

Birla Corporation Ltd. vs Adventz Investments And Holdings Ltd. on 9 May, 2019

Equivalent citations: AIR 2019 SUPREME COURT 2390, AIRONLINE 2019 SC 281, 2019 CRI LJ 3196, (2019) 128 CUT LT 325, (2019) 259 DLT 663, (2019) 3 CRILR(RAJ) 902, (2019) 3 MAD LJ(CRI) 13, (2019) 4 ALLCRILR 674, (2019) 4 CRIMES 335, (2019) 75 OCR 220, (2019) 7 SCALE 834, 2019 CRILR(SC MAH GUJ) 902, AIR 2019 SC(CRI) 1025

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Bench: R. Subhash Reddy, R. Banumathi

REPORTA

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 875 OF 2019
(Arising out of SLP(Crl.) No.9053 of 2016)

BIRLA CORPORATION LIMITED

...Appeal

VERSUS

ADVENTZ INVESTMENTS AND HOLDINGS
LIMITED & OTHERS

...Respo

WITH

CRIMINAL APPEAL NO. 877 OF 2019
(Arising out of SLP(Crl.) No.4609 of 2019 @ D. No.6405 of

BIRLA BUILDINGS LIMITED

...

VERSUS

BIRLA CORPORATION LIMITED

...Res

WITH

CRIMINAL APPEAL NO. 876 OF 2019
(Arising out of SLP(Crl.) No. 4608 of 2019 @ D. No.6122 of

GOVIND PROMOTERS PVT. LTD.

...

VERSUS

BIRLA CORPORATION LIMITED

...Res

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. These appeals arise out of the judgment dated 15.05.2015 passed by the High Court of Calcutta in C.R.R. No.323 of 2011 in and by which the High Court quashed the complaint of the appellant-Company filed under Sections 379, 403 and 411 IPC read with Section 120-B IPC qua documents No.1 to 28 of the Schedule. Insofar as documents No.29 to 54 of the Schedule, the High Court remitted the matter to the trial court to proceed with the matter in accordance with law.

3. Being aggrieved by quashing of the complaint qua documents No.1 to 28, the appellant-complainant has preferred appeal (SLP (Crl.) No.9053 of 2016). Being aggrieved by remitting the matter to the trial court qua documents No.29 to 54, the respondents have filed appeal [SLP(Crl.) D No.6405 of 2019 and SLP(Crl.) D. No.6122 of 2019]. Though the SLPs by the respondents are filed with delay, in the interest of justice, delay in filing the SLPs are condoned.

4. These appeals arise out of the criminal complaint filed by the appellant-Company which belong to Madhav Prasad Birla (MPB) Group, now under the control of respondent No.17- Harshvardhan Lodha who is the son of Rajendra Singh Lodha. The impugned complaint has a background of multitude of litigations filed by the respondents and others. Brief facts which led to filing of these appeals are that one Priyamvada Devi Birla (PDB) and her husband Madhav Prasad Birla (MPB) were in control and management of several corporate entities which are collectively referred to as the M.P. Birla Group of Industries. They did not have any children. They have created several trusts for undertaking charitable activities in particular on the education side. PDB died on 03.07.2004 and MPB had predeceased her. There is an ongoing dispute over legality of a Will allegedly executed by Priyamvada Devi Birla (PDB) dated 18.04.1999 in favour of Rajendra Singh Lodha and respondent No.17-son of said Rajendra Singh Lodha. On 19.07.2004, a petition was filed by Rajendra Singh Lodha, father of respondent No.17 for grant of probate of the purported Will before the High Court at Calcutta. The Probate Petition has been converted into a testamentary suit for grant of Letters of Administration. Krishna Kumar Birla (KKB), Basant Kumar Birla (BKB), Ganga Prasad Birla (GPB) and Yashovardhan Birla (YB) have filed caveats to oppose the grant of probate of the said Will dated 18.04.1999. The High Court held that Ganga Prasad Birla (GPB) has a caveatable interest and therefore, he has a right to oppose the grant of probate of the said Will. The said testamentary suit is pending. Subsequently, Krishna Kumar Birla (KKB), Kashi Nath Tapuria (KNT) and Pradip Kumar Khaitan (PKK) filed an application for grant of probate of the 1982 Will of Madhav Prasad Birla (MPB) and Ganga Prasad Birla (GPB); Kashi Nath Tapuria (KNT) and Pradip Kumar Khaitan (PKK) have filed an application for grant of probate of the 1982 Will of Madhav Prasad Birla (MPB) before the High Court at Calcutta and the said testamentary proceedings are also pending.

5. Respondents No.1 to 5 who are shareholders of the appellant Company and the trust-Birla Education Trust represented by respondent No.6, had filed a Company petition in CP No.1/2010

under Sections 397 and 398 of the Companies Act, 1956 before the Company Law Board (CLB) alleging oppression and mismanagement being perpetrated by respondent No.17 who is in administration and operation of the said Company. The petition before the CLB has been filed through respondents No.6 to 9 who are shown as accused Nos.6 to 9 in the complaint.

6. On 24.03.2010, respondents No.12 to 16 have filed five civil suits in the High Court of Calcutta (CS Nos.73-77/2010) under Section 92 of the Code of Civil Procedure stating that in the year 1988, MPB and PDB had created five mutual and reciprocal trusts to leave the estate covered by these trusts for charity. These trusts are said to have been revoked just three days prior to the alleged Will dated 18.04.1999. In the said suits in CS No.73-77/2010, respondents No.12 to 16 have challenged the revocation of the five trusts and prayed for recovery of the properties of the public charity and for enforcement of the public trust obligations of the properties vested in the said five trusts.

7. The company petition in CP No.1/2010 was filed before CLB (now pending before NCLT) on 10.03.2010. In the said company petition, documents No.1 to 54 have been filed. The advance copy of the company petition and the copies of the documents have been served upon the appellant-Company. Document No.1-Internal Audit Report of the appellant Company was filed in the civil suits filed by respondents No.12 to 16 challenging the revocation of the five trusts created by MPB and PDB. Alleging theft and misappropriation of all the documents No.1 to 54, the appellant Company filed the criminal complaint under Sections 379, 403, 411 read with Section 120B IPC against respondents No.1 to 16 and in the said complaint, appellant was represented by Shri Samir Ganguly who is the Vice-President (Legal) of the appellant-company. The gravamen of the allegations in the complaint is that copies of 54 documents were used before the Company Law Board (CLB) in C.P. No.1 of 2010 filed by respondents No.1 to 5 and Birla Education Trust represented by respondent No.6. Copy of one such document viz., Internal Audit Report of Chanderia Unit of the appellant Company has been filed along with the interlocutory applications filed by respondents No.13 to 16 in the civil suits which were filed challenging the revocation of trusts and for recovery of properties vested in the trust.

8. Let us understand the array of the parties. Each one of respondents No.1 to 5 are the shareholders of the appellant- Company. Respondent No.6-Pradip Kumar Khaitan is a reputed lawyer and a trustee of Birla Education Trust. Respondent No.7- Akshay Poddar is a Director of respondent No.1-Adventz Investments & Holdings Limited. Respondent No.8-Santosh Kumar Poddar is the Director of respondent No.3-Britex (India) Limited. Respondent No.9-Bal Kishan Toshniwal is the Director of respondent No.2-Govind Promoters Private Limited. Respondent No.10-Birla Buildings Limited is in-charge of the overall maintenance and upkeep of Birla Buildings where the appellant Company is located. Respondent No.11-S. Chakrabarty is the Chief Executive Officer of respondent No.10. Respondents No.12 to 16 are ones who have filed the suits CS No.73-77/2010 under Section 92 CPC before the High Court at Calcutta challenging the revocation of the trusts and for recovery of the properties of the public charity. Respondent No.17-Harshvardhan Lodha is the son of late Rajendra Singh Lodha and now the Director-cum-Chairman of the appellant-Company against whom C.P. No.1 of 2010 has been filed.

