IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 510 of 2020

with

CRAN 1 of 2021

with

CRAN 2 of 2021

M/S. Varaha Infra Ltd & Ors.

Vs.

M/S. Greatful Infrastructures Pvt. Ltd.

For the Petitioners	:	Mr. Krishnendu Bhattacharya, Mr. Avishek Guha, Ms. Debarati Das, Ms. Ritika Pal, Ms. Nilanjana Ghosh.
For the Opposite Party	:	Ms. Manaswita Mukherjee.
Hearing concluded on	:	04.09.2023
Judgment on	:	03.10.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the impugned proceeding being Complaint Case No. CNS/376 of 2019 (M/s. Greatful Infrastructures Pvt. Ltd. vs. M/s. Varaha Infra Ltd. and Ors.)

dated 25.09.2019 under Sections 120B/420/406 of the Indian Penal Code along with all orders passed therein, pending before the Court of the learned 12th Court of Metropolitan Magistrate at Calcutta for sheer abuse of the process of law.

2. The petitioners' case is that they have been arraigned as accused persons in the impugned criminal proceeding being complaint case No.CNS/376 of 2019 (M/s. Greatful Infrastructures Pvt. Ltd. vs. M/s. Varaha Infra Ltd. and Ors.) dated 25.09.2019 under Sections 120B/420/406 of the Indian Penal Code presently pending before the Court of the Learned 12th Court of the Metropolitan Magistrate at Calcutta.

3. The complainant through the petition of complaint has alleged that the complainant is carrying on the business of civil engineering works including land development and formation of road and since long the said company is carrying on the said business with good reputation in the commercial as well as Government undertaking organizations.

4. The accused persons placed work order with the complainant company for pattisam lift irrigation project (3086) and also issued work order for land development and formation of access road to work site pattisom (V), Palavaram (M), WG, District Region for a total sum of Rs.8 crores above, and after discussion they also assured that total amount of the bill will be deposited with the TDS amount to the authority concerned. Believing their representation the complainant Company after completing the work order, raised bill and also requested the accuseds to deposit the TDS amount of Rs.48,08,840/- with the authority concerned and accused persons

assured that the said TDS amount had already been deposited with the authority concerned. But after query the complainant gathered information from the Income Tax papers that the accused persons did not deposit the TDS amount of Rs.48,08,840/- with the Income Tax Department. The complainant after collecting the Income Tax papers informed the accused persons and requested them either to deposit the said TDS amount to the authority concerned or refund the said amount to complainant.

5. The accused persons flatly refused to pay the said TDS amount to the complainant. As such the complainant issued a lawyer's letter and requested them to pay the said TDS amount to the complainant.

6. The complainant alleged that the accused persons had no intention to make payment of the said TDS amount and in such way they conspired with each other and cheated the complainant Company, causing wrongful loss to the complainant company and wrongful gain to the accused persons to the tune of Rs.48,08,840/-.

7. Mr. Krishnendu Bhattacharya, learned counsel for the petitioners has submitted that the petition of complaint vividly shows that all the accused persons including the company are situated outside the territorial jurisdiction of the learned Trial Court. But no enquiry in terms of Section 202 of the Code of Criminal Procedure was ever directed and process was issued defying the settled law of the land, which indeed is gross abuse of the process of law.

8. The petitioners state that they have discharged their duty in strict sense pertaining to instant transaction and have paid the entire amount they were asked by the complainant/company and no amount is due. Hence, the statement of account relating to the instant transaction would evidently show that complainant has maliciously initiated this instant proceeding in order to extent unnecessary pressure upon the petitioners.

9. The petitioners state and submit that firstly, complainant himself admitted that business was continuing and it was going on smoothly, hence deception and inducement from inception of the transaction does not find any place in the present case. Complainant did not avow any consequential made over of property or valuable goods and/or whether he deceived to deliver any property, thus there is no element of cheating and not a single ingredients constituting offence of cheating can be derived from petition of complaint.

Secondly, both the petition of complaint and solemn affirmation at the most gives rise to a settlement of claim of Income Deduction at Source and counterclaim, and as such any culpability and/or mensrea is clearly absent.

Thirdly, the statement of account glaringly proves that the complainant is trying to extort money from the petitioner/company by filing this false and baseless case.

Fourthly, the petition of complaint prima facie fails to make out any case in terms of Section 406 and Section 420 of the Indian Penal Code in any manner whatsoever.

Fifthly, the correspondences and email referred hereinabove exchanged by and between the parties evidently shows claim and counter claim, which is purely civil in nature devoid of any culpability in any manner whatsoever thus the instant proceeding is an absolutely misnomer and gross abuse in the eye of law.

10. The impugned proceeding is thus utterly bad in law and the same is liable to be quashed.

11. Written notes of argument and Affidavit-in-reply have been filed reiterating the statements made in the revisional application.

12. Ms. Manaswita Mukherjee, learned counsel for the opposite party has reiterated the case of the complainant as stated in the petition of complaint, by filing affidavit-in-opposition and written notes of argument.

