IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) NO. 1087 OF 2022
WITH
CRIMINAL APPLICATION (APL) NO. 1088 OF 2022

CRI.APPLN.NO.1087/2022.

Munish S/o. Jai Pal Sharda,
Aged about 49 years, Occupation : Service,
R/o. B-2701, Lodha Bellisimo, Appolo Mills
Compound, N.M.Joshi Marg, Parel,
Mumbai – 400 011.

…. APPLICANT.

// VERSUS //

Partha S/o. Sarathy Sarkar,
Aged about 58 years, Occupation:
Professional, Resident of 20,
Surana Layout, Anant Nagar,
Nagpur – 440 013.

…. NON-APPLICANT.

WITH

CRI.APPLN.NO.1088/2022.

Amol Madhukar Apte,
Aged about 43 years, Occupation : Service,
R/o. B-1605, Videocon Towers,
Thakur Complex, Kandivali East,
Mumbai – 400 101.

…. APPLICANT.

// VERSUS //

Partha S/o. Sarathy Sarkar,
Aged about 58 years, Occupation:
Professional, Resident of 20,
Surana Layout, Anant Nagar,
Nagpur – 440 013.

…. NON-APPLICANT.

Shri D.V.Chauhan, Adv. a/b Shri Chaitanya Dhruv, Adv. for Applicants.
The non-applicant in person.

CORAM : ANIL S. KILOR, J.
DATE OF RESERVING THE JUDGMENT : 16/11/2022
DATE OF PRONOUNCING THE JUDGMENT : 28/11/2022

JUDGMENT :

1. Heard.

2. **RULE**. Rule made returnable forthwith. Heard finally by consent of the parties.

3. Since in both these applications the order impugned is common hence, both the matters are heard together.

4. The applicants in the both the applications at hand have approached this Court by way of the present applications under Section 482 of the Code of Criminal Procedure, challenging the order below Exh.1 dated 13/07/2022 passed by the Judicial Magistrate First Class, Court No.10, Nagpur in Summary Criminal Case No. 2442 of 2018, issuing process against the applicants under Section 204 of the Criminal Procedure Code (Cr.P.C.).

5. The brief facts of the present case are as follows:

The applicant No.1 and non-applicant were working with Future Generali India Life Insurance Co. Ltd. The applicant No.1 was subordinate to him. It was informed by the non-applicant that his services were terminated by the Company on 08/02/2011.

6. Since the above referred letter dated 08/02/2011 did not speak of any violation of service terms and conditions and that it did not give any reason for the termination of the non-applicant and allegedly issued without following the laws of natural justice, the non-applicant filed a Special Civil Suit No.69 of 2012 in the Court of Civil Judge Senior Division, Nagpur against (1) the Managing Director and Chief Executive Officer of the Company, (2) the Company and (3) the Country Manager of the Company, for declaration and for loss caused on account of illegal termination of employment and for loss of reputation and consequent hindrance of opportunity for suitable employment and for unwarranted mental torture. He thereby, claimed Rs.1,00,00,000/- against the defendants with future interest. He further sought declaration about his illegal termination with consequential directions of reinstatement. The non-applicant also made other prayers.

7. The defendants filed written statement with parawise reply. In clause (c) of the preliminary objection and in reply to the paragraph No.6 of the plaint, it is stated as under :

> *"… At this stage, it is essential to point out and to mention that the plaintiff though he was working as General Manager in the defendant company has misused is powers and the plaintiff is also aware of it. Therefore, before issuance of the letter of termination to the plaintiff, the matter was discussed in detail with the plaintiff and it was agreed between the plaintiff and the defendant that the termination simplicitor letter only will be issued to the plaintiff, which was in the interest of the plaintiff. Here it will also not be out of place to mention and at the same time very essential to point out that there was a complaint against the Plaintiff from one lady subordinate staff, who was working under the plaintiff. After carefully going through the complaint made by the female subordinate staff, who was working under the plaintiff it will be seen that it was nothing but the complaint regarding sexual harassment of female subordinate staff, who was working under the plaintiff. ..." (sic.)*

8. The non-applicant found the above referred underlined portion of written statement as defamatory, attracting the offence under Section 499 of the IPC. He, therefore, filed a Criminal Complaint under Section 200 of the Code of Criminal Procedure (Cr.P.C.) vide Summary Criminal Case No.21326 of 2012 for the offence punishable under Section 500 of the IPC against the company-Future Generali India Life Insurance Co. Ltd., applicant No.1 herein Madan Gopal Jalan-Company Secretary and Legal Head as accused No.2, applicant No.2 herein-Deepak Sood as accused No.3, Dr. Kim Chai Ooi, Country Manager as accused No.4 and the Branch Manager of the company as accused No.5.