9. The allegations in the complaint in brief are as under:-

The complaint contains a list of fifty-four documents with their brief description given in the Schedule of the complaint.

Document No.1 is an Internal Audit Report of Chanderia unit of the appellant Company for the period ending November, 2009.

According to the appellant-complainant, keeping in mind the confidential nature of the report, only six copies were made. Out of which, five sets were sent to officers of the Company individually named and one was retained by the Auditor. The Internal Audit Report produced by the respondents is the copy of one of the original five sets which was sent to one Bachh Raj Nahar-Executive Director and Chief Executive Officer of the Company. It is alleged that respondents No.1 to 16 have stolen/misappropriated documents No.2 to 28 from the appellant's premises and that after photocopying the documents, they were kept back in the appellant's premises. It is alleged that documents No.29 to 54 have been stolen/misappropriated from the appellant's premises and that after photocopying the documents, they were not returned in the appellant's premises and the originals are still in the possession of the respondents.

Before making the complaint, the complainant-appellant had conducted an internal enquiry to find out how these documents reached the respondents.

10. These documents have at all times been kept at the registered office of the appellant-Birla Buildings. These documents have restricted access and are meant for the consumption of designated and specified individuals only. These documents include intra-company correspondence, internal audit reports, agreements etc. in relation to operations of the Company. The appellant-complainant alleges that respondents No.1 to 9 and 12 to 16 gained access to the Internal Audit Report and other documents unauthorizedly and illegally with the aid of respondent No.10-Birla Buildings Limited and respondent No.11-S. Chakrabarty, CEO who are in-charge of upkeep of the building in which the office of the appellant-complainant is situated.

11. The appellant further averred that by letter dated 29.03.2010, the Company through its advocate called upon the advocate of respondents No.1 to 6 to disclose as to how they obtained the documents mentioned in the Schedule of the complaint. The respondents sent reply dated 30.03.2010 and evaded giving any response to the said query on the premise that there was no procedure of the Company Law Board (CLB) for seeking such information. Appellant-Company sent a letter dated 17.04.2010 to respondents No.12 to 16 calling upon them to explain as to how they came in possession of the documents; but there was no reply. In the rejoinder filed by respondents No.1 to 6, they again failed and/or refused to state how they procured these documents.

12. Appellant alleged that without the consent of the appellant Company, the respondents/accused have dishonestly stolen/misappropriated the documents and thus committed theft and conspiracy to commit theft. It is also averred that the respondents/accused dishonestly received or retained the stolen property knowing and having reason to believe the same to be stolen property and as such

committed the offence punishable under Section 411 IPC. It is alleged that the respondents/accused thus dishonestly committed theft of the documents No.1 to 54 belonging to the appellant Company and misappropriated them by converting the same for their own use and thus committed the offences punishable under Sections 379, 403 IPC read with Section 120-B IPC.

13. Complainant Shri Samir Ganguly was examined on 06.10.2010. Since some of the accused persons are residents beyond local jurisdiction of the court, the trial court/the Magistrate fixed the matter for enquiry under Section 202 Cr.P.C. on 08.10.2010. An employee of the appellant Company by name P.B. Dinesh was examined on 08.10.2010. Considering the averments in the complaint and the statement of Complainant Shri Samir Ganguly and P.B. Dinesh, the learned Magistrate vide order dated 08.10.2010 found that there are sufficient grounds for proceeding against all the sixteen respondents and ordered issuance of summons to the respondents for the offences punishable under Sections 380, 411 and 120B IPC.

14. Aggrieved by the summoning order dated 08.10.2010, respondents filed petition under Section 482 Cr.P.C. before the High Court for quashing the criminal proceedings. Insofar as compliance of the procedure in taking cognizance of the offences, the High Court held that upon perusal of the averments in the complaint and the statement of representative of the company Shri Samir Ganguly and P. B. Dinesh, the Magistrate satisfied himself that there were sufficient grounds for proceeding against the accused and ordered to issue process against the sixteen accused and the High Court held that on the procedural aspect, the Magistrate did not commit any error. The High Court held that since originals of documents No.1 to 28 are still in the custody of the complainant, taking away the information contained in such documents cannot be considered to be "movable property" and the temporary removal of the documents for taking away the contents thereon by itself cannot be the subject of the offence of theft or dishonest misappropriation of property as well as dishonest receiving of the stolen property. On those findings, the High Court held that the complaint would not survive in respect of the documents No.1 to 28. Insofar as documents No.29 to 54 are concerned, the High Court held that as the originals of those documents are missing, the complaint discloses ingredients of the offence of theft. The High Court held that insofar as documents No.29 to 54 are concerned, the complainant can proceed against the respondents and accordingly remitted the matter to the trial court.

15. On behalf of the appellant, Mr. C.A. Sundaram, learned senior counsel submitted that the appellant discharged the initial burden placed upon it by adducing pre-summoning evidence by examining two witnesses and based upon the averments in the complaint and the statement of witnesses Shri Samir Ganguly and P.B. Dinesh, the Magistrate satisfied himself that there are sufficient grounds for proceeding against the accused and the High Court rightly held that there was no irregularity in the procedure followed by the Magistrate in issuing process against the respondents. The learned senior counsel submitted that respondents No.1 to 9 have produced the documents before the Company Law Board and respondents No.12 to 16 have filed document No.1-Internal Audit Report which are highly confidential documents and having not disclosed the source for the accusation/possession of the documents, prima facie case in dishonest removal of the documents have been made out and the Magistrate rightly found that there are sufficient grounds for proceeding against the respondents/accused and took the cognizance of the offences under

Sections 380, 411 and 120-B IPC.

16. The learned senior counsel for the appellant submitted that when the Magistrate has taken cognizance of the offence, the High Court ought not to have substituted its views for the summoning order passed by the Magistrate qua documents No.1 to 28. In support of his submission, reliance was placed upon Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736 and number of other decisions. It was submitted that the High Court was not right in quashing the criminal complaint qua documents No.1 to 28.

17. In appeal preferred by the respondents, they assailed the order of issuance of process against the respondents by the Magistrate contending that there were no adequate materials so as to arrive at satisfaction of the Magistrate that there were sufficient grounds for proceeding against the respondents. It was submitted that the production of the copies of the documents in the Company Law Petition and in the civil suits would not amount to theft and the averments in the complaint and the statement of the complainant and witness P.B. Dinesh would not attract the ingredients of theft and there was no application of mind of the learned Magistrate and the Magistrate mechanically issued process against the respondents and the High Court ought to have quashed the proceedings in toto.

