2024:BHC-AS:22337

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1014 OF 2023

1. Mr. Rajiv Bansal
2. Ms. Meenakshi Kashyap
3. Ms. Amrita Sharan
4. Mr. Ashwini Lohani
5. Mr. Rohit Nandan
6. Mr. Vinod Hejmadi
7. Dr. Harpreet A De Singh
8. Captain Drryl X. Pais
9. Smita Prabhu ...Petitioners

Versus

1. State of Maharsahtra
2. K. V. Jagannatharao
3. Senior Inspector, Airport Police Station
   Near Domestic Airport, Vile Parle (E),
4. Deputy Commissioner of Police
   Zone 8, BKC, Bandra (E), Mumbai ...Respondents

Mr. Aniket Nikam, Mranal Mandhane and Shiva Gaur, i/b Nazish Alam, for the Petitioners.
Mr. S. R. Aagarkar, APP for the State/Respondent No.1.
Mr. K. V. Jagannathrao, Respondent No.1-in-person.

CORAM: N. J. JAMADAR, J.
Reserved On: 1st FEBRUARY, 2024
Pronounced On: 10th MAY, 2024

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of the parties heard finally.

2. By this petition under Articles 226 and 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 ("the Code"), the petitioners assail the legality, propriety and correctness of an order passed by the learned Metropolitan Magistrate, 66th Court Andheri, Mumbai in CC No.553/SW/2022, whereby process was ordered to be issued against the petitioners – accused Nos.1 to 9, for the offences punishable under Sections 420 and 409 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code").

3. The background facts leading to this petition can be stated in brief as under:

(a) Petitioner No.1 is the erstwhile Chairman and the Managing Director of Air India Limited ("AIL"). Petitioner Nos.2, 6 and 7 are the Directors/Managers of AIL. Petitioner Nos.3, 4, 5 and 9 are the former Directors/Manager of AIL. Respondent No.2 – complainant had joined AIL as an Assistant Flight pursuer on 1st December, 1987.

(b) Post an enquiry conducted by AIL, respondent No.2 was dismissed from service on 21st October, 2014. The petitioners alleged, out of spite against AIL and its officials, respondent No.2 had lodged several false and vexatious criminal complaints against AIL and its officials. The instant

complaint is a part of the same chain of vexatious proceedings, and an abuse of the process of the Court.

(c) For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they were arrayed before the learned Magistrate in Complaint No.CC 553/SW/2022. The substance of the petition is that:

In the year 2008, AIL had amended the conditions of service of its cabin crew, by entering into a bilateral agreement with All India Cabin Crew Association, in conformity with the provisions of Industrial Disputes Act, 1947 ("the ID Act, 1947"). In the year 2010, AIL proposed to unilaterally deduct 25% of the applicant's emoluments under the nomenclature of Revised Basic Pay (RBP) on the recommendation of the Justice Dharmadhikari Committee Report. Without following the statutory mode of issue of notice of change under Section 9A of the ID Act, 1947, vide notifications dated 22nd and 23rd January, 2013 AIL professed to withhold 25% of the Performance Linked Incentive (PLI), purportedly due to dire financial condition of AIL.

(d) Several Employees Union assailed the AIL notifications in the writ petitions filed before this Court. By

an order dated 27th January, 2014 this Court declared the act of AIL of deducting 25% of the emoluments as illegal and contrary to the statutory provisions contained in Section 9A of the ID Act, 1947. The Court, however, having regard to the peculiar condition of AIL directed that the petitioners - workmen would be entitled to receive and would continue to have the same service benefits i.e. emoluments etc. as were being received by them on the date of the judgment. The Court further directed that the said position would continue till the resolution of the likely dispute, if raised by the Workmen – Unions, on the service of notice, under Section 9A of the ID Act, 1947.

(e) On an application for speaking to the minutes of the said order, the Division Bench by an order dated 13th March, 2014, clarified that AIL, if desired to change the conditions of service of its workers, shall give a notice of change by 31st July, 2014 to the workmen.

(f) The aforesaid decision of this Court was challenged in several SLPs before the Supreme Court. Those matters are subjudice.

(g) The complainant alleged, the accused did not issue any notice as directed by the Division Bench. Instead

the accused challenged the order passed by this Court in the Supreme Court. Eventually, pursuant to the directions of the Supreme Court, AIL has transferred the arrears of salary to the employees. However, the complainant and the co-employees have been deprived of interest on the said amount.

(h) Referring to the decisions which hold that if the salary is unlawfully withheld, the employee is entitled to interest and it constitutes violation of the constitutional right to property, the complainant alleged, withholding of salary and allowances without following due process of law, amounted to offences punishable under Section 120B, 409, 415 and 420 of the Penal Code.

(i) The complainant lodged reports with the jurisdictional police station as well as the superior official. Since FIR was not registered, the complainant filed a complaint seeking an order for registration of the FIR under Section 156(3) of the Code.

(j) By an order dated 30th December, 2022 the learned Metropolitan Magistrate declined to direct the police to register the FIR and conduct the investigation under Section 156(3). Instead the complainant was directed to

submit a verification statement under Section 200 of the Code.

(k) By the impugned order dated 9th January, 2023, the learned Metropolitan Magistrate observed that a *prima facie* case to proceed against accused Nos.1 to 9 for the offences punishable under Sections 409 and 420 read with Section 34 of the Penal Code was made out and thus process was issued.

4. Being aggrieved, the petitioner – accused Nos.1 to 9 have preferred this petition.

5. On 25th April, 2023 when the petition was first listed before the Court recording a *prima facie* satisfaction that the ingredients of the offences punishable under Section 409 and 420 read with Section 34 of the Penal Code were not made out, this Court granted ad-interim relief.

6. I have heard Mr. Nikam, the learned Counsel for the petitioners, and Respondent No.2-in-person. With the assistance of the learned Counsel for the petitioners and respondent No.2-in-person, I have perused the material on record.

7. Mr. Nikam submitted that no case for the offences punishable under Sections 420 and 409 of the Penal Code

has been made out, even remotely. The learned Magistrate committed a grave error in law in issuing process against accused Nos.1 to 9 in a mechanical manner. Neither the aspect of satisfaction of the ingredients of the offences punishable under Sections 420 and 409 of the Penal Code was examined, nor the learned Magistrate followed the mandatory procedure prescribed in the Code.

8. Assailing the impugned order on the ground of grave procedural irregularities, Mr. Nikam would urge that, firstly, the learned Magistrate did not record the verification statement of the complainant on oath and went on to issue process on the basis of a typed verification statement purportedly tendered by the complainant. Second, the learned Magistrate did not adequately consider that in the compliant, the complainant had deliberately not mentioned the correct address of the accused, and had impleaded accused Nos.1 to 5, 7, 8 and 9 as the then Director/Manager of AIL, with the address, “Kalina Old Airport, Mumbai-29”. The learned Magistrate ought to have examined whether accused Nos.1 to 9 were residing within the local limits of his jurisdiction. In fact, seven out of nine accused were residing beyond the local limits of the jurisdiction of the learned

Magistrate. Thus, the enquiry under Section 202(1) of the Code was indispensable.

9. Mr. Nikam further submitted that the impugned order is infirm on merits also. To add to this, the complainant has lodged the complaint with a design to harass and humiliate AIL and its former Directors/Mangers. Continuation of the prosecution, thus, amounts to an abuse of the process of the Court. It was submitted that while the matters are subjudice before the Supreme Court, AIL had already paid arrears of salary and only issue as to the entitlement of the employees to interest on the delayed payment is under consideration before the Supreme Court. In this backdrop the complaint is nothing but an abuse of the process of the Court. Under no circumstances, withholding a portion of salary and emoluments in the purported exercise of the employers authority can be said to be cheating or criminal breach of trust. The aggrieved employees might have their remedies in civil proceedings and, in fact, the aggrieved employees, including the complainant, have resorted to those remedies, urged Ms. Nikam.

10. Respondent No.2-in-person countered the submissions on behalf of the petitioners with tenacity. On the procedural

count it was submitted that respondent No.2 had not known where the accused Nos.1 to 9 were residing. They were, thus, impleaded in their official capacity and with the office address. Respondent No.2 submitted that the ground of non-compliance of the provisions in Section 200 is also unsustainable as the complainant has tendered the verification which the learned Magistrate endorsed and on that basis issued process. Therefore, it cannot be said that verification statement was not recorded by the learned Magistrate.

