

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-43254-2021 (O&M)

Date of decision : 10.04.2023

S.Kishore @ Sethuramana Kishore and another

.....Petitioners

Versus

Nahar Industrial Enterprises Ltd. and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.Vikram K. Chaudhri, Sr. Advocate with
Mr.Keshvam Chaudhri, Advocate for the petitioners

Mr.Aalok Jagga, Advocate for complainant-respondent No.1

AMAN CHAUDHARY. J.

The challenge is to the complaint No.CRM-25/2020, Annexure P-1, dated 04.01.2020 filed by respondent No.1 as well as the summoning order dated 28.07.2021 passed by learned Judicial Magistrate, 1st Class, Ludhiana vide which the petitioners have been summoned to face the trial under Sections 420, 406 read with Section 120-B of the Indian Penal Code (for short 'IPC').

Succinctly, the facts as emerge from the complaint are that the complainant-company had been solicited by the accused-petitioners for equity participation in the establishment of a power generation unit in Rajasthan on the condition that they had to subscribe to the shares of their company. It was further asserted that the unit falls within the purview of a captive power unit, which would entitle it to concessions with regard to government duties and cess. Agreement in that regard was entered into on

21.12.2006, followed by MOU dated 07.10.2018, with an investment as per which it would get the electricity for a period of 20 years at subsidised rates. The case set up against the petitioner and other co-accused is of having induced the complainant-company with ill-intentions right from the very inception by misrepresenting and making false promises, thereafter, deceiving them by not providing regular supply of electricity despite there being arbitral awards in their favour containing a direction dated 29.10.2017, to supply power to them.

Learned Senior counsel has raised three-fold submissions, firstly, that the Magistrate has not held an inquiry, as contemplated under Section 202 CrPC, which he was bound to, the petitioners, residing beyond the territorial jurisdiction of the Court. Secondly, it was only on account of the direction by the Government of India and Government of Rajasthan that the petitioners could not comply with the order of Arbitral Tribunal to supply power to the complainant-company and the award is subjudice before Rajasthan High Court and their request was turned down, which covers them under the clause of force majeure, a fact mentioned in the police report called by the Magistrate, wherein no offence was said to be made out. No ingredients of offences as alleged against the petitioners have been spelt out in the complaint of cheating right from the very beginning or misrepresentation of any sort, much less of any false promises made or that the electricity that was to be supplied to respondent no.1 company as a matter of fact was stolen or that it was misappropriated. Thirdly, there being no concept of vicarious liability in criminal law, the Magistrate has erred in summoning the petitioners.

To buttress his submissions, he relied on **National Bank of Oman vs. Barakara Abdul Aziz and another**, (2013) 2 SCC 488, **Abhijit Pawar vs Hemant Madhukar Nimbalkar and another**, (2017) 3 SCC 528, and **Birla Corporation Ltd. vs Adventz Investments And Holdings**, (2019) 16 SCC 610, **SUO MOTU WRIT PETITION (CRL.) No.2 of 2020**, (2021) SCC Online, 325, **Bhushan Kumar vs. State (NCT of Delhi)**, (2012) 5 SCC 424, **Mehmood Ul Rehman vs. Khazir Mohammad Tunda**, (2015) 12 SCC 420, **Sunil Bharti Mittal vs. CBI**, (2015) 4 SCC 609, **Inder Mohan Goswami and another vs. State of Uttaranchal and others**, (2007) 12 SCC 1, and **M/s Pepsi Foods Ltd. vs. Special Judicial Magistrate**, 1998 AIR (SC) 128.

Strenuously opposing the above, learned counsel for the complainant-respondent no.1-company (hereinafter referred to as 'complainant-company') while referring to Sections 405 and 415 IPC in great detail brought forth that the ingredients of the offences, under which the petitioners have been rightly summoned are duly met, which were even specifically pleaded in the complaint. The complainant-company, a public limited company was lured by the petitioners to make huge investment from public money. There has also been misappropriation by the petitioners and respondent no.2, by selling the power through open access to third party users, apparent from their website, Annexure R1/2, from the time of commissioning of the plant i.e. 2010 till the licence for captive power plant was surrendered in the year 2015, whereby they disposed of the property-being electricity in the present case, in violation of even the arbitral awards, that were in favour of the complainant-company as well as in contravention