18. On behalf of respondents No.1 to 5, Mr. Kapil Sibal, learned senior counsel submitted that the complaint lacks specification as to the time and manner of the commission of the offence and who committed theft of the documents and when and how the same was detected. The learned senior counsel contended that the averments in the complaint do not make out a *prima facie* case of theft and that the materials placed before the Magistrate were inadequate and there were no sufficient grounds for proceeding against the respondents and the High Court ought to have quashed the entire proceedings in toto. The learned senior counsel further submitted that document No.1-Internal Audit Report of the appellant Company and other documents have been filed by the respondents in the company petition before the CLB to substantiate their case of oppression and mismanagement, which can never amount to theft. Learned senior counsel contended that when the documents are produced in the proceedings before the Company Law Board for vindication of their rights or defence, the criminal complaint filed by the appellant is nothing but a "legal thumb screw" and the High Court rightly quashed the criminal proceedings qua documents No.1 to

28. It was submitted that since there was neither application of mind by the Magistrate nor any reasoned order has been passed disclosing the satisfaction of the mind, the entire proceedings before the Magistrate is liable to be quashed.

19. Mr. Mukul Rohatgi, learned senior counsel appearing on behalf of respondent No.10 and Mr. Amit Desai, learned senior counsel appearing on behalf of respondent No.11 submitted that respondent No.10 has the overall responsibility of the management and maintenance of the "building" in which the office of the appellant is situated and there are no specific allegations in the complaint as to how respondents No.10 and 11 had access to these documents which were in the custody of designated employees of the complainant. It was submitted that in the absence of allegations in the complaint to prove commission of offence by respondents No.10 and 11, the mere

fact that respondents No.10 and 11 are responsible for the maintenance of the building by itself, cannot lead to an inference that respondents No.10 and 11 are responsible for the theft.

20. On behalf of respondent No.11, learned senior counsel submitted that respondent No.11 is the CEO of respondent No.10-Company and is overall administrative in-charge of the company's affairs in Birla Building and in the absence of specific allegations against him, the mere official position of respondent No.11 will not automatically make him vulnerable to criminal prosecution. The learned senior counsel further submitted that the doctrine of vicarious liability is based upon a legal presumption and creates fictional liability and since the doctrine of vicarious liability is not available (as a matter of law) in regard to offences under the IPC, the complainant cannot rely upon a legal presumption of an act or mensrea to proceed against respondent No.11 in a criminal case.

21. On behalf of respondents No.13 to 16, Mr. Ranjit Kumar and Mr. Debal Banerjee, learned senior counsel submitted that the trial court had not applied its mind to the materials on record and the averments in the complaint and the statement of the witnesses do not make a *prima facie* case and the Magistrate mechanically issued process against respondents No.12 to 16. It was submitted that filing a document in the judicial proceedings can never be termed as an act of "theft" or "dishonest misappropriation" so as to attract the ingredients of Sections 380 and 411 IPC read with Section 120-B IPC.

22. Reiterating the contention of other respondents, Mr. K.V. Viswanathan, learned senior counsel appearing on behalf of respondent No.6 submitted that respondent No.6 is a well reputed lawyer and a trustee of the Birla Education Trust which is a shareholder of the appellant Company. The learned senior counsel further submitted that in the absence of specific allegations against respondent No.6, he cannot be made vicariously liable merely because he is adorning the position of trustee in Birla Education Trust. It was submitted that the complaint filed by the appellant is intended to arm twist the respondents from ventilating the legitimate rights before the appropriate judicial forum and in the absence of materials, the proceedings initiated against respondent No.6 is liable to be quashed.

23. On behalf of respondents No.7 to 9, Mr. Sidharth Luthra, learned senior counsel submitted that absolutely there are no averments as to how the said documents had gone out of the possession of the appellant-complainant and mere possession of the copy of the documents will not amount to theft nor would amount to conspiracy. It was submitted that even assuming that the evidence was illegally obtained, the same cannot be shut out and it cannot amount to theft.

24. We have considered the submissions of the learned senior counsel appearing on behalf of the appellant and the respondents and carefully perused the impugned judgment and materials on record.

25. The following questions arise for consideration in these appeals:-

- (i) Whether the allegations in the complaint and the statement of the complainant and other materials before the Magistrate were sufficient to constitute *prima facie*

case to justify the satisfaction of the Magistrate in issuing process against the respondents?

(ii) Whether the respondents are right in contending that in taking cognizance of the offences under Sections 380, 411 and 120-B IPC and ordering issuance of process against the respondents is vitiated due to non-

application of mind?

(iii) Whether the High Court was right in quashing the criminal proceedings qua documents No.1 to 28 on the ground that mere information contained in the documents cannot be considered as “moveable property” and cannot be the subject of the offence of theft or receipt of stolen property?

(iv) Whether filing of the documents in question in the petition before the Company Law Board to substantiate their case of oppression and mismanagement and document No.1 in the civil suits challenging revocation of the trust deeds would amount to theft justifying taking cognizance of the offences?

(v) Whether there is dishonest moving of documents causing wrongful loss to the appellants and wrongful gain to the respondents?

(vi) Whether filing of documents in the judicial proceedings can be termed as an act of theft causing wrongful gain to oneself and wrongful loss to the opponent so as to attract the ingredients of Section 378 IPC?

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

27. 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.

28. In National Bank of Oman v. Barakara Abdul Aziz and Another (2013) 2 SCC 488, the Supreme Court explained the scope of enquiry and held as under:-

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

29. In Mehmood Ul Rehman v. Khazir Mohammad Tunda and Others (2015) 12 SCC 420, the scope of enquiry under Section 202 Cr.P.C. and the satisfaction of the Magistrate for issuance of process has been considered and held as under:-

“2. Chapter XV Cr.P.C. deals with the further procedure for dealing with “Complaints to Magistrate”. Under Section 200 Cr.P.C, the Magistrate, taking cognizance of an offence on a complaint, shall examine upon oath the complainant and the witnesses, if any, present and the substance of such examination should be reduced to writing and the same shall be signed by the complainant, the witnesses and the Magistrate. Under Section 202 Cr.P.C, the Magistrate, if required, is empowered to either inquire into the case himself or direct an investigation to be made by a competent person “for the purpose of deciding whether or not there is sufficient ground for proceeding”. If, after considering the statements recorded under Section 200 Cr.P.C and the result of the inquiry or investigation under Section 202 Cr.P.C, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he should dismiss the complaint, after briefly recording the reasons for doing so.

3. Chapter XVI Cr.P.C deals with “Commencement of Proceedings before Magistrate”. If, in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, the Magistrate has to issue process under Section 204(1) Cr.P.C for attendance of the accused.”

30. Reiterating the mandatory requirement of application of mind in the process of taking cognizance, in Bhushan Kumar and Another v. State (NCT of Delhi) and Another (2012) 5 SCC 424, it was held as under:-

“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. 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.”

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 v. Najima Mamta 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.

34. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, in Mehmood Ul Rehman, this Court held as under:-

“22.the Code of Criminal Procedure requires speaking order to be passed under Section 203 Cr.P.C. 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 Cr.P.C., if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 Cr.P.C., by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 Cr.P.C., the High Court under Section 482 Cr.PC. is bound to invoke its

inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

35. In *Pepsi Foods Ltd. and Another v. Special Judicial Magistrate and Others* (1998) 5 SCC 749, the Supreme Court has held that summoning of an accused in a criminal case is a serious matter and that the order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and law governing the issue. In para (28), it was held as under:-

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The 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." The principle that summoning an accused in a criminal case is a serious matter and that as a matter of course, the criminal case against a person cannot be set into motion was reiterated in *GHCL Employees Stock Option Trust v. India Infoline Limited* (2013) 4 SCC 505.

36. To be summoned/to appear before the Criminal Court as an accused is a serious matter affecting one's dignity and reputation in the society. In taking recourse to such a serious matter in summoning the accused in a case filed on a complaint otherwise than on a police report, there has to be application of mind as to whether the allegations in the complaint constitute essential ingredients of the offence and whether there are sufficient grounds for proceeding against the accused. In *Punjab National Bank and Others v. Surendra Prasad Sinha* 1993 Supp (1) SCC 499, it was held that the issuance of process should not be mechanical nor should be made an instrument of oppression or needless harassment.

37. At the stage of issuance of process to the accused, the Magistrate is not required to record detailed orders. But based on the allegations made in the complaint or the evidence led in support of the same, the Magistrate is to be prima facie satisfied that there are sufficient grounds for proceeding against the accused. In *Jagdish Ram v. State of Rajasthan and Another* (2004) 4 SCC 432, it was held as under:-

“10.The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. 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 inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.”

38. Extensive reference to the case law would clearly show that the allegations in the complaint and complainant's statement and other materials must show that there are sufficient grounds for proceeding against the accused. In the light of the above principles, let us consider the present case whether the allegations in the complaint and the statement of the complainant and other materials before the Magistrate were sufficient enough to constitute *prima-facie* case to justify the Magistrate's satisfaction that there were sufficient grounds for proceeding against the respondents-accused and whether there was application of mind by the learned Magistrate in taking cognizance of the offences and issuing process to the respondents.

39. Respondents No.1 to 5 are minority shareholders in the appellant-Company. Respondent No.6 is a lawyer and a trustee of Birla Education Trust. Respondent No.6 had been empowered to file petition before the CLB. Respondents No.7, 8 and 9 are the Directors of respondents No.1, 3 and 2 respectively. On 10.03.2010, Company Petition CP No.1/2010 was filed before the Company Law Board under Sections 235, 237, 247, 250, 397, 398, 402 and 403 of the Companies Act, 1956 by respondents No.1 to 5 who are the shareholders of the appellant Company alleging oppression and mismanagement. M/s Birla Education Trust (represented by respondent No.6) is also one of the petitioners in the Company Petition. Along with the Company Petition, the copy of the documents in question i.e. documents No.1 to 54 including document No.1-Internal Audit Report were filed and advance copy of the Company Petition and copy of the documents were given to the appellant.

40. On 24.03.2010, respondents No.12 to 16 have filed five civil suits under Section 92 of Code of Civil Procedure before the High Court of Calcutta being CS Nos.73-77 of 2010 challenging the revocation of five public charitable trusts created by Madhav Prasad Birla (MPB) and Priyamvada Devi Birla (PDB) in 1988. Respondents No. 12 to 16 have averred that the trusts have assets worth thousands of crores of rupees which are vested with the trusts dedicated for charity. In the said suits, respondents No.12 to 16 have challenged the revocation of the trusts and sought for recovery of the property that are vested in the public charity through the five trusts set up by MPB and PDB and the said suits are pending. On 29.03.2010, five interlocutory applications have been filed in the aforesaid suits praying for interim reliefs and in those applications, respondents No.12 to 16 annexed photocopy of the document No.1-Internal Audit Report of the Chanderia unit of Birla Corporation Limited for the period ending November, 2009. About seven months thereafter on 04.10.2010, criminal complaint was filed by the appellant against respondents No.1 to 16 under Sections 379, 403 and 411 read with Section 120-B IPC alleging theft of the documents and receipt of stolen property and dishonest misappropriation of the documents. Of the sixteen accused, six are corporate entities and rest are natural persons. Respondents No.1 to 5 are the shareholders who filed the Company Petition CP No.1 of 2010. Respondents No.12 to 16 are the plaintiffs who have instituted civil suits challenging the revocation of the five trusts and for recovery of the properties

that are vested in the public charity.

41. Respondents No.3, 6, 12 and some of the other respondents are the residents beyond the local limits of the trial court – 10th Metropolitan Magistrate, Calcutta. Since number of accused are residents beyond the local limits of the trial court, as per amended provision of Section 202 Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused, he shall enquire into the case 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 are sufficient grounds for proceeding against the accused. In the present case, the learned Magistrate has opted to hold such enquiry himself.

42. The complaint alleges that the respondents have gained unauthorized access and possession of the documents No.1 to

54. It is alleged that documents No.1 to 28 have been stolen/misappropriated from the premises of the appellant and that after photocopying the documents, they were kept back in the premises. In so far as documents No.29 to 54, it is alleged that they have been stolen/misappropriated and have not been returned and are still in the possession of the respondents. It is alleged that respondents No.1 to 16 had gained unauthorized access and exercised to control over the said documents. It is further alleged that by letter dated 29.03.2010, on being called upon to disclose as to how the respondents had obtained the documents, the respondents by letter dated 30.03.2010 evaded making response to the query on the premise that there was no procedure of the CLB for seeking such information.

43. The gist of the allegations in the complaint are:-

- (i) Respondent No.10-Company is in-charge of day to day maintenance of the building which houses office of the complainant and others. Respondent No.11 is the CEO In-charge of respondent No.10 and responsible for the day to day administration of respondent No.10.
- (ii) Respondents No.1 to 9 are in possession of photocopies of documents No.1 to 28 and stated to be in possession of originals of documents No.29 to 54;
- (iii) Use of photocopies of documents No.1 to 24 by respondents No.1 to 9 in the company petition before the CLB and use of document No.1-Internal Audit Report by respondents No.12 to 16 in the civil suits filed by them;
- (iv) The documents are highly confidential and meant for use/consumption only of designated and specified individuals of the appellant Company and the respondents have gained unauthorized access to the documents and exercise of control over the documents; and
- (v) Omission to explain the source of copies of documents in spite of issuance of notice dated 29.03.2010 to respondents No.1 to 9 and notice dated 01.04.2010 to respondents No.12 to 16.

44. With reference to document No.1-Internal Audit Report of Chanderia Unit, it is alleged that one copy of the original of document No.1 was marked to Bachh Raj Nagar and it was claimed to be still with them. With reference to documents No.2 to 28, in para No.(20) of the complaint, it is alleged that the documents were kept in the premises on the 3 rd and 4th floor with the concerned individuals or their secretaries and the respondents have gained unauthorised access and had control over the documents. The allegations against the respondents is that respondents No.10 and 11 are under the control and management of the Birla Buildings and has security and the overall responsibility of the management and maintenance of the same. It is alleged that the respondents in connivance with respondents No.10 and 11 have gained unauthorised access to the documents and thus the documents have been stolen from the premises and then misappropriated. The averments in the complaint even if taken at its face value and accepted in its entirety do not constitute prima facie offence under Section 378 IPC.

45. After referring to filing of CP No.1/2010 where the xerox copies of the documents were annexed, the complaint alleges as under:-

“9.The Company submits that the said documents are highly confidential internal records and correspondence of Company and its officers. These documents were at all time kept inside the registered office of the Company at the said premises.

These documents have restricted access and are meant for the perusal and consumption only of designated and specified individuals. These documents and the information contained therein is the property of company over which no unauthorized person has any right.”