9. In the meantime, the non-applicant, being plaintiff in the main Civil Suit, filed an amendment application on 04/02/2017. The non-applicant thereby was intended to bring on record certain facts

which were brought to his knowledge subsequent to the filing of written statement by the defendants in the said suit. With the amendment application the non-applicant also sought to bring on record certain photographs of the officials of the company. The defendants filed their reply to the amendment application and while making comments about the photographs the following reply was given :

> *"It is submitted that the said Photographs pertain to a game played during foundation day party of the Defendant Company on September, 2012, which is much after the date of termination of the services of the Plaintiff. The said Photograph has been produced by the Plaintiff without giving any context of the game that was played during the said party whereby the participants have to pass a ring through straws from one participant to another without using their hands.*
>
> *It is further submitted that the Plaintiff could not have offered any context to the said photograph as the same is from a period when the Plaintiff was not in services of the company and the same have been taken/obtained by the plaintiff without there being any authorization to do so. The Defendants further submit that the said photographs by no stretch of imagination has any connection with the present matter at the hand as it pertains to a period of more than one year after the date of termination of services of the Plaintiff and has been produced only with an intent to make malicious, defamatory and derogatory allegations against the Defendants and its employees.*
>
> *The Defendants also submit that the act of taking such data out of the company in an unauthorized manner squarely falls within the ambit of data theft. Further the Defendants have a reason to believe that the Plaintiff has been indulging in data theft from the Defendant Company and thus reserve their right to initiate appropriate criminal/civil proceedings against the plaintiff."*

10. Treating the said stand of the defendants, more particularly words "data theft" used in it, as defamatory, the non-applicant filed Summary Criminal Case No.2442 of 2018 before the learned Judicial

Magistrate First Class, Court No.10, Nagpur against the applicants for the offences punishable under Sections 499, 500, 120-B read with Section 34 of the Indian Penal Code (IPC).

11. The learned Magistrate thereupon directed Police Station Officer, Police Station, Gittikhadan to inquire into the allegation of the complaint. Accordingly, the report was submitted by the police with an opinion that no case of defamation is made out against the applicants. Thereupon, the learned Magistrate dismissed the complaint.

12. The order of dismissal of complaint dated 12/04/2019 passed by the Magistrate was carried in Criminal Revision by the non-applicant, which came to be allowed vide judgment and order dated 29/06/2022 and the matter was remanded back to the learned Magistrate for fresh consideration.

13. Then, the learned Magistrate passed the impugned order below Exh.1 issuing process against the applicants under Section 204 of Cr.P.C. for the offences punishable under Sections 120-B, 500 read with Section 34 of the IPC. The same is under challenge in the present application.

14. I have heard Shri Devendra Chauhan, learned counsel for the applicants and the non-applicant in person.

15. The non-applicant in person, at the outset, has raised the following preliminary objections to the maintainability of the present application:

a) The applicants cannot be termed as 'persons aggrieved' as the applicants did not suffer any legal injury or deprivation / denial of a legal right. In support, he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Ravi Yashwant Bhoyar ..vs.. Collector*, reported in **(2012)4 SCC 407**.

b) It is mandatory to make the State as party in the proceedings filed under Section 482 of Cr.P.C. Whereas, State is not made party in the present proceedings.

c) When the remedy under Section 397 of Cr.P.C. by way of revision is available, application under Section 482 of the Cr.P.C. is not maintainable.

16. Before touching to the merits of the matter, I will first deal with Preliminary Objection to the maintainability. The Hon'ble Supreme Court of India in the case of *Kartik Chandra Majee.. vs. State of Jharkhand*, reported in **AIR 2017 SC 3096,** has held that judicial process is a solemn proceeding which cannot be allowed to be converted into an

instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with malafide and proceeding is malicious, instituted with an ulterior motive, High Court will not hesitate in exercise of its jurisdiction under Section 482 of the Cr.P.C. to quash the proceeding under category seven as enumerated in *State of Haryana ..vs.. Bhajan Lal* , reported in **AIR 1992 SC 604**.

17. In the present case, it is the case of the applicants that the trial Court ought not to have issued process as no *prima facie* case of defamation is made out by the non-applicant. It is submitted that therefore, issuance of process and continuation of criminal proceedings against the applicants is nothing but permitting the non-applicant to use a judicial process to degenerate into a weapon of harassment.

18. It is a settled law that issuance of process in a criminal case is a serious matter and Criminal Law cannot be set into motion as a matter of course. Hence, it cannot be said that the applicants are not aggrieved persons. Accordingly, the first objection to the maintainability is rejected.

19. As far as second objection that in the proceedings under Section 482 of the Cr.P.C. it is mandatory to add the State as party, the said submission is misconceived as the provision does not say so.

Moreover, the present proceeding is arising out of a complaint between private parties, therefore, the State is not the necessary party in the present proceedings. Accordingly, the second objection is rejected, as well.

20. The third objection is also liable to be rejected in view of the judgment of the Hon'ble Supreme Court of India in the case of *Prabhu Chawla ..vs.. State of Rajasthan*, reported in **(2016) 16 SCC 30**, wherein the Hon'ble Supreme Court of India has held that there is no total ban on exercise of inherent power where abuse of process of Court or other extraordinary situation warrants exercise of inherent jurisdiction.

21. Now, moving further to examine the merits of the matter. On merit, the learned counsel for the applicants makes the following submissions:

a) The learned trial Court has committed error in issuing process in ignorance of the law;

b) In absence of *prima facie* case, issuance of process by the trial Court is erroneous.

c) Sufficient pleadings to fulfill the prerequisites of offence under Section 499 of the IPC, are absent.

d) The alleged defamatory statement made in the written statement was made in defence and in good faith, therefore, the ninth exception to Section 499 of the IPC would apply to the present case.

e) The *mens rea* and intention are the *sine qua non* and in absence of pleadings to that effect, the complaint itself is not maintainable.

f) On similar set of facts second complaint under Section 200 of Cr.P.C. is not maintainable, particularly when earlier is pending.

g) No specific allegations are made against each of the accused which is mandatory to arraign them as accused.

h) Even no case is made out under Section 120-B of the IPC.

22. On the other hand, the non-applicant in person makes the submissions as under:

a) The order of issuance of process by the learned Judicial Magistrate First Class is absolutely legal.

b) In view of the specific findings recorded by the Court below that a *prima facie* case is made out attracting the offence under Section 499 of IPC, the order of issuance of process is sustainable in the eyes of law.

c) If the averments make out an offence and there is no legal impediment to the trial, this Court cannot stifle a prosecution at its very threshold. In support, he relied on the judgment of High Court of Madras in the case of *Dr. J. Sudershan ..vs..R. Shankaran*, reported in **1992 Cr.L.J. 2427**.

d) When exercising jurisdiction under Section 482 of Cr.P.C. this Court would not ordinarily embark upon an inquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained. It is the function of the trial Judge. Therefore, this Court should not interfere with it under Section 482 of Cr.P.C.

e) Whether the case falls within ninth exception or not and other grounds raised by the applicants are the matter of evidence which can be established at the trial. He relied on the judgments of Hon'ble Supreme Court of India in the cases of *M.N.Damani ..vs.. S.K. Sinha & oth*. reported in **AIR 2001 SC 2037,** *Central Bureau of Investigation ..vs.. Shri Ravi Shankar Srivastava*, reported in **AIR 2006 SC 2872**, *Jeffrey J. Diermeier and Anr..vs.. State of West Bengal & Anr.*, reported in **(2010) 6 SCC 243** and the judgment of the High Court of Bombay in the case of *Rahul Gandhi ..vs.. Rajesh Mahadev Kunte*, reported in **2015(2) Bom.C.R. (Cri.) 273**.

f) Any defamatory matter stated in the reply to the amendment application or in any legal proceedings, amounts to publication and as such in the present case the prerequisite to attract the offence under Section 499 of the IPC can be said to be complied with. He relied on a judgment of the Madhya Pradesh High Court in the case of *Trichinopoly Ramaswamy Ardhanani & oth. ..vs.. Kripa Shankar Bhargava*, reported in **1990 Cri.L.J. 2616**, and the judgment of Bombay High Court in the case of *Shri Sopullo Datta Naik Dessai..vs..Shri Yashwant Govind Dessai and another*, reported in **MANU/MH/1182/2009**.

g) There is sufficient material brought on record which attracts Section 120-B of the IPC.