to the legal contracts. The plea of force majeure also stands already decided against the petitioners by the Arbitral Tribunal. The summoning order has been rightly passed wherein not only was the complainant himself examined but two more of his officials, who lend corroboration to the version to substantiate the facts averred in the complaint along with producing 39 exhibits that included the awards in favour of the complainant. His thrust was that it is the human agency in the accused-company being in charge of the affairs of the accused company who took all decisions and in the absence of such individual accused persons who are responsible, it may become difficult to proceed against the company alone as it was a mens rea offence. The conspiracy has been held to be a secret affair and it is alright to not have direct evidence, as such the offence has to be proved going by the circumstantial evidence. It is the conduct and knowledge of commission of crime in a conspiracy which makes the petitioners liable in the case. The petitioners are the main persons who transacted with the complainant-company and have been dealing with all the affairs of the company and there is enough material on record to show their clear criminal intent in the offences alleged in the complaint and are the real offenders on behalf of the company. Reliance was placed on the judgments of Hon'ble The Supreme Court of India in the cases of **Shivjee Singh vs Nagendra Tiwary and others**, (2010) 7 Supreme Court Cases 578, **Sau Kamal Shivaji Pokarnekar vs. State of Maharashtra and others**, 2019(2) RCR (Cr.) 38, **M/s Medohl Chemicals & Pharma Pvt. Ltd. vs. Biological E.Ltd.**, 2000(2) RCR (Cr.) 122, and **Iridium India Telecom Ltd. vs. Motorola Incorporated and others**, (2010) 3 SCC (Cri) 1201.

Heard learned counsel for the parties at length and perused the record.

The facts admitted between the parties are that agreements were entered into, some disputes ensued right from the initial stage that were adjudicated by the Arbitral Tribunal. The parties are at variance on the aspect of the plea of the petitioners with regard to invocation of the clause of force majeure, which was based on the circulars issued by the Central Government followed by the Rajasthan Government, that debarred supply of electricity to the complainant-company, to which serious objection was taken, the issue having been fairly and squarely decided by the Arbitral Tribunal.

Proceeding to adjudicate the matter from the standpoint of the submissions as ably advanced on behalf of the petitioners and at the same time deeming it appropriate to not delve into the crevices of the dispute per se at this juncture, lest it may prejudice the case of either party. It would be apposite to, at first deal with the judgments, on which reliance had been placed to assert their plea in so far as Section 202 CrPC is concerned, having been projected as the pivot.

Hon'ble The Supreme Court of India in the case of **National Bank of Oman** (supra), while considering the amended provisions of sub-section (1) of section 202 Cr. P.C observed that, "The duty of a Magistrate receiving a complaint is set out in Section 202 Cr. P.C and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in

the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 Cr. P.C is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under section 202 Cr. P.C is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

- (i) on the materials placed by the complainant before the court;
- (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and
- (iii) for deciding the question purely from the point of view of the complainant without at all advert to any defense that the accused may have”.

In the said case, the order of Magistrate issuing the process on the complaint is necessary to be reproduced, which reads thus:

“Perused complaint and the documents attached thereto. The Central Government has accorded sanction to prosecute the accused. Heard learned counsel appearing for the complainant. There are sufficient materials against the accused. The complainant has made out prima facie case against the accused. Hence process be issued for offences u/s 418 and 420 of I.P.C.”

In view of the above, it was found that the Magistrate had failed to carry out any inquiry or ordered investigation as contemplated under the amended Section 202 of the CrPC and thus, the matter was remitted to the Magistrate for passing fresh orders after complying with the procedure laid down in the said provisions.

In the case of **Abhijit Pawar** (supra) wherein the facts were that the complainant, feeling agitated by the editorials published in different editions of Sakal newspaper with the heading 'Police "Dog" Millionaire' filed the complaint before the Chief Judicial Magistrate, Kolhapur under Section 501, 502 and 504 read with Section 34 of the Indian Penal Code and Hon'ble The Supreme Court by observing the following order passed by the Magistrate as reproduced below, held that in so far as, these two accused persons (appellants therein), whose names were absent in the declaration under Press Act are concerned there was no inquiry of the nature enumerated in Section 202 Cr.P.C. and directed the learned Magistrate to hold the same inquiry qua A-1 and apply his mind as to whether notice against A-1 and A-2 needs to be issued or not;

“25. For this reason, the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment *Mehmood Ul Rehman Vs. Khazir Mohammad Tunda* in the following words:

“20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the

process of criminal law against a person is a serious matter.

22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. 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..”

27. When we peruse the summoning order, we find that it does not reflected any such inquiry. No doubt, the order mentioned that the learned Magistrate had passed the same after reading the complaint, verification statement of complainant and after perusing the copies of documents filed on record, i.e., FIR translation of complaint, affidavit of advocate who had translated the FIR into English etc. the operative portion reads as under:

“On considering facts on record, it appears that complainant has made out prima facie case against the accused for, the offences punishable under

Sections 500, 501, 50 read with 34 of the Indian Penal Code. Hence issue process against the accused for the above offences returnable on 23.12.2009. case be registered as Summary Case.”

