate in the affairs of the company by the Serious Fraud Investigation Official (SFIO). Further, such opinion has to be formed based on the receipt of a report of a Registrar or Inspector under Section 208 or upon the intimation of a special resolution passed by the company that it affairs are to be investigated. Thus, there are multiple layer of enquiries and investigation involved as far as the offence of fraud under Sec 447 is concerned, and only after forming an opinion by Central Government, that too based on the report of Registrar, the investigation can be handed over to the SFIO and after such investigation alone, a complaint can be filed before the Special Court based on the finding of SFIO report.
27. For a ready reference, provisions of Section 212, to the extent relevant, is reproduced below:-

212. Investigation into affairs of Company by Serious Fraud Investigation Office

(1) *Without prejudice to the provisions of section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—*

- (a) on receipt of a report of the Registrar or inspector under section 208;*
- (b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;*
- (c) in the public interest; or*
- (d) on request from any Department of the Central Government or a State Government,*

the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(2) *Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.*

(3) *Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order.*

(4) *The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217.*

(5) *The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.*

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), offence covered under section 447 of the Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

- (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
- (ii) (i) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by—

- (i) the Director, Serious Fraud Investigation Office; or***
- (ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.***

Full extract of Sec 212 of the Companies Act 2013 is produced and marked as **Annexure 11**

28. As it could be seen from the above extracted provisions, the offence covered under Section 447 is specifically dealt under Sec. 212. Further, the 2nd proviso to proviso to Sub section (6) to Sec 212 provides that, Special Court shall not take

cognizance of any offence referred to in that subsection, i.e., offence under Section 447, except upon the complaint in writing made by the Director, Serious Fraud Investigation Office (SFIO) or any other authorized officer of the Central Government.

29. The petitioners submit that, in view of the express bar contained in the 2nd proviso to Sub-section 6 of Section 212, the Special Court could not have taken cognizance of the Annexure A1 complaint. There is no application of mind by the Special Court while Annexure 9 summonses were issued to the petitioners herein.
30. The Annexure 1 complaint is clear that, the offence alleged against the petitioners herein is Section 447 of the Companies Act and therefore clearly covered by the bar under 2nd proviso to Sub-section (6) of Section 212. Since no cognizance can be taken based on a private complaint, all proceedings in CC No.1/2021 on the file of Special Court is liable to quashed. The proceedings against the petitioners here in before the Special Court, will be nothing but an abuse of process of law and no meaningful purpose would be served and it will be only waste of the valuable time of the Special Court.
31. In the circumstances, the petitioners have no other alternative remedy other than to approach this Hon'ble Court for quashing the proceedings under Section 482 of the Criminal Procedure Code. Hence this Criminal Miscellaneous case is filed on the following among other grounds:

GROUND

- A. That the Annexure 1 complaint and Annexure A9 summonses are ex-facie illegal, untenable and liable to be quashed.
- B. That the offence alleged against the petitioners, who were the directors of a private limited company is 'fraud' punishable under Section 447 of Companies Act. That the Companies Act contains special provisions in Section 212 to deal

with the allegations of fraud and no investigation can be done with respect to allegation of fraud unless the Central Government has formed an opinion.

- C. That the Central Government's opinion referred to in Section 212 shall be on the basis of a report from Registrar or other Central Government Authorized Officer. That in the instant case, there is no report of the Registrar or any other competent persons nor there is any opinion formed by the Central Government with respect to an allegation of fraud on the part of the Petitioners herein.
- D. That the 2nd proviso to Sub-section (6) of Section 212 is clear in its language that, no Court can take cognizance of offence under Section 447 except upon a complaint in writing made by the Director, Series Fraud Investigation Office (SFIO) or any other Central Government Authorized officers.
- E. That, the Special Court has taken cognizance based on a private complaint filed by the 2nd Respondent and not based on the complaint filed by any specified competent persons.
- F. That even otherwise there is no merit in the contention that the managing Director cannot draw salary or receive gratuity. It is submitted that, there are no restrictions under the Companies Act with respect to payment of salary or gratuity to a managing Director and instead, there are specific enabling provisions which regulates the payment of remuneration and gratuity to the managerial persons.
- G. That there is absolutely no basis for the allegation that the 6th petitioner is not entitled to draw salary or receive gratuity and such an allegation has been raised only because of the misunderstanding of the provisions of the Companies Act.
- H. That, the Companies Act do not treat drawing of excess salary as the act of fraud and as per Section 197 (9) and (10), such excess payment can be