23. In the backdrop of rival contentions of the parties I have perused the relevant documents and the judgments with the able assistance of the learned counsel for the applicants and the non-applicant in person.

24. The whole controversy revolves around a question whether the learned Magistrate before issuing the process has applied his mind to the material available on record, to *prima facie* get satisfied that the essential ingredients of defamation Section 499 of the IPC are present to constitute the offence?

25. Law of defamation seeks to protect individual reputation. The word "defamation" is the generic name for the wrong; Libel and Slander are forms of it. Defamation therefore, is of two kinds viz. Libel and Slander.

26. Broad distinction between the two is that libel is addressed to the eye while as slander to the ear.

27. Slander is the publication of defamatory statement in a transient form, which may be spoken words. Libel is a representation made in some permanent form e.g. writing, printing, picture.

28. In the above referred backdrop, at this juncture it would be appropriate to refer to Section 499 and 500 of the IPC which read thus :

> ***"499. Defamation —***
> *Whoever, by words, either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.*
> *Explanation 1 —It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.*
> *Explanation 2 —It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.*
> *Explanation 3 —An imputation in the form of an alternative or expressed ironically, may amount to defamation.*
> *Explanation 4 —No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.*
>
> *First Exception —Imputation of truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.*
>
> *Second Exception—Public conduct of public servants.—It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.*
>
> *Third Exception — Conduct of any person touching any public question.—*
> *It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.*
>
> *Fourth Exception — Publication of reports of proceedings of*

Courts.—It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.
Explanation —A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.
It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Sixth Exception—Merits of public performance.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.
Explanation —A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Seventh Exception —Censure passed in good faith by person having lawful authority over another —
It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Eight Exception —Accusation preferred in good faith to authorised person.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Ninth Exception : Imputation made in good faith by person for protection of his or other's interests.
It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person , or for the public good.

Tenth Exception : Caution intended for good of person to whom conveyed or public good.

> *It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.*
>
> ***500. Punishment for defamation*** *— Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both."*

29. The above definition is subject to four explanations and ten exceptions. If a person is found guilty of having committed defamation in terms of Section 499 of the IPC, the punishment is stipulated in Section 500 of the IPC. The offence is non-cognizable and bailable.

30. It becomes evident from the reading of Section 499 of IPC that, mere publication of an imputation by itself may not constitute the offence of defamation unless such imputation has been made with the intention, knowledge or belief that such imputation will harm the reputation of the person concerned. Therefore, the intention or knowledge to cause harm are the essential ingredients to constitute the offence under Section 499 of IPC.

31. Let us examine the law on issuance of summons. The Hon'ble Supreme Court of India, time and again reiterated that Criminal case is a serious matter and Criminal Law cannot be set into motion as a matter of course. The Magistrate has to therefore, carefully scrutinize the evidence brought on record before issuance of summons. For instance I

may refer to some of the judgments of the Hon'ble Supreme Court of India, in this regard, namely:

32. The Hon'ble Supreme Court of India in the case of *Pepsi Foods Ltd. ..vs.. Special Judicial Magistrate*, reported in **(1998) 5 SCC 749,** has held as under :

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

33. The Hon'ble Supreme Court of India in the case of *Mehmood Ul Rehman ..vs.. Khazir Mohammad Tunda*, reported in **(2015) 12 SCC 420,** has held as under :

> *"22. ... In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for*

> *proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."*

34. The Hon'ble Supreme Court of India in the case of *Sunil Bharti Mittal ..vs..CBI, reported in* ***(2015) 4 SCC 609,*** *has held as under:*

> *"52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.*
>
> *53. However, the words "sufficient grounds for proceeding" appearing in the Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."*