Hon’ble The Supreme Court in the case of **Birla Corporation Ltd.** (supra), quashed the complaint and summoning order by observing that, there were no averments in the complaint nor allegations in the statement of the complainant or witness P.B. Dinesh as to when and how the theft was committed. The complaint had been filed alleging commission of the offence punishable under Sections 380, 411 and 120-B IPC. Still, the Magistrate had taken cognizance vide order dated 08.10.2010:-

“The representative of the complainant Company is present. This court takes the case record up for enquiry under Section 202 Cr.P.C. itself. Witness P.B. Dinesh is examined during the enquiry and his statement has been recorded. Purpose of the enquiry seems to have been meted out. Perused the affidavit filed for that purpose on behalf of the complainant company. Perused the documents (both original and xerox copies) supplied and relied on by the complainant company in support of its case. Considering all above I find sufficient grounds for proceeding against all the sixteen accused persons for commission of an offence under Sections 380, 411, 120-B IPC. Cognizance is taken. Issue summons accordingly upon the accused persons fixing 10.12.2010 for S/R and appearance.”

It was thus, observed and held that:

“Complaint filed under Section 200 Cr.P.C. and enquiry contemplated under Section 202 Cr.P.C. and issuance of process

25. Under Section 200 of the Criminal Procedure Code, on presentation of the complaint by an individual, the Magistrate is required to examine the complainant and the witnesses present, if any. Thereafter, on perusal of the allegations made in the complaint, the statement of the complainant on solemn affirmation and the witnesses examined, the Magistrate has to get himself satisfied that

there are sufficient grounds for proceeding against the accused and on such satisfaction, the Magistrate may direct for issuance of process as contemplated under Section 204 Cr.P.C. The purpose of the enquiry under Section 202 Cr.P.C. is to determine whether a prima facie case is made out and whether there is sufficient ground for proceeding against the accused.

26. The scope of enquiry under this section is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 Cr.P.C. or whether the complaint should be dismissed by resorting to Section 203 Cr.P.C. on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. At the stage of enquiry under Section 202 Cr.P.C., the Magistrate is only concerned with the allegations made in the complaint or the evidence in support of the averments in the complaint to satisfy himself that there is sufficient ground for proceeding against the accused.

27 to 53. xx xx xx

54. While ordering issuance of process against the accused, the Magistrate must take into consideration the averments in the complaint, statement of the complainant examined on oath and the statement of witnesses examined. As held in *Mehmood Ul Rehman*, since it is a process of taking a judicial notice of certain facts which constitute an offence, there has to be application of mind whether the materials brought before the court would constitute the offence and whether there are sufficient grounds for proceeding against the accused. It is not a mechanical process.”

The case of **SUO MOTU WRIT PETITION** (supra), is also distinguishable on facts from the present case as are the aforesaid judgments, in **National Bank of Oman, Abhijit Pawar and Birla Corporation** (supra) inasmuch as that it was observed therein by Hon’ble The Supreme Court that, “There has been a divergence of opinion amongst the High Courts relating to the applicability of Section 202 in respect of complaints filed under Section 138 of the Act. Certain cases under Section 138 have been decided by the High Courts upholding the view that it is

mandatory for the Magistrate to conduct an inquiry, as provided in Section 202 of the Code, before issuance of process in complaints filed under Section 138. Contrary views have been expressed in some other cases. It has been held that merely because the accused is residing outside the jurisdiction of the court, it is not necessary for the Magistrate to postpone the issuance of process in each and every case. Further, it has also been held that not conducting inquiry under Section 202 of the Code would not vitiate the issuance of process, if requisite satisfaction can be obtained from materials available on record.” Further, “The learned Amici Curiae referred to a judgment of this Court in K.S. Joseph v. Philips Carbon Black Ltd & Anr. 4 where there was a discussion about the requirement of inquiry under Section 202 of the Code in relation to complaints filed under Section 138 but the question of law was left open.”

Hon’ble The Supreme Court in the case of **Shivjee Singh** (supra) had found that the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of proviso to Section 202(2) CrPC by holding that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint. Para as relevant in this regard reads thus:

“22. The use of the word “shall” in the proviso to Section 202 (2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof

along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the Magistrate concerned of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word “all” appearing in the proviso to Section 202 (2) is qualified by the word “his”. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process.”

In Bhushan Kumar vs. State (NCT of Delhi) (2012) 5 SCC

424, Hon’ble The Supreme Court held that the Magistrate has to satisfy whether there is sufficient ground for issuing process and not for conviction, paras relevant read thus:—

“11. In Chief Enforcement Officer v. Videocon International Ltd. (2008) 2 SCC 492 (SCC p. 499, para 19) the expression “cognizance” was explained by this Court as “it merely means ‘become aware of’ and when used with reference to a court or a Judge, it connotes ‘to take notice of judicially’. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.” It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

12. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not

whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code.”

In **Birla Corporation** (supra), Hon’ble The Supreme Court held that,“...The Magistrate who is conducting an investigation under Section 202 Cr.P.C. has full power in collecting the evidence and examining the matter. We are conscious that once the Magistrate is exercised his discretion, it is not for the Sessions Court or the High Court to substitute its own discretion for that of the Magistrate to examine the case on merits. The Magistrate may not embark upon detailed enquiry or discussion of the merits/demerits of the case. But the Magistrate is required to consider whether a prima case has been made out or not and apply the mind to the materials before satisfying himself that there are sufficient grounds for proceeding against the accused.”

It is pertinent to make a reference to para 3 of the petition, wherein the petitioners have admitted holding of inquiry under Section 202 CrPC, which reads thus:

“That at the very outset it is also very pertinent and important to submit and point out that prior to impugned summoning order dated 28.07.2021, the learned Magistrate has ordered an investigation under Section 202 wherein report dated 17.09.2020 had been submitted by the Police Authorities from where it is clear that no offence is made out. Learned Magistrate vide order dated 09.03.2021 declined the complainant's request under Section 156(3). However, while passing the Impugned Summoning Order dated 28.7.2021, the Report under Section 202 Cr.P.C., has not been considered and even the previous order dated 9.3.2021 has also not been considered. Non-consideration of Report under Section

202 Cr.P.C is equivalent to non-holding of mandatory enquiry under Section 202 Cr.P.C. and therefore, the impugned suffers from material illegality. Copy of Police Report is annexed as Annexure P-3. Copy of the impugned order dated 09.03.2021 is annexed herewith as Annexure P-4.”

The operative portion of the police report, wherein there was a mention of letters dated 13.11.2017 and 27.11.2017 relied upon by the petitioners, being communications inter se petitioners and Rajasthan Government, which according to them were not taken into consideration by the Magistrate, reads thus:

“Being not satisfied with the decision of the Arbitrator, respondent No.1-company has filed an appeal under Section 37 of Arbitration and Conciliation Act before the Hon’ble High Court of Rajasthan, Jaipur Bench, Jaipur. Thus, the matter of supply of power by respondent No.1-company to complainant company is under the gaze of the judicial scrutiny of the Hon’ble High Court of Rajasthan as mentioned above. Not only this, earlier respondent No.1-company had written letter dated 13.11.2017 to the Rajasthan Government to open access to supply power to its captive consumers including the complainant-company but the Rajasthan Government vide its letter dated 27.11.2017 informed that no open access can be restored. Copies of the said letters are also attached herewith.”

With regard to the aforesaid, this Court deems it appropriate to refer to the relevant zimni orders passed by the Magistrate, which read thus:

“Report has been received from SHO concerned, but the same is incomplete. As per the report, the accused have not appeared and got recorded their statements in the present matter and they are yet to join the proceedings. Therefore, matter is adjourned to 17.02.2020 for awaiting further status report.
Date of order:29.01.2020 (P.S. Kaleka) Kashmiri Lal
Chief Judicial Magistrate,

The documents mentioned in the last order not filed by the SHO. Now to come upon 04.12.2020 for awaiting the

copies of letters and report as stated by the SHO in his report dated 17.09.2020.

Date of Order: 10.11.2020 (Sumit Garg) Judicial Magistrate - Ist Class

The documents mentioned in the last order not filed by the SHO. Now to come upon 17.12.2020 for awaiting the copies of letters and report as stated by the SHO in his report dated 17.09.2020.

Date of Order: 14.12.2020 (Sumit Garg) Judicial Magistrate - Ist Class

Today the case was fixed for awaiting report of SHO regarding letters and copies of order of Rajasthan Government as referred in the previously submitted status report, therefore, SHO, Focal Point is directed to supply the copies of said letters along with his report on or before 05.02.2021. In case of non-furnishing of report, said SHO is directed to appear in person. Notice to complainant be also issued for the said date.

Aman Bansal Gagandeep Singh/JMIC/Ldh/11.01.2021

Today the case was fixed for awaiting report of SHO regarding letters and copies of order of Rajasthan Government as referred in the previously submitted status report. SHO Mohammed Zamil came present and produced on record photocopy of letter RRVPNL (GOR) JPUR/MVKR/1040101/317 dated 13/11/2017, letter no. RVPN/CE(NPP& RA)/SE (NPP & RA)NPP3/F504/D/1076 dated 27.11.2017 and screen short of case status pending between the parties before the Hon'ble Rajasthan High Court. He suffered separate statement and produced the above stated documents. Arguments partly heard. Now to come up for remaining arguments on 23.02.2021.

Aman Bansal Gagandeep Singh/JMIC/Ldh/05.02.2021”

The Magistrate after having received police report in the complaint filed under Section 156(3) CrPC however, rejected the request for registration of FIR made by the complainant-company, vide order dated 03.09.2021, by observing thus:

“5. After hearing the Ld. counsel for the complainant and going through the record of the case, this court is of the considered view that all the allegations raised by the complainant in the present complaint/application requires

evidence and all the facts and circumstances of the present controversy are in the specific knowledge of the complainant. Apart from this, applicant complainant is well acquainted with all the transactions and other financial/contractual commitments with the proposed accused. Further, as per the settled law, it is not always mandatory for the magistrate to direct the police authorities for registration of the case of the application under Section-156(3) of Cr.P.C, rather, it is discretionary power of the magistrate. In the present case also, this court do not find appropriate to direct the police authorities to register the FIR against the proposed accused as the material information and details are in the possession of the complainant and his witnesses. All the allegations referred in the complaint can be proved by inducing evidence by the complainant. In these circumstances, the application filed by the complaint/applicant under Section-156(3) Cr.P.C stands disposed off being declined and case stands adjourned to 01.04.2021 for the preliminary evidence of the complainant.” (emphasis supplied)

Moving on to the summoning order, from a perusal whereof it transpires that Tanuj Mittal, complainant was examined as CW-1, who reasserted the version of complaint in-toto and proved on record minutes of meeting dated 30.05.2017 as Ex.C1, memorandum and article of association as Ex.C2, certificate of incorporation as Ex.C3, resolution as Ex.C4, information obtained from website of registrar of companies as Ex.C5, share subscription agreement dated 21.12.2006 as Ex.C6, power delivery agreement as Ex.C7, memorandum of understanding dated 07.10.2008 as Ex.C8, copy of award dated 14.06.2012 as Ex.C9, certified copy of investment account as Ex.C10, certified copies of the bank certificates as Ex.C11 to Ex.C14, copy of award Ex.C15, copy of order dated 18.01.2018 as Ex.C16, status report as Ex.C17, downloaded copies of information qua selling of power to third parties as Ex.C18 to Ex.C36, certificate under

Section 65-B as Ex.C37, CD as Ex.C38 and copy of complaint as Ex.C39. Mukesh Sood, Company Secretary/authorized signatory was examined as CW2, who also lend corroborative support to the version of complainant and proved on record the aforementioned documents produced by the complainant. Manager Account-cum-Authorized Signatory, Dhruv Dev Katoch, who appeared as CW3, proved the certificate under Section 65-B of the Indian Evidence Act as Ex.C42 and CD as Ex.C43 alongwith the certificate of bank regarding payments as Ex.C11 to Ex.C14.

It is thereupon that the Magistrate satisfied himself based on the statements recorded and documents substantiating the same, that the allegations in the complaint constitute an offence and formed a prima facie opinion that the accused were required to be called upon by issuing the process, the paras relevant of the summoning order read thus:

“5.The total investment made by the complainant company has been shown by proving certified copy of investment account as Ex.C10 alongwith the bank certificates as Ex.C11 to Ex.C14. It can also be seen from the record that complainant company invoked the jurisdiction of Arbitral Tribunal for the crystallization of their rights arising out of the agreements executed with the accused company. Said arbitration proceedings were decided against the accused company and even the appeal filed by the accused company met with same fate. From the award passed by the court Tribunal, it is clear that accused were directed to restore the power supply to the complainant on the settled terms and conditions and specific direction that they will not sell the power to any third party without meeting its obligations to the claimants, including complainant. It is clear that the accused company terminated the contract of power supply to the complainant company without the refund of investment amount. From the documents i.e. Ex.C18 to Ex.C36, it can be observed that the