refunded to the company within a period of 2 years and until such sum is refunded, the concerned Director will be hold it trust for the company. Further, by a special resolution of the company, the company can even waive off the requirement of refund and the concerned Director can be exempted from making the payment of the excess remuneration to the company.

- I. That, there are no actions taken by the Petitioners here in secret and all decisions are reduced in to writings in the form of resolution and the same forms part of the statutory records of the company. Therefore, there are no elements to attract the offence of fraud under Section 447 of the Companies Act 2013.
- J. That, the 2nd Respondent being frustrated and disgruntled because of the loss of election to the post of Director, is only trying to harass the petitioners herein by filing false and frivolous complaints before the various forums.

PRAYER

1. For these and the other grounds that may be urged at the time of hearing this Hon'ble Court may be pleased to:
 - A. To quash all the proceedings against the petitioners herein CC No 1/2021 pending on the files of Additional District Session Court VII, Ernakulam ("Special Court under The Companies Act 2013").
 - B. All other relief in favour of the petitioners as this Hon'ble Court may fit to grant in the facts and circumstances of the case.

Dated this theday of March 2021

Counsel for the Petitioner

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

Cr. Misc. Application No. /2021

In

Crl. M.C No. /2021

PETITIONERS /ACCUSED 1 TO 6

7. Dr. PP. JOSEPH
Erstwhile Director, Cosmopolitan Hospital Pvt.
Ltd, No.II Housing Board Colony,
Pongumoodu, Medical College
p.o Thiruvananthapuram -11.
8. S. GOMATHY
Director, Cosmopolitan Hospital Pvt.
Ltd. Sivapriya, Tagore Gardens,
Medical College P.O., Thiruvananthapuram -11.
9. K.M. LEKSHMI DEVI
Erstwhile Director, Cosmopolitan Hospital Pvt.
Ltd 103 Prasanth Nagar,
Ulloor, Thiruvananthapuram -11.
10. SUSAN THOMAS
Erstwhile Director, Cosmopolitan Hospital Pvt.
Ltd Samariam, M-2, R P Lane, Kowdiar
Thiruvananthapuram -3.
11. Dr. BABU SUBASH VELAYUDHAN
Director, Cosmopolitan Hospital Pvt.
Ltd Lekshmi Nivas, Near R.C.-Jn.
Kunnukuzhy, Thiruvananthapuram -695037.
12. CHANDRIKA MENON
Director, Cosmopolitan Hospital Pvt.
Ltd 2/1025, Pazhaya Road,
Medical College.P.O, Thiruvananthapuram -11.

RESPONDENTS/RESPONDENT

1. THE STATE OF KERALA
Represented by Public
Prosecutor High Court of Kerala,
Ernakulam Kochi- 682021

3. B.K.N. PILLAI @ B.K. NARAYANA PILLAI
Laxmi Vilas, KRVA- 71, Champion Bhaskaran
Road Kunnukuzhi, Thiruvananthapuram- 695035

CRIMINAL MISCELLANEOUS APPLICATION FOR STAY FILED
UNDER SECTION 482 OF THE CODE OF CRIMINAL
PROCEDURE

For the reasons stated in the accompanying Crl.MC case, it is most respectfully submitted that this Hon'ble High Court may be pleased to stay all further proceedings in CC No. 1/2021 of the files of Additional District and Session Court VII, Ernakulam pending disposal of the above Criminal Case

Dated this the ----- day of March 2021

Counsel for the Petitioner



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE