

Court No. - 91

Case :- APPLICATION U/S 482 No. - 239 of 2024

Applicant :- Kishore Biyani

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Dhananjai Rai, Sr. Advocate, Vibhu Rai

Counsel for Opposite Party :- Animesh Pandey, G.A.

Hon'ble Mayank Kumar Jain, J.

1. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Vibhu Rai, learned counsel for the applicant, AGA for the state of U.P. and Sri Animesh Pandey, learned counsel for opposite party no. 2.
2. Present Application under Section 482 Cr.P.C. has been filed to quash the summoning order dated 27.03.2023 passed by learned Additional Civil Judge, (Senior Division), Court No. 2, Gorakhpur, order issuing non-bailable warrant dated 18.07.2023, and to quash the entire proceedings of complaint case no. 32393 of 2022 (Neelima Verma Vs. Future Retail Ltd. (Big Bazaar) through CEO, Mr. Kishore Biyani) pending in the court of Additional Civil Judge, (Senior Division), Court No. 2, Gorakhpur.
3. Opposite party no. 2 instituted a criminal complaint against the applicant under Section 120B, 463, 406, 420, 504, and 506 IPC.
4. The substance of the complaint are summarised thus: –
 - 4.1 That the complainant is a wholesale supplier of food products in the name and style of M/s Maa Durga Enterprises, Gorakhpur. The applicant was running his business establishment in the name and style 'Big Bazaar' in Gorakhpur.
 - 4.2 During the period from 10.02.2020 to 01.06.2020, the complainant supplied food products to the applicant worth Rs. 4,38,938/- against

proper receipts. Further, during the period from 10.02.2020 to 24.06.2020, the complainant supplied food products of worth Rs. 7,75,925/ and raised corresponding invoices towards supply of the same.

4.3 The complainant made regular demands for payment against aforesaid supplies but the applicant waved her off. Whenever she visited the employees of the applicant, they misbehaved and hurled abuses at her. Thus, the applicant had usurped the money of the complainant and committed breach of trust.

4.4 The complainant sent a notice through her counsel to the applicant but no action was taken by the applicant.

5. The Additional Chief Judicial Magistrate, Court No. 3, Gorakhpur after recording primary evidence of the complainant and her witnesses under Section 200 and 202 Cr.P.C. summoned the applicant to face trial under Section 406 IPC.

6. Sri Anoop Trivedi, learned Senior counsel appearing on behalf of the applicant submitted that the applicant was Executive Chairman of Future Retail Limited till 19.07.2022. Being the Executive Chairman of the aforesaid company, he was not directly involved in the day-to-day business affairs of the company. The company is engaged in the business of multi-brand retail and operated India's most popular retail chains spread across the country through digital platforms and retail stores in the trade name of 'Big Bazaar'.

7. That the business of the company was impacted due to nation wide outbreak of COVID-19 pandemic in 2020. The company faced severe liquidity crisis and therefore, was unable to comply with its obligations. These circumstances were beyond the control of the company.

8. In August 2020, a scheme of arrangement was proposed between the Company and certain Reliance group entities. This scheme could not be materialised and the bank accounts of the company were classified as Non-Performing Assets.

9. Later, the Bank of India moved before National Company Law Tribunal, Mumbai against the company. The N.C.L.T, Mumbai vide its

order dated 20.07.2022, admitted Insolvency Petition against the company. The bank account operation of the company was restricted as the bank had frozen their accounts. Pursuant to order dated 20.07.2022, moratorium was imposed and the management was devolved upon the Interim Resolution Professional (I.R.P.), appointed by the Tribunal. Not only payments of various vendors were stopped but payment of the electricity was also stopped and thus, all stores had to cease operations.

10. Learned Counsel for the applicant submitted that complaint was not maintainable at the time of its filing since at the relevant time, the applicant was not officiating as an Executive Chairman of the company. The officiating board and its power has been relegated to Interim Resolution Professional.

11. The company always made best efforts so that people like complainant may not get affected or they might not be forced to take recourse of the court of law for realization of their debts but due to the moratorium, the applicant had no choice but to remain as a silent spectator.

12. Learned counsel for the applicant submitted that there was no direct relation or interference of the applicant in the business transaction alleged by the complainant.

13. He further argued that since the applicant does not reside within the local jurisdiction of the Court concerned, therefore, the learned trial Court was bound to hold an enquiry under Section 202(1) Cr.P.C.

14. He relied upon judgments of the Hon'ble Apex Court namely:-

(a) *Vijay Dhanuka Vs. Nazim Mamtaj, (2014) 14 SCC 638;*

(b) *Abhijit Pawar Vs. Hemant Madhukar Nimbalkar, (2017) 3 SCC 528*

(c) *Sachin Dhaiya and others Vs. State of U.P. (2020) ILR 7, ALL 353 and*

(d) *Deepak Gaba and Ors. Vs., State of U.P. and Ors. (2023) 3SCC 423.*

15. It is further submitted that the learned trial Court passed the impugned summoning order dated 27.03.2023 against the applicant

without following the said procedural aspect which is duly established by law. Therefore, the summoning order is bad in law.

16. Learned counsel for the applicant further argued that no offence is made out under Section 406 of I.P.C as alleged in the complaint. The transaction was purely a business transaction which has been dragged into a criminal transaction. The applicant has not committed any offence. The ingredients of Section 406 I.P.C are not made out against the applicant. The dispute between the parties is purely civil in nature.

17. Reliance is placed on the judgement of Apex Court in the case of **M/s Indian Oil Corporation Vs. M/s NEPC India Ltd., & Ors, AIR 2006 SC 2780.**

18. Learned counsel for the applicant further submitted that as per the averment of the complaint, it transpires that opposite party no. 2 supplied certain goods to the company. It was purely a commercial transaction. There was no entrustment of any goods to the applicant. There was no criminal intent on the part of the applicant to misappropriate the goods. The complainant has a liberty to file claim before the Interim Resolution Professional and after adopting a due course, the Interim Resolution Professional can make payment of the complainant on the basis of the demand to be produced by her. The learned counsel for the applicant relied upon the judgment of the Apex Court in the case of ***Hridaya Ranjan Prasad Verma & Ors. Vs. State of Bihar (2000) 4 SCC 168*** which is followed in ***Vijay Kumar Ghai & Ors. Vs. State of West Bengal & Ors., (2022) 7 SCC 124.***

19. He drew attention of the Court to statement of the complainant recorded under Section 200 Cr.P.C. She stated that the Manager who was posted at Big Bazar misbehaved with her and informed her that no payment would be made to her. The complainant did not disclose the name of the Manager. The complainant admitted that prior to the impugned transaction, she was regularly supplying goods to the retail outlet. The witness who deposed under Section 202 Cr.P.C, Rahul is the employee of opposite party no. 2. Another witness Aman Verma also

deposed under Section 202 Cr.P.C. Both these witnesses have stated about the misbehaviour allegedly committed by the Manager of the retail outlet and stated that payment of opposite party no. 2 was usurped. He further submitted that the complainant as well as her witnesses did not depose anything about criminal intent or any entrustment of the property made to the applicant.

20. Per contra, Sri Animesh Pandey, the learned counsel for opposite party no. 2 vehemently opposed the prayer. He submitted that as per the report of Insolvency Committee, dated February 2020, the purpose of the moratorium is to keep the assets of the debtor together for successful insolvency resolution, and it does not bar all actions, especially where countervailing public policy concerns are involved. For instance, criminal proceedings are not considered to be barred by the moratorium. He further submitted that on the bills raised for supply of food product by opposite party no. 2, it was mentioned that the payment would be made within 15 days. Therefore, the property was entrusted to the applicant.

21. To buttress his argument, the learned counsel for opposite party no. 2, relied on the judgement of Hon'ble Apex Court in the case of **Sachin Garg Vs. State of U.P. & Ors., MANU/SC/0069/2024** and submitted that the dispute revolves about the non payment of the amount which flows from a business/commercial transaction. He further submitted that the applicant was never entrusted with the property or entrusted with dominion over the property. Since, the applicant was the Executive Chairman of the FRL/Company **has not converted, used or disposed or misappropriated any property so entrusted by the applicant.**

22. Perused the record.

23. Section 482 Cr.P.C. provides thus:

“Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

24. The Hon'ble Apex Court in the case of **Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and Ors. (2021) 19 SCC 401**, examined the factors which were to be considered by the High Court for quashing an F.I.R. at the threshold. The Hon'ble Apex Court referred the judgment of **R.P.Kapoor vs State of Punjab, AIR 1960 SC 866** in which the principles for quashing were set down as:-

“10.1 The first case on the point which is required to be noticed is the decision of this Court in the case of R.P. Kapur (supra). While dealing with the inherent powers of the High Court under Section 561-A of the earlier Code (which is pari materia with Section 482 of the Code), it is observed and held that the inherent powers of the High Court under Section 561 of the earlier Code cannot be exercised in regard to the matters specifically covered by the other provisions of the Code; the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice; ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. After observing this, thereafter this Court then carved out some exceptions to the above-stated rule, which are as under:

“(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category.

(ii) Where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in

question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained.

10.3. Then comes the celebrated decision of this Court in Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] . In the said decision, this Court considered in detail the scope of the High Court powers under Section 482CrPC and/or Article 226 of the Constitution of India to quash the FIR and referred to several judicial precedents and held that the High Court should not embark upon an inquiry into the merits and demerits of the allegations and quash the proceedings without allowing the investigating agency to complete its task. At the same time, this Court identified the following cases in which FIR/complaint can be quashed:

“102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

25. In the case of **Deepak Gaba and Ors. Vs. State of U.P. and Anr., (2023) 3 SCC 423**, the Hon’ble Apex Court dealt with the basic ingredients of complaint under Section 405 and 406 of I.P.C. It reads thus:

“15. For Section 405 I.P.C. to be attracted, the following have to be established:

(a) the Accused was entrusted with property, or entrusted with dominion over property;

(b) the Accused had dishonestly misappropriated or converted to their own use that property, or dishonestly used or disposed of that property or wilfully suffer any other person to do so; and

(c) such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.”

26. In **Sachin Garg Vs. State of U.P. and Ors. (supra)**, the Hon’ble Apex Court further observes that :

14. Past commercial relationship between the appellant’s employer and the respondent no.2 is admitted. It would also be evident from the petition of complaint the dispute between the parties centred around the rate at which the assigned work was to be done. Neither in the petition of complainant nor in the initial deposition of the two witnesses (that includes the complainant) the ingredients of the offence under Section 405 of the 1860 Code surfaced. Such commercial disputes over variation of rate cannot 13 per se give rise to an offence under Section 405 of the 1860 Code without presence of any aggravating factor leading to the substantiation of its ingredients. We do not find any material to come to a prima facie finding that there was dishonest misappropriation or conversion of any material for the personal use of the appellant in relation to gas supplying work done by the respondent no.2.....

15. In the case of Binod Kumar and Ors. -vs- State of Bihar and Another [(2014) 10 SCC 663], a coordinate Bench of this Court dealt with a criminal complaint arising out of retention of bill amount in course of commercial transaction. The Court found essential ingredients of criminal breach of trust or dishonest intention of inducement, which formed the foundation of the complaint were missing. The High Court’s judgment rejecting the plea for quashing the criminal proceeding was set aside by this Court. The reasoning for quashing the criminal proceeding would be revealed from paragraphs 18 and 19 of the Report, which reads:-

“18. In the present case, looking at the allegations in the complaint on the face of it, we find that no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the appellants in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the complainant. Excepting the bald allegations that the appellants did not make payment to the second respondent and that the appellants utilised the amounts either by themselves or for some other work, there is no iota of allegation as to the dishonest intention in misappropriating the property. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the appellants. It must also be shown that the appellants dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the appellants did not pay the money to the complainant does not amount to criminal breach of trust.

19. Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a shortcut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the appellants under Sections 406/120- B IPC, is liable to be quashed.”

27. In State of Gujarat Vs. Jaswant Lal Nath Lal, (1968) (2) SCR 408
the Hon’ble Supreme Court observed as under:

8. The term "entrusted" found in S. 405 IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property"

*Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trustsee *Jaswantraji Manilal Akhaney v. State of Bombay(1)*. The expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. **A mere transaction of sale cannot amount to an entrustment.** It is true that the government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than*

a sale. After delivery of the cement, the government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust."

28. In C.B.I. Vs. Duncans Agro Industries Ltd (1996) 5 SCC 591, the Hon'ble Apex Court observed that:

"27. In the instant case, a serious dispute has been raised by the learned counsel appearing for the respective parties as to whether on the face of the allegations, an offence of criminal breach of trust is constituted or not. In our view, the expression "entrusted with property" or "with any dominion over property" has been used in a wide sense in Section 405 IPC. Such expression includes all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and dishonestly disposed of in violation of law or in violation of contract. The expression 'entrusted' appearing in Section 405 IPC is not necessarily a term of law. It has wide and different implications in different contexts. It is, however, necessary that the ownership or beneficial interest in the ownership of the property entrusted in respect of which offence is alleged to have been committed must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit. The expression 'trust' in Section 405 IPC is a comprehensive expression and has been used to denote various kinds of relationships like the relationship of trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee."

29. In V. P. Srivastava Vs. Indian Explosive Ltd. (2010) 10 SCC 361, the Hon'ble Apex Court observed that:

"36. Therefore, in relation to the offence under Section 405 IPC, the first ingredient that needs to be established is "entrustment." In Common Cause v. Union of India [(1999) 6 SCC 667 : 1999 SCC (Cri) 1196] this Court held that: (SCC p. 749, para 168)

"168. A trust contemplated by Section 405 would arise only when there is an entrustment of property or dominion over property. There has, therefore, to be a property belonging to someone which is entrusted to the person accused of the offence under Section 405. The entrustment of property creates a trust which is only an obligation annexed to the ownership of the property and arises out of a confidence reposed and accepted by the owner."

37. However, it must be borne in mind that Section 405 IPC does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. (See

Jaswantrai Manilal Akhaney v. State of Bombay [AIR 1956 SC 575 : 1956 Cri LJ 1116] and Indian Oil Corpn. v. NEPC India Ltd. [(2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188]

38. *In the instant case, there is nothing in the complaint which may even suggest remotely that IEL had entrusted any property to the appellants or that the appellants had dominion over any of the properties of IEL, which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405 IPC, punishable under Section 406 IPC.”*

30. In Indian Oil Corporation Vs. NEPC India Ltd. (2006)6 SCC 736, the Hon’ble Apex Court observed:

21. *We will next consider whether the allegations in the complaint make out a case of criminal breach of trust under Section 405 which is extracted below:*

“405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits ‘criminal breach of trust’.”

22. *A careful reading of the section shows that a criminal breach of trust involves the following ingredients: (a) a person should have been entrusted with property, or entrusted with dominion over property; (b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so; (c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust. The following are examples (which include the illustrations under Section 405) where there is “entrustment”:*

(i) An “executor” of a will, with reference to the estate of the deceased bequeathed to legatees.

(ii) A “guardian” with reference to a property of a minor or person of unsound mind.

(iii) A “trustee” holding a property in trust, with reference to the beneficiary.

(iv) A “warehouse keeper” with reference to the goods stored by a depositor.

(v) A carrier with reference to goods entrusted for transport belonging to the consignor/consignee.

(vi) A servant or agent with reference to the property of the master or principal.

(vii) A pledgee with reference to the goods pledged by the owner/borrower.

(viii) A debtor, with reference to a property held in trust on behalf of the creditor in whose favour he has executed a deed of pledge-cum-trust. (Under such a deed, the owner pledges his movable property, generally vehicle/machinery to the creditor, thereby delivering possession of the movable property to the creditor and the creditor in turn delivers back the pledged movable property to the debtor, to be held in trust and operated by the debtor.)

31. Perusal of the averments made in the complaint discloses that it is alleged by opposite party no. 2 that during the period of 10.02.2020 to 01.06.2020, she supplied goods of Rs. 4,38,938/- and thereafter till the period of 24.06.2020, goods costing Rs. 7,75,925/- were supplied by her. The payment remains outstanding on the part of the company to which the goods were supplied. It is pertinent to mention here that during her deposition under Section 200 Cr.P.C, she did not make any allegation against the applicant that the goods supplied by opposite party no.2 to the company were really entrusted to the applicant and the applicant with criminal intention misappropriated the said goods. On the contrary, she stated that prior to this transaction regular supply was made by her to the retail outlet at Gorakhpur and no problem was ever faced by her. She made certain allegation against the Manager of retail outlet for misbehaving with her. Similarly, two witnesses who deposed under Section 202 Cr.P.C followed the deposition of opposite party no. 2.

32. Admittedly, it was a business transaction. A mere transaction of sale cannot amount to an entrustment. The primary dispute between the parties appears to be based upon the business transaction. The transaction is based upon the sale and purchase of the articles. The transaction between the parties is established as a business/commercial transaction, thus, the sale of any goods does not fall under the definition of "entrustment". Moreover, the main ingredient of *mens rea* is missing under the business transaction. Simplicitor, opposite party no. 2 was supplying food products to the retail outlet of the company of the applicant and it was making regular payment, when it was in a position to do so.

33. It is also pertinent to mention here that opposite party no. 2 filed the complaint on 15.10.2022. Admittedly, the Bank of India moved before N.C.L.T, Mumbai. N.C.L.T, Mumbai vide its order dated 20.07.2022, admitted the petition and appointed Mr Vijay Kumar V. Aiyar as Interim Resolution Professional (I.R.P.) to carry out the functioning as mentioned in the Insolvency and Bankruptcy, 2016. Therefore, the applicant was not having any administrative or supervisory control over the company. Pursuant to order dated 20.07.2022 passed by N.C.L.T, Mumbai, coupled with the fact that at the same point of time COVID pandemic spread over the country and all business transactions were adversely effected, indicate that the company of which the applicant was Executive Chairman become helpless in settling dues of its creditors. Thus, the payment cannot be made by the company to opposite party no. 2.