13. It is submitted that there is sufficient materials on record to prima facie make out a case against the petitioners in respect of the offenses alleged and as such the revision is liable to be dismissed.

14. From the materials on record, it is evident that:-

i) Admittedly there was a business relationship between the parties.

ii) **The only dispute between the parties is that though TDS was deducted by the petitioners, they have not deposited the same with the income tax authority.**

iii) On the other hand the petitioners have claimed that the total agreed amount has been paid to the complainant.

iv) It appears from the document at page 31 to the affidavit-in-opposition, that the work order issued by the petitioners in favour of the complainant, clearly notes that:-

"..... 3. Taxes:	***i) TDS shall be recovered from all the payments that will be released you.*** ***ii) Service tax is nil as per notification no.25/2012-Service Tax dt.20.06.2012 under S. No.29(H)....."***

v) Penalty for non-payment or belated payment of tax deducted at source, is provided under the Income Tax Act.

15. It is submitted by the petitioners that the mandatory provision of section 202 Cr.P.C. has not been complied with by the learned Magistrate.

16. The only address of the petitioners as given in the petition of complaint is:-

> ***"Umesh Smrati, 6, Jalem Vilas, Scheme Paota-'B' Road, Jodhpur, Rajasthan-342 001.."***

17. The order issuing process is as follows:-

*"**CNS- 376 of 2019***

Order dated:03.10.2019

Today is fixed for S/A.

The authorised representative of the complainant Ranjit Gupta was examined on S.A. He also filed supportive xerox copy of documents.

After perusal of the initial deposition and the document filed by the complainant, this Court is of the view that the complainant has been able to prove a prima facie case u/s 420/406 of IPC.

Cognizance had already been taken. Issue summons upon all the accused u/s 420/406 of IPC.

Issue summons at once.

To for appearance and S/R.

Requisite at once.

Sd/-
Metropolitan Magistrate,
12th Court, Calcutta"

18. In ***Vijay Dhanuka and Ors. vs Najima Mamtaj and Ors., (2014)***

14 SCC 638, on March 27, 2014, held:-

> *"**11.** Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.*
>
> ***12.** The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" were inserted by Section 19 of*

the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that 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."

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.

13. *In view of the decision of this Court in Udai Shankar Awasthi v. State of U.P. [(2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708] , this point need not detain us any further as in the said case, this Court has clearly held that the provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment: (SCC p. 449, para 40)*

*"40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were outside his territorial jurisdiction. The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it [**Ed.**: The matter between the two asterisks has been emphasised in original as well.] mandatory to postpone the issue of process [**Ed.**: The matter between the two asterisks has been emphasised in original as well.] where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."*

(emphasis supplied)

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

*"**2. (g)** '**inquiry**' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"*

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

19. In ***2018(3) AICLR 625(Cal.), S.S. Binu vs. State of West Bengal (Cal.),*** the court held:-

> *"**100.** To sum up, the reference made by the Learned Single Judge on the five issues are answered as follows:-*
>
> *I. According to the settled principles of law, the amendment of sub-section (1) of Section 202 Cr.P.C. by virtue of Section 19 of the Criminal Procedure (Amendment) Act, 2005, is aimed to prevent innocent persons, who are residing outside the territorial jurisdiction of the Learned Magistrate concerned, from harassment by unscrupulous persons from false complaints. The use of expression "shall", looking to the intention of the legislature to the context, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.*
>
> *II. Keeping in mind the object sought to be achieved by way of amendment of sub-section (1) of Section 202 Cr.P.C., the nature of enquiry as indicated in Section 19 of the Criminal Procedure (Amendment) Act, 2005, the Magistrate concerned is to ward of false complaints against such persons who reside at far of places with a view to save them from unnecessary harassment and the Learned Magistrate concerned is under obligation to find out if there is any matter which calls for investigation by Criminal Court in the light of the settled principles of law holding an enquiry by way of examining the witnesses produced by the complainant or direct an investigation made by a police officer as discussed hereinabove.*
>
> ***III. When an order of issuing summon is issued by a learned Magistrate against an accused who is residing at a place beyond the area in which he exercises his jurisdiction without conducting an enquiry under Section 202 Cr.P.C., the matter is required to be remitted to the learned Magistrate concerned for passing fresh orders uninfluenced by the prima facie conclusion reached by the Appellate Court.***

IV. Keeping in mind the object underlined in Section 465 Cr.P.C. that if on any technical ground any party to the criminal proceedings is aggrieved he must raise the objection thereof at the earliest stage. In the event of failure on the part of an aggrieved party to raise objection at the earliest stage, he cannot be heard on that aspect after the whole trial is over or even at a later stage after his participation in the trial.

V. In cases falling under Section 138 read with Section 141 of the N.I.Act, the Magistrate is not mandatorily required to comply with the provisions of Section 202 (1) before issuing summons to an accused residing outside the territorial jurisdiction of the learned Magistrate concerned."