46. On 06.10.2010, Vice-President (Legal) - Power of Attorney of the complainant Company, Shri Samir Ganguly was examined as a representative of the Company under Section 200 Cr.P.C. Shri Samir Ganguly has stated “that the accused persons have filed various litigations before various forums. These accused persons have committed a serious crime of theft of various documents which I have mentioned in my compliant.” Shri Samir Ganguly has further stated as under:-

“....Our office situated at Birla Building, 9/1, R.N. Mukherjee at 3rd & 4th Floor. Accused No.10 has full control of maintenance and security to each and every floor....” “....In normal course, the accused persons could never have access to those documents except by illegal means. The documents are highly confidential like internal audit report of one of our units which is not supposed to be in their possession. Other accused persons have filed five civil suits basing on those stolen documents, from which I apprehend that all accused persons in connivance with each other have procured those documents by theft.....”

47. Being the Vice-President (Legal) and a representative of the Company, Shri Samir Ganguly may not have personal knowledge of the averments made in the complaint and he has not attributed any specific overt act to any of the respondents. Shri Samir Ganguly has only alleged that he apprehends that all the accused persons in connivance with each other have procured the documents. The

allegations in the statement of the complainant are vague and lack material particulars as to the commission of the theft. Complainant Shri Samir Ganguly has neither attributed to any facts nor material particulars as to the commission of theft.

48. Respondent No.10-Birla Buildings Limited is responsible for the day to day affairs of the maintenance of the building. Respondent No.11-S. Chakrabarty is the CEO of Respondent No.10-Birla Buildings Limited. In the complaint, there are no specific averments against respondents No.10 and 11 as to how they had access to the 3rd and 4th floors of the building owned by the appellant Company and as to how they are responsible in moving the documents out of the possession of the appellant. Likewise, no specific overt act of "dishonest removal" of the documents is attributed to the other respondents. The mere fact that respondents No.10 and 11 are responsible for security and maintenance of the building cannot lead to an inference that respondents No.10 and 11 are responsible for the theft.

49. So far as respondent No.11 who is the CEO of respondent No.10-Company is concerned, it is stated that he is responsible for the day to day affairs of respondent No.10-Company and the complainant invoked the doctrine of vicarious liability. The learned senior counsel Mr. Desai has submitted that for proceeding against respondent No.11, the complaint must show "active role" of the natural person. Reliance was placed upon Sunil Bharti Mittal v. Central Bureau of Investigation (2015) 4 SCC 609, wherein it was held as under:-

"43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent....."

50. As rightly submitted by learned senior counsel for respondents No.10 and 11, it is inconceivable that respondent No.11, CEO of respondent No.10-Company, if committed the offence of theft, would have been permitted to continue in that profession. Be it noted, the complainant-appellant Company is also a shareholder in respondent No.10-Company and had its nominee Mr. S.N. Prasad on the Board of Directors of the appellant at the relevant time till his death in December, 2012. It is pertinent to note that no complaint has ever been made against respondent No.11 against alleged theft or any other overt act. In the absence of particulars or prima-facie case in the complaint or the statement of Shri Samir Ganguly against respondents No.10 and 11, the satisfaction of the Magistrate appears to be on the presumptive footing that respondents No.10 and 11 are in-charge of maintenance of the building. Likewise, issuance of process to other respondents is only on the presumptive footing that they have filed copies of the documents in CP No.1/2010 and in the civil suits filed challenging revocation of the trusts.

51. In his order dated 06.10.2010, the Magistrate observed that since some of the accused persons are residents beyond the local jurisdiction of the court, the matter further requires to be enquired into under Section 202 Cr.P.C. and therefore, fixed the matter for further enquiry on 08.10.2010. On 08.10.2010, P.B. Dinesh, employee of the appellant Company was examined who have stated that respondent No.14-Kumar Mangalam Birla is the Chairman of Aditya Birla Group having their office in Mumbai; respondent No.15-Sidharth Birla is also a part of that Company and he resides at

Alipore, Calcutta; respondent No.13-Rajendra Prasad Pansari is a resident of Calcutta who has now joined Birla Group. Witness P.B. Dinesh has stated that these respondents have procured documents stolen from the appellant's custody and filed case before the Company Law Board on the basis of those documents.

52. Based on the allegations in the complaint and the statements of Shri Samir Ganguly and P.B. Dinesh, the Metropolitan Magistrate took cognizance and directed issuance of summons to respondents No.1 to 16. As pointed out earlier, as per Notes on Clause 19, the object behind the amendment to Section 202 Cr.P.C. is to ensure that innocent persons who are residing at far off places are not harassed by unscrupulous persons. The amendment therefore, makes it obligatory upon the Magistrate that before summoning the accused residing beyond the jurisdiction, the Magistrate has to enquire the case either himself or direct investigation to be made by the police officer and is required to apply his mind and record his satisfaction with reasons.

53. As pointed out earlier, P.B. Dinesh had merely stated that respondent No.14-Shri Kumar Mangalam Birla is the Chairman of Aditya Birla Group having their office in Mumbai and respondent No.15-Shri Sidharth Birla is a part of the Company and resides at Alipore. P.B. Dinesh has also stated that respondent No.13- Rajendra Prasad Pansari stays in Calcutta and that he was an ex-employee of Birla Corporation and now he has joined Birla Group. P.B. Dinesh has thus stated about residence of respondent No.14 being at Mumbai and residence of respondents No.13 and 15 at Calcutta. There are no specific allegations against respondent No.14 or against any other respondents who are residing outside the jurisdiction. Likewise, no specific allegation as to how respondent No.14 or other respondents who are residing outside the jurisdiction have gained entry into the building of the appellant Company and committed theft of the documents nor any specific allegation as to the alleged conspiracy.

54. In the statement of P.B. Dinesh, there is only a bare statement that respondents No.13 to 15 have filed case before the Company Law Board that the documents are highly confidential and that they have procured the documents stolen from the custody of the appellant. There are no specific allegations against respondents No.13 to 15. Likewise, there are no specific allegations against the other accused who are residing outside the jurisdiction of the court and how and when they committed theft of the documents that how they entered into conspiracy. Considering the various litigations pending between the parties before issuing summons, the learned Magistrate ought to have considered the complaint and statement of witnesses and satisfied himself that there are *prima facie* materials showing the ingredients of the offence of theft (house theft) and receipt of stolen property.

55. 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.

56. As held in *Chandra Deo Singh v. Prokash Chandra Bose alias Chabi Bose and Another AIR 1963 SC 1430* and in a series of judgments of the Supreme Court, the object of an enquiry under Section 202 Cr.P.C. is for the Magistrate to scrutinize the material produced by the complainant to satisfy himself that the complaint is not frivolous and that there is evidence/material which forms sufficient ground for the Magistrate to proceed to issue process under Section 204 Cr.P.C. It is the duty of the Magistrate to elicit every fact that would establish the bona fides of the complaint and the complainant.

57. The order of the Magistrate dated 08.10.2010 reads as under:-

“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, 120B IPC. Cognizance is taken. Issue summons accordingly upon the accused persons fixing 10.12.2010 for S/R and appearance. Requisites at once.” For taking cognizance of the offence, the Magistrate thus inter alia relied upon the statement of the complainant and P.B. Dinesh to arrive at a conclusion that a prima facie case is made out against the respondents. As discussed earlier, neither the statement of the complainant nor the statement of P.B. Dinesh contain the particulars as to the commission of the offence to have satisfied the Magistrate that there were sufficient grounds for proceeding against the accused. By perusal of the above order passed by the Magistrate, we find absolutely nothing to indicate application of mind in taking cognizance of the offence against respondents No.1 to 16 including the respondents who are residents beyond the jurisdiction of the court. Though speaking or elaborate reasoned orders are not required at this stage, there must be sufficient indication that there was application of mind by the Magistrate to the facts constituting the commission of offence.