35. The Hon'ble Supreme Court of India while examining what care shall be taken by the Magistrate while exercising discretion to issue process, the Apex Court of India in the case of *Subramanian Swamy ..vs.. Union of India*, reported in **(2016) 7 SCC 221,** has held thus:

> *"207. ... In Punjab National Bank v. Surendra Prasad Sinha it has been held that judicial process should not be an instrument of oppression or needless harassment. The Court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. …"*

36. The Hon'ble Supreme Court of India in the case of *Birla Corpn. Ltd. ..vs.. Adventz Investments & Holdings Ltd.*, reported in **(2019) 16 SCC 610,** has held as under :

> *"35. To be summoned/to appear before the Criminal Court as an accused is a serious matter affecting one's dignity and reputation in the society. In taking recourse to such a serious matter in summoning the accused in a case filed on a complaint otherwise than on a police report, there has to be application of mind as to whether the allegations in the complaint constitute essential ingredients of the offence and whether there are sufficient grounds for proceeding against the accused. In Punjab National Bank v. Surendra Prasad Sinha, it was held that the issuance of process should not be mechanical nor should be made an instrument of oppression or needless harassment."*

37. From the above referred judgments of the Hon'ble Supreme Court of India it becomes evident that the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind is best

demonstrated by disclosure of mind on the satisfaction. The Magistrate would be judicious in exercising discretion lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice, but it would not be the means to wreak personal vengeance as it is a serious matter affecting one's dignity and reputation in the society.

38. In the teeth of above referred well settled law, I will examine whether the learned Magistrate in the case at hand has taken necessary care before exercising discretion to issue process. I, therefore, revert back to the facts of the case.

39. It is the case of the non-applicant that the photographs intended to be brought on record by way of amendment were of the Foundation Day Party held in the month of September, 2012, when admittedly, the non-applicant was not in service of the company, Future Generali India Life Insurance Co. Ltd. In the said backdrop, as the non-applicant has not disclosed his source of information from where those photographs were received by the non-applicant, the defendants in reply stated that the act of taking such data out of the company in an unauthorized manner squarely falls within the ambit of data theft.

40. In the above referred backdrop, the words “data theft” cannot be considered in isolation, but it has to be considered as a whole with the background in which it was made. Despite this fact, taking the words “data theft” in isolation, the non-applicant filed Summary Criminal Case under Section 200 of Cr.P.C. in respect of offences punishable under Sections 120-B, 499 and 500 read with Section 34 of the IPC.

41. The Hon’ble Supreme Court of India in the case of *S. Khushboo .vs.. Kaniamal and another*, reported in **AIR 2010 SC 3196**, after considering the key ingredients of the offence contemplated by Section 499 of IPC, has held that the definition makes it amply clear that the accused must either intend to harm the reputation of a particular person or reasonably know that his/ her could cause such harm.

42. It is therefore, for inviting the provisions contained in Section 499/500 of the IPC which is penal in nature, the Magistrate has to consider if the requirement of *mens rea* which is a mandate for criminal defamation punishable under Section 500 of the IPC was fulfilled. If *mens rea* or criminal intention is lacking or is missing in the act of the accused, he cannot be held guilty for an offence of defamation within the meaning of Section 499 of IPC.

43. The Hon'ble Supreme Court of India in the case of *Subramaniam Swamy* (supra) has held that in the matters of criminal defamation the heavy burden is on the Magistrate to scrutinize the complaint from all aspects. The Magistrate has also to keep in view the language employed in Section 202 of Cr.P.C. which stipulates about the residence of the accused at the place beyond the area the Magistrate exercises his jurisdiction. He must be satisfied that the ingredients of Section 499 of Cr.P.C. are satisfied. Application of mind in case of complaint is imperative.