accused company started selling its power in open market to third party after the misappropriation of invested amount of the complainant and caused wrongful loss to the complainant company. From the document Ex.C5, it is clear that accused company (accused no.1) is being run by accused no.2 to 4 and they are vicariously liable for the commission of offence of cheating and misappropriation. Therefore, at this stage, the allegations made in the complaint clearly depicts that the accused company i.e. accused no.1 to 4 has cheated the complainant company as the modus-operandi of the said accused company was to induce the complainant company to part with huge amount of money, which was refundable, to become a user member for availing the benefit of cheap power by misrepresenting the facts and thereafter selling the electricity to other consumers, thereby causing wrongful loss to the complainant and wrongful gain to themselves..... Consequently, prima-facie, it is clear that accused no.1 to 4 in connivance with each other de-frauded the complainant and usurped their huge invested amount. They were entrusted with investment amount of the complainant company, but they misappropriate the same contrary to the terms of obligations imposed by the contract. Consequently, there is sufficient material at this stage to summon accused no.1 to 4 for the offence of cheating and criminal misappropriation after the active criminal conspiracy.”

The Magistrate in the aforesaid order took into consideration the judicial pronouncements in the case of **Shivjee Singh** (supra) that where there is a prima facie evidence, the Magistrate should issue process even though the persons charged of an offence in the complaint might have a defence, which would be decided at the appropriate stage. It is a settled proposition of law, a person who files a complaint and supports it by oath, renders himself to be prosecuted and imprisoned, if it is found to be false, as also by following the guidelines with regard to issuance of process as laid

down in **Mehmood Ul Rehman vs. Khazir Mohammad Tunda and others** 2015 AIR (SC) 2195.

A perusal of the complaint, Annexure P-1, also reveals that specific averments so as to show that the ingredients of relevant offences alleged have been made out, which have been duly taken note of by the Magistrate to arrive at a prima facie view to summon the petitioners.

Unlike the facts involved in the cases of **National Bank of Oman, Abhijit Pawar and Birla Corporation** (supra), the Magistrate in the case in hand, sought the police report, called for the documents, pertaining to the Rajasthan Government, as relied upon by the accused during the inquiry, that it had written letter dated 13.11.2017 seeking open access to supply power to captive consumers including the complainant-company but was rejected vide letter dated 27.11.2017, by the said Government, which though even the petitioners admitted to be an inquiry under Section 202 CrPC in para 3 of the petition and thereafter, not only examined the complainant but also two witnesses and the documents exhibited, as has been held in the case of **Vijay Dhanuka vs. Najima Mamtaj** (2014) 14 SCC 638, to be the requirement of inquiry envisaged under Section 202 CrPC, relevant paras thereof read thus:

“14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word “inquiry” has been defined under Section 2(g) of the Code, the same reads as follows:

“2. (g) ‘inquiry’ means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;” It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.”

The impugned summoning order in the present case is also in consonance with the law laid down in **Birla Corporation** (supra) (though factually distinct), wherein Hon’ble The Supreme Court held that, “...The Magistrate who is conducting an investigation under Section 202 Cr.P.C. has full power in collecting the evidence and examining the matter. We are conscious that once the Magistrate is exercised his discretion, it is not for the Sessions Court or the High Court to substitute its own discretion for that of the Magistrate to examine the case on merits. The Magistrate may not embark upon detailed enquiry or discussion of the merits/demerits of the case. But the Magistrate is required to consider whether a prima case has been made out or not and apply the mind to the materials before satisfying himself that there are sufficient grounds for proceeding against the accused....”

Hon’ble The Supreme Court in the case of **Sau Kamal Shivaji Pokarnekar** (supra), has held that, “The only point that arises for our consideration in this case is whether the High Court was right in setting

aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.(see **Sonu Gupta vs. Deepak Gupta** (2015)3 SCC 424).”

In **State of Karnataka vs. M. Devendrappa & Anr**, (2002) 3 SCC 89, Hon’ble The Supreme Court following the law laid down in **Mrs. Dhanalakshmi vs. R. Prassanna Kumar and Ors.**, (AIR 1990 SC 494), **State of Bihar & Anr. vs. P.P. Sharma I.A.S. & Anr.**, (1992 Suppl. (1) SCC 222), **Rupan Deo Bajaj (Mrs.) & Anr. vs. Kanwar Pal Singh Gill & Anr.**, (1995 (6) SCC 194) **Rajesh Bajaj vs. State NCT of Delhi and Ors.**, (AIR 1999 SC 1216), held that, “It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court.”

Hon’ble The Supreme Court in the case of **Priti Saraf vs. State of NCT of Delhi**, 2021 AIR (SC) 1531, held that, “on a careful reading of

the complaint/FIR/charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420 IPC cannot be said to be absent on the basis of the allegations in the complaint/FIR/charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482 CrPC for quashing such proceedings.”