58. There are 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 has been filed alleging commission of the offence punishable under Sections 380, 411 and 120B IPC. The Magistrate has taken cognizance under Sections 380, 411 and 120B IPC. The offence under Section 380 IPC in the case instituted otherwise than on a police report is a warrant case triable by the Magistrate under Chapter XIX – Trial of warrant cases by Magistrates, XIX-B – Cases instituted otherwise than on police report. For the offences triable under Chapter XIX – trial of warrant cases by the Magistrate, the court has to frame the charge. As per Section 212 Cr.P.C., the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom or the thing in respect of which, the offence was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. In the present case, the complaint lacks particulars as to time and the place of theft or the person who has committed theft. There are no

averments in the complaint alleging that how the documents had gone out of the possession of the complainant. There are only mere statement of the complainant Shri Samir Ganguly that respondents No.12 to 16 have filed civil suits basing on the stolen documents and that he apprehends that all the accused persons in connivance with each other must have procured the documents by theft. In the absence of particulars, by mere possession of the documents or mere production of the documents in the Company Petition or civil suits, it cannot be said that sufficient grounds were made out to proceed against the accused or that the satisfaction of the Magistrate was well founded justifying issuance of process.

59. As held in Pepsi Foods Limited, summoning the accused for a criminal offence is a serious matter and the respondents are answerable in the criminal court. The non-application of mind as to the materials cannot be brushed aside as a procedural irregularity. There is no indication in the order of the Magistrate dated 08.10.2010 as to application of the mind and as to the satisfaction of the Magistrate as to the sufficient ground for proceeding against the respondents under Sections 380, 411 and 120-B IPC.

60. The High Court held that witness P.B. Dinesh has stated about alleged involvement of some of the accused and there is no fundamental error committed by the Magistrate in following the procedure under Chapter XIX of the Criminal Procedure Code. The High Court further observed that the flaw at the worst would be a procedural irregularity. The order dated 08.10.2010 taking cognizance of the offence under Sections 380, 411 and 120B IPC against respondents No.1 to 16 are liable to be set aside. 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. In the case in hand, we do not find that the satisfaction of the Magistrate for issuance of summons is well founded.

61. The object of investigation under Section 202 Cr.P.C. is “for the purpose of deciding whether or not there is sufficient ground for proceeding”. The enquiry under Section 202 Cr.P.C. is to ascertain the fact whether the complaint has any valid foundation calling for issuance of process to the person complained against or whether it is a baseless one on which no action need be taken. The law imposes a serious responsibility on the Magistrate to decide if there is sufficient ground for proceeding against the accused. The issuance of process should not be mechanical nor should be made as an instrument of harassment to the accused. As discussed earlier, issuance of process to the accused calling upon them to appear in the criminal case is a serious matter and lack of material particulars and non-application of mind as to the materials cannot be brushed aside on the ground that it is only a procedural irregularity. In the present case, the satisfaction of the Magistrate in ordering issuance of process to the respondents is not well founded and the order summoning the accused cannot be sustained. The impugned order of the High Court holding that there was compliance of the procedure under Section 202 Cr.P.C. cannot be sustained and is liable to be set

aside. Production of copies of documents in the Company Petition – whether would amount to theft:

62. So far as documents No.1 to 28 filed in the company petition, the High Court held that since originals of documents No.1 to 28 are still in the custody of the appellant Company-complainant, temporary removal of those documents and the subject of alleged removal was “the information” contained in those documents, the same cannot be considered to be “movable property”. The High Court took the view that such temporary removal of documents and use of information cannot be the subject of the offence of theft or dishonest misappropriation of property as well as dishonest receiving of the stolen property.

63. Insofar as documents No.1 to 28 are concerned, the point falling for consideration is whether the temporary removal of the documents and filing of photocopies and use of the information/contents of the documents can be the subject matter of theft.

64. Contention of the appellant is that the very act of moving the documents out of the possession of the appellant-Company would amount to theft. It was submitted that the loss need not be caused by permanent deprivation of the property; but loss due to theft may be caused even by temporary moving of the property. In support of this contention, the learned senior counsel for the appellants placed much reliance upon Pyare Lal Bhargava v. State of Rajasthan AIR 1963 SC 1094. In the said case, wherein the appellant-Pyare Lal Bhargava, a superintendent in the Chief Engineer’s Office, at the instance of one Ram Kumar Ram got a file from the Secretariat through a clerk and took the file to his house, made it available to said Ram Kumar Ram who replaced the same documents in the file with other papers and thereafter, returned the file the next day. In the said case, the arguments were advanced contending that appellant/accused Pyare Lal Bhargava was one of the officers working in the department and the facts do not constitute the offence of theft for the reason that there was no intention to take it dishonestly as he had taken it only for the purpose of showing the documents to Ram Kumar Ram and returned it on the next day to the office and therefore, he had not taken the said file out of the possession of any person. Rejecting the said contention, the Supreme Court held that “.....To commit theft, one need not take movable property permanently out of the possession of another with the intention not to return it to him. It would satisfy the definition if he took any movable property out of the possession of another person though he intended to return it later on.....”. In the light of the ratio laid down in Pyare Lal Bhargava, temporary removal of original documents for the purpose of replicating the information contained in them in some other medium would thus fulfill the requirement of “moving” of property which is the actus reus of the offence of theft as defined under Section 378 IPC.

65. In Pyare Lal Bhargava, yet another contention raised was that the accused did not intend to take it dishonestly as he did not receive any “wrongful gain” or caused any “wrongful loss” to any other person. Rejecting the said contention, in Pyare Lal Bhargava, the Supreme Court held as under:-

“8. To commit theft one need not take movable property permanently out of the possession of another with the intention not to return it to him. It would satisfy the definition if he took any movable property out of the possession of another person though he intended to return it later on. We cannot also agree with learned

Counsel that there is no wrongful loss in the present case. Wrongful loss is loss by unlawful means of property to which the person losing it is legally entitled. It cannot be disputed that the appellant unauthorizedly took the file from the office and handed it over to Ram Kumar Ram. He had, therefore, unlawfully taken the file from the department, and for a short time he deprived the Engineering Department of the possession of the said file. The loss need not be caused by a permanent deprivation of property but may be caused even by temporary dispossession, though the person taking it intended to restore it sooner or later. A temporary period of deprivation or dispossession of the property of another causes loss to the other.....”

66. One of the foremost components of theft is that the subject matter of the theft needs to be a “moveable property”. “Moveable property” is defined in Section 22 IPC which includes a corporeal property of every description. It is beyond doubt that a document is a “moveable property” within the meaning of Section 22 IPC which can be the subject matter of theft. A “document” is a “corporeal property”. A thing is “corporeal” if it has a body, material and a physical presence. As per Section 29 IPC, “Document” denotes “any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used, or which may be used as evidence of that matter”. The first Explanation to Section 29 IPC provides that it is immaterial by what means or upon what substance these are formed. This definition would include within its ambit photocopy of a document. As per Explanation No.2 of Section 29 IPC, letters, figures or marks shall be deemed to be expressed by such letters, figures or marks within the meaning of the Section. Such letters, figures or marks thus have a material and physical presence. Therefore, it can also be inferred that the said information would be deemed to fall within the purview of “Document” – a corporeal property.