11. On the merits of the matter, the respondent No.2 submitted that there is no absolute bar on initiation of criminal action where in the same set of facts a party can also resort to civil remedies. The act of withholding a portion of salary to which the complainant was entitled to, without adverting to the mandatory provisions contained in Section 9A of the ID Act, 1947, was clearly an act with criminal intent. Deprivation of a portion of the salary amounted to deprivation of the livelihood of an employee. The intention of the accused was dishonest since inception as despite legal advice that the conditions of service cannot be changed without resorting to the procedure prescribed under Section

9A of the ID Act, 1947, AIL and the accused continued to withhold a portion of the salary.

12. To bolster up these submissions, respondent No.2 placed reliance on a decision of the Supreme Court in the case of ***Workman of the Food Corporation of India vs. Food Corporation of India***[1]***,*** wherein it was enunciated that any illegal change in the service conditions invites a penalty under Section 31(2) of the ID Act, 1947 and such a change which is punishable as a criminal offence would obviously be an illegal change. Reliance was also placed on another decision in the case of ***J. Aswartha Narayana vs. The Ste of Andhra Pradesh***[2]***,*** wherein, it was enunciated that the salary to the employees in service falls within the definition of property under in Article 300-A of the Constitution of India and the action of the respondents (in that case) was nothing but pay docking; it was illegal, arbitrary and violative of Articles 14, 21 and 300-A of the Constitution of India, Human Right to Livelihood guaranteed under Article 25(1) of Universal Declaration of Human Rights.

13. I have given anxious consideration to the rival submissions. I have noted the facts of the case rather

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1 (1985) 2 Supreme Court Cases 136.

2 WP/9279/2019, dtd.17/12/2021.

elaborately, on purpose. On facts, there can be no dispute that AIL had withheld a portion of the employees emoluments by issuing notifications dated 22nd and 23rd January, 2013. Those actions were a subject matter of challenge in writ petitions before this Court, wherein this Court considered the following issue:

> "Whether Air India Limited can alter the Pay Scale, Designation, Seniority etc., i.e. conditions of service as provided in the fourth schedule of the I.D. Act 1947 on the basis of the recommendation of Justice Dharmadhikari committee without following the due procedure of law as provided under Section 9-A of the I.D. Act, 1947?"

14. After an elaborate analysis, the Division Bench answered the issue in the negative. It was, in terms, held that AIL cannot alter the conditions of service as provided in 4th Schedule of ID Act, 1947 without following the procedure prescribed in Section 9A of the ID Act, 1947. At the same time, the Division Bench, apparently taking into account the then financial position of AIL, directed that the petitioners/workmen would be entitled to receive the emoluments as were being received by them on that day. Meaning thereby the employees would receive the emoluments, after the cut under the notifications. The said

position was to continue till the resolution of the likely dispute, if raised by the Workmen - Unions on the service of notice under Section 9A of the ID Act, 1947. By an order on the application for speaking to the minutes, the Division Bench prescribed a time frame of 31st July, 2014 to give such notice of change under Section 9A.

15. Indisputably, the order passed by this Court was carried in appeal and during the pendency of those appeals, the arrears were paid, in January, 2022. The order dated 28th September, 2022 passed by the Supreme Court records that a submission was made on behalf of the Unions that interest at a reasonable rate may also awarded in favour of the employees. Thus, it emerges that the complainant has already been paid the arrears and the controversy revolves only around the claim for interest.

16. In the backdrop of these facts, the question as to whether the withholding of a portion of the salary/emoluments *prima facie* amounts to cheating or criminal breach of trust, warrants consideration. At this stage, even if the Court proceeds on the premise that AIL could not have deducted a portion of salary/emoluments without giving a notice of change under Section 9A of the ID

Act, 1947, yet, the fact that there is a penalty provided under Section 31(2) of the ID Act, 1947 if the change in conditions of service is effected without following the procedure prescribed under Section 9A of the ID Act, 1947, by extension, does not imply that it constitutes an offence of cheating.