44. To examine whether the complaint filed by the non-applicant under Section 200 of Cr.P.C. satisfies the ingredients of Section 499 of the IPC, I will refer to the relevant paragraphs of the complaint, which read thus :

> *"3. Brief background facts causing the instant complaint -3.1 The complainant filed a Special Civil Suit -69/12 before the Hon'ble Court of 10th Jt. Civil Judge Sr. Divn. Nagpur, seeking compensation and other reliefs against his illegal termination of employment arraying Future Generali & its officers as defendants. The defendants in their WS' callously defamed the complainant of sexually harassing some unknown female staff of Future Generali. The complainant aggrieved of such false defamation filed a criminal complaint – 21326/12 before this Hon'ble Court, against which the Ld. Magistrate was pleased to issue process, some of the accused persons i.e. Dipak Sood (the erstwhile CEO/MD) & Madan Jalan (Sr. VP Legal) took bail from this Hon'ble Court & filed Cr. Rev. Application - 141/13 U/s 397 of Cr.P.C.*
> *3.2 It was in the Cr. Rev. Application – 141/13 in the matter of the aforestated criminal complaint, a mail was annexed by Dipak Sood/ Madan Jalan, purportedly circulated by Accused-1 & Sunil Wariar (HR Head of Future Generali) defaming the instant complainant of alluding sexual harassment of Ragini Das, (an ex-employee of*

Future Generali and therein was reporting the complainant; against whom the complainant reported serious issues of integrity/tampering of official records). Aggrieved by circulation of such slanderous mail/false allegation of sexual harassment, the complainant filed Cr. Complaint -18664/15 before this Hon'ble Court arraying – Dipak Sood; Madan Jalan; Sunil Wariar & Accused -1; the said complaint was ordered for proceedings U/s 202 of Cr. PC and subsequently ordered for issuance of process. Pertinent to state herein, that the revisionists of Revision Application -141/13 in the inquiry proceedings U/s -202 of Cr PC concerning the Cr. Complaint -18664/15 have distanced / denied themselves of any awareness/mail concerning allegation of sexual harassment of Ragini Das by the instant complainant, the relevant statements is a matter of record with this Hon'ble Court.

3.3 That in early, 2017 the complainant herein and plaintiff in Spl. Civil Suit -69/12 filed application U/O -6 R -17 of CPC, for amending the plaint, & a/with requisite recital annexed photographs of Dipak Sood, Madan Jalan, Sunil Wariar & other officials of Future Generali. The said photographs annexed herewith as ***Annexure – A, A – 1, A -2 & A – 3*** *which are already marked as Exh – 96 to 99 in the said Suit. In the context of the said photographs Accused – 1 without any evidence, and failing the basic test of 'good – faith' laid down U/s – 52 of IPC, callously and willfully, falsely alleged and defamed the complainant of theft, vide internal pg – 7/8 of Accused – 1's affidavit annexed as* ***Annexure – B****.*

3.4 Apparent of the trail of events, Accused – 1's alleging theft vide Annexure – B is/was to further defame the complainant. The complainant shocked by the kind of defamatory allegation put the accused persons on notice thru email, requesting them to withdraw the false – defamatory allegation vide his notice dt/ -27th May, 2017, the requisite notice along with the e–mail is vide ***Annexure – C*** *which is already marked as Exh – 93 (collectively) in Spl. Civil Suit – 69/12. The accused persons expressed no remorse and didn't even care to acknowledge / respond to the complainant's notice, impelling sufficient cause of action in filing the instant complaint before this Hon'ble Court as an appropriate / efficacious legal remedy.*

4. Offences committed by the accused person(s) -

4.1 <u>Falsely Defaming the complainant of Theft –</u> Given the factum/circumstances stated in para-3, the accused persons willfully defamed the complainant concerning the false baseless allegations of theft to cause continual anguish and distress to the complainant & also subjecting the complainant of continuing disrepute in the society/public at large and hence are offences within the meaning of Sec – 499/500 of IPC.

4.2 <u>Criminal Conspiracy</u> - That the criminal acts the accused person(s) interse conspired with a common intent to commit injury/ loss/harm/prejudice to the complainant and thus have committed offences U/s – 120-B r/w Sec -34 of IPC."

45. The next question that arises for consideration is whether reading the above referred relevant paragraphs of the complaint can it be said that a *prima-facie* case exists for issuance of process by the learned Magistrate.

46. It is evident from the complaint at no place it is the case of the non-applicant that the alleged imputation is with the intention of causing harm to the reputation of the non-applicant or it was with knowledge or reason to believe that the imputation will harm the reputation of the non-applicant. Thus, the complaint does not fulfill the prerequisites of Section 499 of the IPC.