In the case of **Nagpur Steel & Alloys Pvt. Ltd. vs. P. Radhakrishna and Others** 1997 SCC(Cri) 1073, Hon’ble Apex Court observed thus:-

“2. We have heard learned counsel for the parties at length and examined the record. It appears to us that the High Court was primarily influenced by the fact that since there was a commercial transactions between the parties and alleged breach of contractual liability there was no sufficient ground to proceed with the trial of the respondents and quashed the criminal complaint and the proceedings arising therefrom.

3. We have perused the complaint carefully. In our opinion it cannot be said that the complaint did not disclose the commission of an offence. Merely because the offence was committed during the course of a commercial transaction, would not be sufficient to hold that the complaint did not warrant a trial. Whether or not the allegations in the complaint were true was to be

decided on the basis of evidence to be led at the trial in the complaint case. It certainly was not a case in which the criminal trial should have been cut short. The quashing of the complaint has resulted in grave miscarriage of justice. We, therefore, without expressing any opinion on the merits of the case, allow this appeal and set aside the impugned order of the High Court and restore the complaint. The learned trial Magistrate shall proceed with the complaint and dispose of it in accordance with law expeditiously.”

Hon’ble The Supreme Court in the case of **UP Pollution Control Board vs. Dr. Bhupendra Kumar Modi & Anr.**, (2009) 2 SCC 147, it has been held thus :

“23. It is settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused.

24. In Nagawwa vs. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736, this Court has held that it is not the province of the Magistrate to enter into a detailed discussion on the merits or demerits of the case. It was further held that whether a process should be issued, the Magistrate can take into consideration improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. It was further held that once the Magistrate has exercised his discretion, it is not for the High Court or even this Court to substitute its own discretion for that of the Magistrate or to examine their case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.”

In so far as the second submission, regarding the plea of force majeure, this Court in exercise of its jurisdiction under Section 482 of the Code cannot go into the truth or otherwise of the allegations and appreciate

evidence, if any, available on record, as has been held in **Lee Kun Hee vs. State of U.P.**, (2012) 3 SCC 132 by Hon'ble The Supreme Court.

The petitioners have also not been able to, in these proceedings, fully demonstrate the issues on merits, as the same would require leading of evidence, and this Court cannot in exercise of powers under Section 482 of the Code go into the appreciation of evidence, as has been held by Hon'ble The Supreme Court in the case of **State of Uttar Pradesh vs. Akhil Sharda and others**, 2022(3) RCR (Cr.) 841 that, "Having gone through the impugned judgment and order passed by the High Court by which the High Court has set aside the criminal proceedings in exercise of powers under Section 482 Cr.P.C., it appears that the High Court has virtually conducted a mini trial, which as such is not permissible at this stage and while deciding the application under Section 482 Cr.P.C. "

In so far as the third submission is concerned, it will be profitable to refer to the judgment of Hon'ble The Supreme Court in the case of **Iridium India Telecom Ltd. vs. Motorola Incorporated and others**, (2010) 3 SCC (Cri) 1201, involving a case of alleged representation made by the accused-company inviting investment in shares from prospective investors to float a product giving a rosy picture of it, a complaint was filed with allegation of cheating under Section 420 IPC read with Section 120B IPC, observed that under Section 202 CrPC, the scope of inquiry is limited only to the ascertainment of truth and falsehood of allegations made in the complaint, wherein accused had absolutely no locus standi and was not entitled to be heard on the question whether the process should be issued against him or not and that the complainant-appellants

were entitled to an opportunity to prove the averments made in the complaint to establish that they had been deliberately induced into making huge investments on the basis of representations made by the accused company, which subsequently turned out to be completely false and fraudulent and that the High Court had no authority or jurisdiction to go into the matter or examine its correctness and clearly exceeded its jurisdiction in quashing the criminal proceedings.

The legal proposition that is laid down in the authoritative pronouncement is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well, as they are the "alter ego" of the company. Likewise, in the present case, on behalf of the complainant-company, it has been demonstrated in a vivid manner, by drawing the attention of this Court to the allegations unequivocally made against the petitioner-accused in the complaint that are of, in furtherance of ill-intention and deceiving nature of the accused, the complainant-company was induced by the accused-petitioners for equity participation that it will get subsidized power, if it subscribed to the shares of respondent No.2-company, however, regular supply of electricity was not provided to it, which rather was sold to third party users at higher market rates with intention to cause wrongful gain to themselves and wrongful loss to the complainant, attracting the ingredients of the offences alleged against the petitioners in their individual capacities, considering their exalted stature in the respondent no.2-company and running it with their mind, being at the

helm of affairs, thus the criminality in the complaint, stands duly imputed to them, as accused.