17. It is trite, for an offence of cheating there ought to be deceit coupled with injury. The offence of cheating involves elements of deception, fraudulent or dishonest inducement and thereby making a person to deliver any property or to consent that any person shall retain any property.

18. A useful reference in this context can be made to a decision of the Supreme Court in the case of ***Vijay Kumar Ghai and others vs. State of West Bengal and others***[3]**,** wherein the ingredients of the offence of cheating were illuminatingly postulated. It read as under:

> "31. Section 415 of Indian Penal Code define cheating which reads as under: -
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> > "415. Cheating. — Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."
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> The essential ingredients of the offense of cheating are:

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3 2022(7) SCC 124.

1. Deception of any person

2. (a) Fraudulently or dishonestly inducing that person-

(i) to deliver any property to any person: or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were no so deceived, and which act or 23 (2009) 8 SCC 1 omission causes or is likely to cause damage or harm to that person in body,mind,reputation or property.

32. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

33. Section 420 Indian Penal Code defines cheating and dishonestly inducing delivery of property which reads as under: -

420. Cheating and dishonestly inducing delivery of property. —Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

34. Section 420 Indian Penal Code is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.

35. To establish the offence of Cheating in inducing the delivery of property, the following ingredients need to be proved:-

1. The representation made by the person was false

2. The accused had prior knowledge that the representation he made was false.

3. The accused made false representation with dishonest intention in order to deceive the person to whom it was made.

> 4. The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.
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> 32. As observed and held by this Court in the case of Prof. R. K. Vijayasarathy & Anr. Vs. Sudha Seetharam & Anr. (2019) 16 SCC 739, the ingredients to constitute an offence under Section 420 are as follows:-
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> i) a person must commit the offence of cheating under Section 415;
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> and
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> ii) the person cheated must be dishonestly induced to;
>
> a) deliver property to any person; or
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> b) make, alter or destroy valuable security or anything signed or 24 (2019) 16 SCC 739 sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 Indian Penal Code."

19. In the case of ***Mariam Fasihuddin and another vs. State by Adugodi Police Station and another***[4], on which reliance was placed by Mr. Nikam, the Supreme Court expounded the nature and import of the offence of cheating in the following words:

> **"The offence of cheating under Section 420 IPC:**
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> 22. Section 420 IPC provides that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy, the whole or any part of valuable security, or anything, which is signed or sealed, and which is capable of being converted into a valuable security, shall be liable to be punished for a term which may extend to seven years and shall also be liable to fine.
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> Further, Section 415 IPC distinctly defines the term 'cheating'. The provision elucidates that an act marked by fraudulent or dishonest intentions will be categorised as 'cheating' if it is intended to induce the person so

4 2024 SCC Online SC 58.

> deceived to deliver any property to any person, or to consent that any person shall retain any property, causing damage or harm to that person.
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> 23. It is thus paramount that in order to attract the provisions of Section 420 IPC, the prosecution has to not only prove that the accused has cheated someone but also that by doing so, he has dishonestly induced the person who is cheated to deliver property. There are, thus, three components of this offence, i.e., (i) the deception of any person, (ii) fraudulently or dishonestly inducing that person to deliver any property to any person, and (iii) mens rea or dishonest intention of the accused at the time of making the inducement. There is no gainsaid that for the offence of cheating, fraudulent and dishonest intention must exist from the inception when the promise or representation was made.
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> 24. It is well known that every deceitful act is not unlawful, just as not every unlawful act is deceitful. Some acts may be termed both as unlawful as well as deceitful, and such acts alone will fall within the purview of Section 420 IPC.
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> It must also be understood that a statement of fact is deemed 'deceitful' when it is false, and is knowingly or recklessly made with the intent that it shall be acted upon by another person, resulting in damage or loss.2 'Cheating' therefore, generally involves a preceding deceitful act that dishonestly induces a person to deliver any property or any part of a valuable security, prompting the induced person to undertake the said act, which they would not have done but for the inducement.
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> 25. The term 'property' employed in Section 420 IPC has a well-defined connotation. Every species of valuable right or interest that is subject to ownership and has an exchangeable value - is ordinarily understood as 'property'. It also describes one's exclusive right to possess, use and dispose of a thing. The IPC itself defines the term 'movable property' as, "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." Whereas immovable property is generally understood to mean land, benefits arising out of land and things attached or permanently fastened to the earth."