47. In the light of the above observation, let us move to the finding recorded by the learned Magistrate while issuing process to examine whether the learned Magistrate has applied its mind to satisfy that ingredients of Section 499 of IPC are satisfied. For this purpose, it is appropriate to refer to the order passed by the learned Magistrate, issuing process against the applicants, which reads thus:

> *"SCC No. 2442/2018 Partha Sarathy Vs Amol*
>
> ***ORDER BELOW EXH. 1***
>
> *(Passed on 13th day of July, 2022)*
>
> *This is a complaint filed under Sec. 200 of Cr.P.C. for the offence punishable under Sec. 499, 500, 120-B R/w 34 of the Indian Penal Code. Heard the complainant, in person and perused the written notes of submission. I have gone through the verification of the complainant. Thereafter, the report of Police under Section 202 of Cr. P.C. was called upon, wherein the police submitted that*

> *the applicant had not furnished any evidence to show that the non-applicant No.1 had defamed him in a public place by making the false allegation of theft.*
>
> *2] The record shows that the non-applicants have filed a reply to the amendment application in Spl. C.S. No. 69/2012 before the Hon'ble 10th Civil Judge, Sr. Division, Nagpur, wherein the contents of 21-I i.e. "The act of taking such data out of the company in an unauthorized manner squarely false within the ambit of data theft. The defendants have a reason to believe that the plaintiff has been indulgent in data theft from the defendant company. The defendant company also prays that the court also pass appropriate stricture against the plaintiff for data theft and for making defamatory, derogatory and malicious allegation against the officials of the defendant company."*
>
> *3] Having gone through the material on record and after hearing the complainant, I find that there is a sufficient material prima-facie on record to proceed against non-applicant Nos. 1 and 2 under Sec. 120-B and 500 R/w 34 of I.P.C.. Hence, I pass the following order.*
>
> ***ORDER***
>
> *1) Issue process against non-applicant Nos.1 and 2 under Sec. 120-B and 500 R/w. 34 of I.P.C. vide Sec. 204 of Cr.P.C.*
>
> *2) Issue summons to the witnesses after the filing of witness list as per Sec.204 (2) of Cr.P.C.*
>
> *Sd/-*
>
> *Nagpur* *(G.N. Bagrodia)*
>
> *Date:- 13/07/2022* *Judicial Magistrate First Class,*
>
> *Court No.10, Nagpur."*

48. In the impugned order, there are no findings recorded by the learned Magistrate that the alleged imputation is *prima facie* with the intention of causing harm to the reputation of the non-applicant or with knowledge or reason to believe that the imputation will harm the reputation of the non-applicant.

49. There are also no findings for not accepting the police report wherein after recording statements of the non-applicant and other concerned persons, including the applicants, the police have categorically observed that *prima facie* no offence attracts.

50. It is evident from the impugned order that the learned Magistrate has not at all dealt with the mens rea or criminal intention. Even he has not considered whether sufficient pleadings are made by the non-applicant as regards mens rea or criminal intention of the applicants as the *mens rea* is *sine qua non* to attract Section 499/ 500 of IPC.

51. Admittedly, there are no pleadings in the complaint about the *mens rea* or intention of the applicants. Thus, I have no hesitation to hold that in this case *mens rea* or criminal intention is lacking or for want of necessary pleadings it is missing in the act of the applicants and therefore, they cannot be held guilty for the offence of defamation within the meaning of Section 499 of IPC.

52. Now moving further to examine that when a Company, an artificial person acts through its officers, directors, managing directors chairman etc., if commits an offence, who would be responsible for any action. In this regard, the Hon'ble Supreme Court of India in the case of *Sunil Bharti Mittal ..vs.. CBI*, reported in **(2015) 4 SCC 609** has held as under :

> *"42. No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of*

criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

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

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, 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.

45. ...

45.1 …

45.2. Sham Sunder v. State of Haryana

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

45.3. ...

45.4. Maksud Saiyed v. State of Gujarat

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose

unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

45.5. R. Kalyani v. Janak C. Mehta

"32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created."

45.6. ...

45.7. ...