On the contrary, the emphatic urging on behalf of the petitioners was that there is no concept of vicarious liability in criminal law, thus the impugned order was bad in the eyes of law, though in the same breath it was also sought to be projected that petitioners did make their earnest efforts to comply with the covenants and the Arbitral awards etc. which they were unable to, their request having been not acceded to by the concerned Government, in wake of which was the plea of force majeure was brought in, which the learned counsel for the complainant-company vociferously refuted on the ground that the said plea ought not to have been pressed, as it already stood categorically rejected by the Arbitral Tribunal.

Hon'ble the Supreme Court in **Sunil Bharti Mittal vs. CBI** (2015) 4 SCC 609, also held that “Thus, 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. 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.” It was also observed that, “It is true that the Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.”

In the above case, even though, the summoning order against the appellants-petitioners was set aside, however, it was observed that, “While parting, we make it clear that since on an erroneous presumption in law, the Special Magistrate has issued the summons to the appellants, it will always be open to the Special Magistrate to undertake the exercise of going through the material on record and on that basis, if he is satisfied that there is enough incriminating material on record to proceed against the appellants as well, he may pass appropriate orders in this behalf. We also make it clear that even if at this stage, no such prima facie material is found, but during the trial, sufficient incriminating material against these appellants surfaces in the form of evidence, the Special Judge shall be at liberty to exercise his powers under Section 319 of the Code to rope in the appellants by passing appropriate orders in accordance with law at that stage.”

Fortiori, a wide discretion has been given as to grant or refusal of process and it must be judicially exercised. 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.

It is trite that sine qua non for taking cognizance of the offence is the application of mind which is best demonstrable by the disclosure of mind on the satisfaction of the Magistrate that the allegations, if proved, would constitute an offence. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is sufficient ground for proceeding with the matter, the underlying object being to ascertain whether there is prima facie case

against the accused and not whether there is sufficient ground for conviction of the accused.

It is axiomatic that the inquiry was conducted under Section 202 CrPC and plea of the petitioners that it was not taken into consideration, is contrary to record, peculiarly in the facts that have emerged, that the Magistrate, after having called for the report from the police, still did not rest till such time that the documents/letters mentioned in the said report, which the accused had relied upon during inquiry, were secured from the SHO, apparent from the zimni orders as reproduced in the preceding paragraphs. It is only thereupon that the Magistrate finding enough material to proceed against the petitioners, based on the facts and the allegations incorporated in the complaint, statements recorded and documents produced, formed an opinion of satisfaction on having applied his judicial mind and passed a speaking order issuing the process that prima facie there is ground for proceeding further in the matter, for which the accused were answerable before the Court, as is amply discernible therefrom.

Thus, the summoning order in the instant case cannot be termed to be the same as the ones that were the subject matter in **National Bank of Oman, Abhijit Pawar and Birla Corporation** (supra), on account of which, in the said cases the matter had been remitted to the Magistrate, it being in conformity with the exposition of law, as discussed above.

For the petitioners to state non-submission to the jurisdiction of the trial Court in the complaint basis the plea of force majeure, it being a policy decision of the Government, would amount to trivializing the issue,

especially in view of its rejection before the Arbitral Tribunal, therefore, on that ground alone the process cannot be allowed to be scuttled.

The Court has a bounden duty to separate grain from the chaff. Technicalities pressed into service are not the kinds that would absolve the petitioners to an extent that they are not even made answerable by issuing the process by the Magistrate, wherein during the proceedings ample opportunity to refute and disprove the allegations and, asserting and substantiating their pleas would be available.

The aforesaid view finds strength from the judgment in the case of **Rajiv Thapar & Ors. vs. Madan Lal Kapoor**, (2013) 3 SCC 330, wherein Hon'ble The Supreme Court laid that, "The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/ complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/ complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same."

Reiterating the above, Hon'ble The Supreme Court in the case of **Rathish Babu Unnikrishnan vs The State (Govt. of NCT of Delhi) & Anr**, 2022 SCC Online SC 513 held that, "The consequences of scuttling

the criminal process at a pre-trial stage can be grave and irreparable.

Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process.”

Having analyzed the impugned order through the prism of the dictum of law referred to hereinabove while bearing in mind the peculiarity of facts and circumstances of the case, this Court finds no illegality or perversity in the impugned order, which may call for any intervention. As a sequel thereto, the present petition is hereby dismissed being bereft of merit.

The observations made herein above shall not be construed as an expression of opinion on the merits of the case and the trial Court shall proceed uninfluenced therefrom and decide the case on merits, in accordance with law.

Pending applications, if any, shall stand disposed of accordingly.

10.04.2023
gsv

[AMAN CHAUDHARY]
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No