67. Information contained in a document, if replicated, can be the subject of theft and can result in wrongful loss, even though the original document was only temporarily removed from its lawful custody for the purpose of extracting the information contained therein. In the case of K.N. Mehra vs. State of Rajasthan AIR 1957 SC 369, this Court held that gain or loss contemplated need not be a total acquisition or a total deprivation but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary keeping out of property from person legally entitled.

68. The High Court, in our view, was not right in holding that the replication of the documents or use of information in the documents No.1 to 28 and the contents thereon are not corporeal property and would not amount to theft qua documents No.1 to

28. The documents and the replication of the documents and the contents thereon have physical presence and therefore, are certainly “corporeal property” and the same can be the subject matter of theft.

69. The main question falling for consideration is whether in the facts and circumstances of the case in hand whether temporary removal of the documents and using them in the litigations pending between the parties would amount to theft warranting lodging of a criminal complaint.

70. Admittedly, documents No.1 to 54 including the Document No.1-Internal Audit Report of Chanderia unit of the appellant Company has been filed by the respondents in the company petition. These documents are intra-company correspondence, internal audit reports, agreements, etc. in relation to the operations of the appellant Company. Admittedly, these documents have been produced in the company petition by the shareholders of the appellant-Company to substantiate their case of oppression and mismanagement by respondent No.17 and for vindication of their rights. As discussed infra in the facts and circumstances of the case in hand, in our view taking away of the documents temporarily and using them in the pending litigations between the parties would not amount to theft.

71. In the criminal complaint, by order dated 08.10.2010, the Magistrate has taken the cognizance of the offence under Section 380 IPC - “Theft in dwelling house, etc.”. In order to constitute theft, the following ingredients are essential:-

- i. Dishonest intention to take property;
- ii. The property must be moveable;
- iii. It should be taken out of the possession of another person;
- iv. It should be taken without the consent of that person;
- v. There must be some removal of the property in order to accomplish the taking of it.

72. Intention is the gist of the offence. It is the intention of the taker which must determine whether taking or moving of a thing is theft. The intention to take “dishonestly” exists when the taker intends to cause wrongful loss to any other which amounts to theft. It is an essential ingredient of the offence of “theft” that the movable property should have been “moved” out of the possession of any person without his consent. “Movable property” is defined in Section 22 of IPC, which reads as under:-

“Movable property – The words “movable property” are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.” “Dishonestly” has been defined in Section 24 IPC, which reads as under:-

“Dishonestly - Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing “dishonestly”.

“Wrongful gain” and “Wrongful loss” have been defined in Section 23 IPC which read as under:-

“Wrongful gain” - “Wrongful gain” is gain by unlawful means of property to which the person gaining is not legally entitled.

“Wrongful loss” - “Wrongful loss” is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully, losing wrongfully - A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.”

73. In the facts and circumstances of the case, it is to be seen in using the documents in the litigation, whether there is “dishonest intention” on the part of the respondents in causing “wrongful loss” to the appellant Company and getting “wrongful gain” for themselves. Respondents No.1 to 5 are the shareholders of the appellant-Company and they have produced the photocopies of the documents No.1 to 54 in the CLB proceedings which were filed by them on the ground of oppression and mismanagement.

Merely because the respondents have produced the copies of the documents in the CLB proceedings, it cannot be said that the respondents have removed the documents with “dishonest” intention. Copies of documents are produced in support of the case of respondents No.1 to 5 and to enable the Court to arrive at the truth in a judicial proceeding involving alleged oppression and mismanagement in the affairs of the appellant Company by respondent No.17. A person can be said to have “dishonest intention” if in taking the property it is the intention to wrongful gain by unlawful means or to cause wrongful loss by unlawful means. As discussed earlier, the complaint does not allege that there was any wrongful gain to the respondents or wrongful loss to the appellant-Company so as to constitute ingredients of theft under Section 378 IPC. The complaint only alleges that the copies of the document were used in the CLB proceedings by respondents No.1 to 5. There is no allegation of “wrongful gain” to the respondents or “wrongful loss” to the appellant.

74. As pointed out earlier, documents No.1 to 54 are filed in the Company Petition to substantiate their case of oppression and mismanagement. Filing of documents in the CLB proceedings is only to assert their claim of oppression and mismanagement of the appellant Company. According to the respondents, there is a bona fide dispute of oppression and mismanagement and the documents No.1 to 54 are filed only to substantiate their case. When a bona fide dispute exists between the parties as to whether there is oppression and mismanagement, there is no question of “wrongful gain” to the respondents or “wrongful loss” to the appellant. In using the documents, when there is no dishonest intention to cause “wrongful loss” to the complainant and “wrongful gain” to the respondents, it cannot be said that the ingredients of theft are made out.

75. As discussed earlier, respondents No.12 to 16 have filed five civil suits challenging the cancellation of the trusts for recovery of the property that had vested in public charity through the trust deeds. Respondents No.12 to 16 have filed copy of document No.1-Internal Audit Report of

Chanderia Unit of the appellant Company. By the time, the document was filed in the interlocutory applications filed in the civil suits, the document was already filed in CP No.1/2010. Here again, there is a bona fide dispute as to the correctness of cancellation of the revocation of the trusts deed and to substantiate the averments in the complaint and in the interlocutory applications. It cannot be said that the respondents No.1 to 16 had dishonest intention in using the documents so as to cause “wrongful loss” to the appellant or “wrongful gain” to themselves so as to attract the ingredients of theft under Section 378 IPC.

76. How the respondents had access to the documents may be one thing. It may perhaps have bearing on the evidentiary value to be attached to the documents. But to say that it amounts to theft and seeking to prosecute the respondents is nothing but an attempt to cow down their defence in the litigation or to deprive the respondents of their valuable defence. In Pooran Mal v. Director of Inspection (Investigation), New Delhi and Others (1974) 1 SCC 345, it has been held by the Constitution Bench that even in case of illegal search and seizure, the documents obtained cannot be shut out from consideration as long as they are relevant to the matters in issue. In the present case, the documents are used in good faith in the legal proceedings i.e. Company Petition filed by respondents No.1 to 5 alleging oppression and mismanagement and the other suits are the civil suits challenging the cancellation of the Trusts. These cases are pending and both the parties are hotly contesting those cases. Use of the documents in judicial proceeding by the respondents is to substantiate the case of oppression and mismanagement of the appellant-Company. Absolutely, no “dishonest intention” or “wrongful gain” could be attributed to the respondents. Likewise, there is no “wrongful loss” to the appellants so as to attract the ingredients of Sections 378 and 380 IPC.

77. The intention under Section 24 IPC “dishonestly” must be to cause “wrongful loss” to the other or to have “wrongful gain” for oneself. In determining whether a person has acted dishonestly or not, it is the intention which has to be seen. By filing the documents in the legal proceedings, there is no intention on the part of the respondents to cause “wrongful loss” to the appellant nor intention to make “wrongful gain” to themselves. Filing of the documents in the legal proceedings is only to vindicate their stand in the company petition. We find much force in the submission of the learned senior counsel, Mr. Sibal, appearing for respondents No.1 to 5 that the attempt of the appellant in trying to prosecute the respondents appears to arm-twist the respondents in an attempt to shut out the relevant material documents before the CLB proceedings by prosecuting respondents No.1 to 9 and in the civil suits.