20. The withholding of a portion of the salary/emoluments by no stretch of imagination can fall within the dragnet of the offence of cheating as the employer cannot be said to have

either deceived the employee or fraudulently, or dishonestly induced the employee to deliver the property or give consent to any person to retain the property or intentionally induced the employee to do or omit to do anything, which the employee would not do or omit, if he was not so deceived.

21. It is equally well settled that to constitute an offence of cheating, the intention of the accused should be dishonest since the inception of the transaction. In the circumstances of the case at hand, the act of AIL to deduct the salary/emoluments was in purported exercise of its authority as an employer. It is one thing to state that such a deduction was illegal. However it is a completely different thing to term the said deduction as cheating.

22. In the case of ***V. Y. Jose vs. State of Gujarat***[5] the Supreme Court enunciated as under:

> "14. An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied :
>
> (i) deception of a person either by making a false or misleading representation or by other action or omission;
>
> (ii) fraudulently or dishonestly inducing any person to deliver any property; or To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.
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> For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making

5 2009(3) SCC 78.

> promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out."

23. On the aspect of criminal breach of trust, it is imperative to note that same act may not amount to cheating and criminal breach of trust at the same time.

24. In the case of ***Lalit Chaturvedi vs. State of UP and another***[6]**,** the Supreme Court observed that there are decisions which hold that the same act or transaction cannot result as an offence of cheating and criminal breach of trust simultaneously. For the offence of cheating, dishonest intention must exist at the inception of the transaction, whereas, in the case of criminal breach of trust there must exist a relationship between the parties, whereby one party entrusts another with the property as per law, albeit dishonest intention comes later.

25. Applying these principles to the facts of the case, evidently, the ingredients of the offence punishable under Section 409 of the Penal Code cannot be said to have been made out even if the allegations in the complaint are taken at par. It cannot be said that there was any entrustment of any

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6 2024 SCC Online SC 171.

property by the employees with the employer. Moreover, in the case at hand, it also cannot be urged that the employer has acted in breach of any legal contract which the employer had made touching the discharge of trust. The submission of respondent No.2 that AIL deprived its employee of the right to property in breach of the statutory provisions does not afford an answer to the challenge to the initiation of prosecution as the essential ingredients of the offences of cheating and criminal breach of trust cannot be said to have been *prima facie* made out. Undoubtedly, the complainant can agitate his rights on account of the alleged illegal change in service condition in appropriate proceedings, however, criminal proceedings is not the remedy.

26. There is another significant factor which impairs the prosecution of the petitioners – accused Nos.1 to 9. AIL, the company, has not been impleaded as an accused. Accused Nos.1 to 9 were sought to be prosecuted for being the Directors/Officers of AIL. Thus the prosecution of accused Nos.1 to 9 by invoking the principle of vicarious liability, in the absence of any statutory mandate, cannot be sustained.

27. In the context of prosecution for an offence of criminal breach of trust by invoking the principle of vicarious liability,

a profitable reference can be made to a decision of the Supreme Court in the case ***S. K. Alagh vs. State of Uttar Pradesh and others***[7]. The following observations are material and hence extracted below:

> "16, The Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.
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> 17. A criminal breach of trust is an offence committed by a person to whom the property is entrusted.
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> 18. Ingredients of the offence under Section 406 are :
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> "(1) a person should have been entrusted with property, or entrusted with dominion over property;
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> (2) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so;
>
> (3) 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."
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> 19. As, admittedly, drafts were drawn in the name of the company, even if appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Indian Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. {See *Sabitha Ramamurthy and Anr. v. R.B.S. Channabasavaradhya [(2006) 10 SCC 581)]*.
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> (emphasis supplied)

28. On the procedural aspect as well, the learned Magistrate seems to have committed an error in not recording the verification statement of the complainant on oath.

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7 (2008) 5 Supreme Court Cases 662.