46. It is stated at the cost of repetition that in the present case, while issuing summons against the appellants, the Special Magistrate has taken shelter under a so-called legal principle, which has turned out to be incorrect in law. He has not recorded his satisfaction by mentioning the role played by the appellants which would bring them within criminal net. In this behalf, it would be apt to note that the following observations of this Court in the case of GHCL Employees Stock Option Trust v. India Infoline Ltd.:

> *"19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. (Thermax Ltd. v. K.M. Johny followed) xx xx xx*
>
> *21. In the instant case the High Court has correctly noted that issuance of summons against Respondents 2 to 7 is illegal and amounts to abuse of process of law. The order of the High Court, therefore, needs no interference by this Court."*

53. From the above referred observations of the Hon'ble Supreme Court of India, it becomes evident that an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Moreover, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Even under a special statute when the vicarious criminal liabilities fastened on the person on the premise that he was incharge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled.

54. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Director of the company when the accused is a company. Moreover, there are no pleadings how the vicarious criminal liability is fastened on them on the premise that they are in charge of the affairs of the applicant No.1 company and responsible to it. There are no pleadings to *prima facie* disclose their active role coupled with criminal intent.

55. The applicants are, admittedly, connected with the company- Future Generali India Life Insurance Co. Ltd. in various capacities.

56. It is evident from the impugned order of the learned Magistrate that he has not recorded his satisfaction about the *prima facie* case against the applicants individually and in their official capacity in the company, which is *sine qua non* for initiating criminal action against them.

57. It is significant in view of the fact that neither in the first complaint or in the police report which was called in the present matter, the non-applicant mentioned anything about the role of the applicants.

58. Thus, on this ground also in absence of necessary pleadings to show that there is any vicarious criminal liability, on the premise that they are in-charge of affairs of the company and responsible for it coupled with their criminal intent, the complaint itself is not maintainable against the applicants and issuance of process against the applicants is illegal and amounts to abuse of process of law.

59. The non-applicant cited following judgments of Hon'ble Supreme Court of India, High Court of Bombay and High Court of Madhya Pradesh in the cases of :

(i) *M.N.Damani ..vs.. S.K. Sinha & oth.* (**AIR 2001 SC 2037), (**ii) *Central Bureau of Investigation ..vs.. Shri Ravi Shankar Srivastava*, [**AIR 2006 SC 2872]**, (iii) *Jeffrey J. Diermeier and Anr..vs.. State of West*

Bengal & Anr., [**(2010) 6 SCC 243]** (iv) *Rahul Gandhi ..vs.. Rajesh Mahadev Kunte*, [**2015(2) Bom.C.R. (Cri.) 273],** (v) *Shri Sopullo Datta Naik Dessai..vs..Shri Yashwant Govind Dessai and another*, [**MANU/MH/1182/2009],** (vi) *Trichinopoly Ramaswamy Ardhanani & oth. ..vs.. Kripa Shankar Bhargava*, [**1990 Cri.L.J. 2616].**

60. After going through the aforesaid judgments, it is revealed that the said judgments cited by the non-applicant in support of his case are distinguishable on facts and not of any help to the non-applicant.

61. As no case of defamation is made out for want of necessary pleadings, the case under Section 120-B of the IPC also fails.

62. In view of the above referred observations and in absence of necessary pleadings, I do not think it necessary to go into the issue whether the alleged imputation amounts to defamation or whether it falls within the ninth exception of Section 499 of IPC.

63. In light of the above referred findings recorded, I have no hesitation to hold that the learned Magistrate has mechanically issued the process against the applicants without applying his minds to the essential ingredients of Section 499 of the IPC and without examining the role of the applicants individually and whether there is any vicarious liability against them.

64. Hence, in exercise of inherent powers of this Court under Section 482 of Cr.P.C. for ends of justice and to prevent abuse of the process of the Court, I am of the considered view that the present application needs to be allowed. Accordingly, I pass the following order :

i) Both the Criminal Applications are allowed.

ii) The impugned common order dated 13/07/2022, passed by Judicial Magistrate First Class, Court No.10, Nagpur is hereby quashed and set aside and consequently proceedings of Summary Criminal Case No. 2442 of 2018 is quashed.

Rule is made absolute accordingly.

Pending application(s), if any, shall stand disposed of.

JUDGE

RRaut..