34. So far as the argument raised by the learned counsel for opposite party no. 2 is concerned, merely giving a short period of 15 days for payment does not mean that property was entrusted to the applicant since the property remained with the applicant's company during such period. Opposite party no. 2 in her complaint or during her deposition did not make any allegation as to cheating or dishonest intention of the applicant in retaining the money in order to earn wrongful gain or cause wrongful loss to her. She only made a bald allegation that the applicant did not make payment to her. No allegation is levelled about dishonest intention in misappropriating the property. Suffice to say that to make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the applicant. It is also to be shown that the applicant dishonestly disposed of the same in some way or dishonestly retained the same. Mere allegation that the applicant did not pay the money to opposite party no. 2 does not amount to criminal breach of trust.

35. This Court found substance in the argument of Sri Anoop Trivedi, learned Senior Counsel that since the applicant was not residing within the local jurisdiction of the Court concerned, therefore, it was incumbent upon the Court to hold an enquiry under Section 202(1) Cr.P.C.

36. In *National Bank of Oman vs. Barakara Abdul Aziz And Another*, (2013) 2 SCC 488, the Hon'ble Apex Court, observed as under:

“9. The duty of a Magistrate receiving a complaint is set out in Section 202 of the 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 of the 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 of the 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 advertent to any defence that the accused may have.”

15. In *Birla Corporation Limited vs. Adventz Investments and Holdings Limited & Others*, 2019 AIR (SC) 2390, the Apex Court observed as under:

31. Under the amended sub-section (1) to Section 202 Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall enquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused.

32. By Cr. P.C. (Amendment) Act, 2005, in Section 202 Cr.P.C. of the Principal Act with effect from 23.06.2006, in sub-section (1), the words “...and shall, in a case where accused is residing at a place beyond the area in which he exercises jurisdiction...” were inserted by Section 19 of the Criminal Procedure Code (Amendment) Act, 2005. In the opinion of the legislature, such amendment was necessary as false complaints are filed against persons residing at far off places in order to harass them. The object of the amendment is to ensure that persons residing at far off places are not harassed by filing false complaints making it obligatory for the Magistrate to enquire. Notes on Clause 19 reads as under:-

“False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to

make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.”

33. *Considering the scope of amendment to Section 202 Cr.P.C. in Vijay Dhanuka and Others vs. Najima Mamtaj and Others, (2014) 14 SCC 638, it was held as under:-*

“12.The use of the expression “shall” prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word “shall” is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word “shall” in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression “shall” and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.”

Since the amendment is aimed to prevent persons residing outside the jurisdiction of the court from being harassed, it was reiterated that holding of enquiry is mandatory. The purpose or objective behind the amendment was also considered by this Court in Abhijit Pawar v. Hemant Madhukar Nimbalkar and Another (2017) 3 SCC 528 and National Bank of Oman v. Barakara Abdul Aziz and Another (2013) 2 SCC 488.”

16. An order passed by the Court, summoning the accused to face trial, must reflect that it has applied its mind to the facts of the case and the law applicable thereto. The Court cannot act merely because a complaint had been made and two witnesses in support of the allegations are produced before it. It has to examine the nature of allegations made in the complaint and the evidence, both oral and documentary, in support thereof and whether that would be sufficient for the complainant to succeed in bringing home charge against 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.

37. In view of the above, it transpires that the applicant was not entrusted with property or dominion over the property in any manner. He did not dishonestly misappropriate or convert to his own use any property so entrusted by opposite party no. 2. Mere transaction of sale cannot amount to an entrustment. Admittedly, regular commercial transaction took place between opposite party no. 2 and the company at its outlet at Gorakhpur. The applicant being the Executive Chairman of cannot be held to be responsible for non payment of the bill raised by opposite party no. 2. Admittedly the applicant was not residing within the local jurisdiction of the Court concerned who passed the summoning order dated 27.03.2023, therefore, it was incumbent upon the Court concerned to hold an enquiry under Section 202 (1) Cr.P.C.

38. In view of the discussion made above, the application deserves to be allowed.

39. Summoning order dated 27.03.2023 passed by learned Additional Civil Judge, (Senior Division), Court No. 2, Gorakhpur, order issuing non-bailable warrant dated 18.07.2023, and entire proceedings of complaint case no. 32393 of 2022 Neelima Verma Vs. Future Retail Ltd. (Big Bazaar) through CEO, Mr. Kishore Biyani in the court of Additional Civil Judge, (Senior Division), Court No. 2, Gorakhpur. are hereby quashed.

Order Date :- 12.03.2024

P.S

(Mayank Kumar Jain, J.)