Reliance placed by Mr. Nikam on a judgment of a learned Single Judge of this Court in the case of ***Mohd. Nawaz Iqbal Shaikh vs. The State of Maharashtra and another***[8] appears to be well founded. The observations in paragraphs 27 and 28 read as under:

> "27. Section 200 as it stands, makes it obligatory on the part of the Magistrate to record the statement of the complainant or his witnesses on oath before taking cognizance of the matter. The use of the word "shall", leave no scope for the Magistrate to dispense with the said requirement. In a decision in the case of Tula Ram & Ors. Vs. Kishore Singh (1977) 4 SCC 459, the Apex Court culled out the necessary procedure to be followed by the Magistrate before taking cognizance and in paragraph 15, it is held as under :-
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> > "Where a Magistrate choose to take cognizance, he can adopt any of the following alternatives; he can peruse the complaint and being satisfed that there are suffcient grounds for proceeding, he can straight way issue process, but before he does so, he comply with requirement of Section 200 and record the evidence of the complainant or his witnesses. In view of the mandatory provision, the Magistrate is duty bound to examine the complainant on oath before he reach the stage of Section 202 or Section 204."
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> 28. Admittedly, in the present case, the Magistrate has failed to adhere to the said procedure, as there is no verification of the complainant and he was not examined on oath. The complaint which is fled, itself gave the list of the witnesses, as the complainant himself and any other witness with the permission of the Hon'ble Court.
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> The Magistrate, on 04/09/2019, rejected the request for issuance of direction under Section 156(3) and the complainant as directed to furnish verification statement under Section 200 of Cr.P.C. In compliance, on 06/01/2020, a verification was submitted by the complainant, without any solemn affirmation and not only this, the Magistrate skipped the important stage of recording his statement on oath, though he indicated the said procedure to be followed. In the record and proceedings, there is one affidavit of the complainant

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8 Cri. Application No.450/2022, dtd.30/3/2023.

> dated 25/06/2019, which admittedly is prior to the issuance of direction by the Magistrate on 04/09/2019 and this affidavit is in support of the complaint, affirming that he has put the aforesaid facts on the record of the Court and has not fled any other complaint in any other Court. The said affidavit, though projected to be a compliance of Section 200, in my opinion, is not. Unless examination of the complainant was made under Section 200 of Cr.P.C., the Magistrate cannot exercise the power under Sections 202, 203 or 204 and in this case, by surpassing the said procedure, the Magistrate has issued the process against the accused persons, which order cannot be sustained, being not in compliance of Section 200 of Cr.P.C. Hence, the order of the Magistrate suffers from serious infraction of procedure to be adopted by a Magistrate, upon a complaint being fled before him."

29. It also appears the question as to whether all the accused were residing within the local limits of the jurisdiction of the learned Magistrate was not adequately adverted to by the learned Magistrate. A bare perusal of the cause-title of the complaint would have aroused an inquisitiveness about the said fact. As noted above, many of the accused were arrayed in their erstwhile capacity as, "the then Directors/Mangers". An omnibus address as, "Kalina Old Airport, Mumbai 29" was furnished. The learned Magistrate ought to have been more careful in ascertaining whether the accused were residing within the local limits of his jurisdiction, when the amended Section 202(1) of the Code casts an obligation on the Magistrate to hold an enquiry or direct investigation in a case where the accused is residing

at a place beyond the area in which he exercises his jurisdiction.

30. At this juncture, it may be apposite to make a reference to the decision of the Supreme Court in the case of ***Vijay Dhanuka and ors. vs. Najima Mamtaj and ors.***[9]***,*** wherein it was enunciated that the use of expression "shall", and the background and the purpose for which the amendment has been brought, there was no doubt 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. Had the learned Magistrate been alive to the aforesaid position, in the context of the facts of the case, the impugned order would not have been passed.

31. The conspectus of the aforesaid consideration is that, the continuation of the prosecution of the petitioners – accused Nos.1 to 9 amounts to abuse of the process of the Court and quashment of the same would secure the ends of justice. I am, therefore, inclined to allow the petition.

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9 (2014) 14 Supreme Court Cases 638.

32. Hence, the following order:

: O R D E R :

(i) The petition stands allowed.

(ii) The impugned order stands quashed and set aside.

(iii) The complaint stands dismissed.

Rule made absolute in the aforesaid terms.

No costs.

[N. J. JAMADAR, J.]