78. Whether respondents should have called for the documents in accordance with various provisions:-

Contention on behalf of the appellant is that despite there being adequate provisions under Section 10-E of Companies Act and Section 91 Cr.P.C. relating to summoning of documents and of discovery, interrogatories and inspection of documents under Order XI CPC, the respondents resorted to dubious methods to procure the documents and thus, cannot skirt the liability for their actions by contending that since the documents were used for a legal proceeding, it cannot be theft.

79. Undoubtedly, adequate provisions have been provided in all the laws concerned with the instant case to enable a party to a suit or the concerned court to require the production of all documents and materials considered necessary or desirable for proper adjudication of the dispute at hand. If a document in possession is not produced after notice, there is further presumption under Section 114 illus.(g) that the evidence if produced would have been unfavourable to the opposite party.

80. The respondents herein are alleged to have used the documents of appellant-Corporation without calling upon them to produce the documents in accordance with law. Of course, the litigants and their counsel are expected to comply with the provisions of law and court discovery rules in producing the documents. But merely because the respondents have not called for the documents as per the provisions, it cannot be said that they have committed "theft". It may be that the respondents have not issued notice calling upon the appellant-Corporation to produce the documents or may not have taken steps in accordance with various provisions of law calling upon them to produce documents. This may probably be the point to be raised in appropriate proceedings so as to advance arguments as to the evidentiary value to be attached to the documents. But it would be far-fetched to say that the respondents have dishonestly removed the documents and committed the offence of theft and that they are to face criminal prosecution for theft of the documents. It would only be an arm-twisting tactics to deprive the respondents from pursuing their defence with relevant evidence and materials. Since we have held that there are no sufficient ground for proceeding against the respondents and that the order of issuance of summons itself is not sustainable, we are not inclined to go further deep on this aspect; nor express our views as to the evidentiary value to be attached to the documents in the relevant proceedings. Lest, it would amount to expressing our views in the pending proceedings between the parties.

81. Whether the criminal prosecution against the respondents be permitted to continue:- As discussed earlier, admittedly the parties are entangled in several litigations. Allegations of theft and misappropriation are relating to the documents No.1 to 28 and the documents No.1 to 54 which are filed in the company petition and filing of Internal Audit Report in the civil suits. As discussed earlier, there are no specific allegations as to when, where and how the respondents have committed theft; nor are there specific allegations against the respondents accused. Allegations in the complaint, being taken at their face value, do not disclose *prima-facie* case nor the ingredients of the offence of house theft or misappropriation are made out.

82. Exercise of power under Section 482 Cr.P.C. envisages three circumstances in which the inherent jurisdiction may be exercised namely:- (i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice. Inherent jurisdiction under Section 482 Cr.P.C. though wide has to be exercised sparingly, carefully and with caution.

83. It is well settled that the inherent jurisdiction under Section 482 Cr.P.C. is designed to achieve a salutary purpose and that the criminal proceedings ought not to be permitted to degenerate into a weapon of harassment. When the Court is satisfied that the criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon the accused, in exercise of the

inherent powers, such proceedings can be quashed. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Others (1976) 3 SCC 736, the Supreme Court reviewed the earlier decisions and summarised the principles as to when the issue of process can be quashed and held as under:-

“5. 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 the 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. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminates into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused; (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.”

84. In State of Haryana and Others v. Bhajan Lal and Others 1992 Supp (1) SCC 335, the Supreme Court considered the scope of inherent powers of the Court and after referring to earlier decisions, the Supreme Court enumerated categories of cases by way of illustration where the extraordinary jurisdiction under Article 226 of the Constitution of India can be exercised by the High Court to prevent abuse of process of Court or otherwise to secure ends of justice. It was held that “where the uncontested 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.”

85. In the present case, it is one thing to say that the documents have not been secured in accordance with the law and no value could be attached to them. But merely because documents have been produced from one source or other, it cannot be said that documents have been dishonestly removed to obtain “wrongful gain” to the respondents and cause “wrongful loss” to the appellant. Where it appears that the criminal complaint has been filed to bring pressure upon the

respondents who are shown as accused in the criminal case, the complaint is to be quashed.

86. In Indian Oil Corp. v. NEPC India Ltd. and Others (2006) 6 SCC 736, the Supreme Court after observing that there is a growing tendency in business circles to convert powerful civil disputes in criminal cases held as under:-

“14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may.”

87. In Madhavrao Jiwajirao Scindia and Others v. Sambhajirao Chandrojirao Angre and Others (1988) 1 SCC 692, it was held that “when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontested allegations as made prima-facie establish the offence.” It was further held that “while considering the matter, the court is to take into consideration any special feature which appear in a particular case showing whether or not it is expedient in the interest of justice to permit a prosecution to continue.”

88. The FIR or the criminal proceedings can be quashed if the allegations do not make out a prima-facie case or allegations are so improbable that no prudent person would ever reach a just conclusion that there are sufficient grounds for proceeding against the accused. So far as, the allegation of retention of the documents No.29 to 54, in our view, no allegation as to when and how the original documents were removed and retained by the respondents. Where on the admitted facts no prima-case case is made out against the accused for proceeding or when the Supreme Court is satisfied that the criminal proceedings amount to abuse of process of court, Supreme Court has the power to quash any judicial proceedings in exercise of its power under Article 136 of the Constitution of India. In our view, the present case is a fit case for exercising the power in quashing the criminal complaint qua the documents No.29 to 54 also.

89. We summarise our conclusions as under:-

By the order of the Magistrate dated 08.10.2010, cognizance was taken against respondents No.1 to 16 for commission of the offences under Sections 380, 411 and 120B IPC. There are no averments in the complaint nor are there allegations in the statement of the complainant or the witness P.B. Dinesh as to when and how the theft was committed and the order of the Magistrate dated 08.10.2010 taking cognizance of the criminal case against respondents No.1 to 16 qua documents No.1 to 54 is liable to be set aside.

It is held that the “document” as defined in Section 29 IPC is a “moveable property” within the meaning of Section 22 IPC which can be the subject matter of theft. The information contained thereon in the documents would also fall within the purview of the “corporeal property” and can be the subject matter of the theft. The findings of the High Court is modified to that extent.

In the facts and circumstances of the present case, use of documents No.1 to 28 and documents No.29 to 54 by the respondents in judicial proceedings is to substantiate their case namely, “oppression and mismanagement” of the administration of appellant-Company and their plea in other pending proceedings and such use of the documents in the litigations pending between the parties would not amount to theft. No “dishonest intention” or “wrongful gain” could be attributed to the respondents and there is no “wrongful loss” to the appellant so as to attract the ingredients of Sections 378 and 380 IPC.

Considering the facts and circumstances of the present case and the number of litigations pending between the parties, in our considered view, continuation of the criminal proceedings would be an abuse of the process of the court. The order of the Magistrate dated 08.10.2010 taking cognizance of the offences and the issuance of summons to respondents No.1 to 16 and the criminal proceedings thereon are liable to be quashed.

90. In the result, the impugned judgment of the High Court dated 15.05.2015 qua Documents No.29 to 54 is set aside and the appeals arising out of SLP(Crl.) D.Nos.6405 and 6122 of 2019 preferred by the respondents are allowed. The appeal arising out of SLP(Crl.) No.9053 of 2016 preferred by the appellants qua Documents No.1 to 28 is dismissed.

.....J. [R. BANUMATHI]J. [R. SUBHASH REDDY] New Delhi;

May 09, 2019