20. Section 202 Cr.P.C. lays down:-

*"**202. Postponement of issue of process.** -*

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

> *(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:*
>
> *Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.*
>
> *(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant."*

21. This court also relies upon the case of ***Birla Corporation Ltd. vs. Adventz Investments and Holdings (Criminal appeal No. 875, 876, 877 of 2019).*** The Supreme Court on 9th May, 2019 observed and held in respect of Section 202 Cr.P.C. as follows (The relevant paragraph are reproduced herein):-

> ***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 Mamtaj and Others (2014) 14 SCC 638, it was held as under:-*

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

amendment was also considered by this Court in Abhijit Pawar v. Hemant Madhukar Nimbalkar and Another (2017) 3 SCC 528 and National Bank of Oman v. Barakara Abdul Aziz and Another (2013) 2 SCC 488.

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."

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.*

60*……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……*

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……"

22. **Thus it is clear** that Section 202 Cr.P.C. makes it obligatory upon the Magistrate that before summoning the **accused residing beyond** his jurisdiction he shall inquire 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 is sufficient ground for proceeding against the accused.

23. **In the present case** only the complainant has been effectively examined under Section 202 Cr.P.C., who has stated about the facts/offences alleged in the present case. **The deposition of the sole witness is clearly not in respect of the statements made in the written complaint and thus not part of an inquiry.** Thus in view of the judgment in ***Vijay Dhanuka and Ors. vs Najima Mamtaj and Ors. (Supra),*** **it is clear from the said order dated 05.03.2019 that no inquiry as obligatory under Section 202 Cr.P.C. has been conducted.**

24. The Magistrate did not comply with the provision of Section 202 Cr.P.C., even though the petitioners reside (State Rajasthan) outside the jurisdiction of the Court (District Kolkata).

25. In the present case the Magistrate did not Conduct any inquiry into the case himself or direct an investigation as required under Section 202 Cr.P.C. before directing the issue of process and as such the order is not in accordance with law, and is thus an abuse of the process of law.

26. The Supreme Court i**n *M/s US Technologies International Pvt. Ltd. vs The Commissioner of Income Tax, Civil Appeal No. 7934 of 2011 with Civil Appeal Nos. 1258-1260 of 2019, on 10.04.2023*,** held:-

> *"**7.** Heard learned counsel appearing on behalf of the respective parties at length.*
>
> *7.1 The short question which is posed for the consideration of this Court is in case of belated remittance of the TDS after deducting the TDS whether such an assessee is liable to pay penalty under Section 271C of the Act, 1961?*
>
> *7.2 The question which is also posed for the consideration of this Court is what is the meaning and scope of the words "fails to deduct" occurring in Section 271C(1)(a) and whether an assessee who caused delay in remittance of TDS deducted by him, can be said a person who "fails to deduct TDS"?*
>
> *7.3 In order to appreciate the rival contentions and to answer the aforesaid questions, it is necessary to have analysis of Statutory provisions.*
>
> *7.4 The relevant provisions are as under:-*
>
> ***"Section 201(1A) of the Act***
>
> *Without prejudice to the provisions of subsection (1), if any such person, principal officer or company as is referred to in that subsection does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest, —*
>
> *(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and*
>
> *(ii) at one and onehalf per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid, and such interest shall be paid before furnishing the statement in accordance with the provisions of sub section (3) of Section 200:]*
>
> ***Section 271C of the Act***
>
> ***271C. Penalty for failure to deduct tax at source.***

(1) If any person fails to—

(a) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVIIB; or

(b) pay the whole or any part of the tax as required by or under,—

(i) subsection (2) of Section 115O; or

(ii) the second proviso to Section 194B; then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.]

(2) Any penalty imposable under sub section (1) shall be imposed by the Joint Commissioner.

Section 273B of the Act

273B. Penalty not to be imposed in certain cases.— *Notwithstanding anything contained in the provisions of clause (b) of subsection (1) of Section 271, Section 271A 4203[Section 271 AA], Section 271B 4204[Section 271 BA], 4205[Section 271 BB, 4206[Section 271C, Section 271 CA], Section 271D, Section 271 E, 4207[Section 271F,] 4208[Section 271FA 4209[, 4210[Section 271FAB, Section 271FB, Section 271G, Section 271GA, 4211[Section 271 GB,]]] 4212[Section 271 H,] 4213[Section 271I,] 4214[Section 271J,] clause (c) or clause (d) of sub section (1) or subsection (2) of Section 272A, subsection (1) of Section 272 AA] or 4215[Section 272B or] 4216[subsection (1) or subsection (1A) of Section 272BB] or subsection (1) of Section 272BBB or] clause (b) of subsection (1) or clause (b) or clause (c) of subsection (2) of Section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.*

Section 276B of the Act

276B. Failure to pay tax to the credit of Central Government under Chapter XIID or XVIIB.—*If a person fails to pay to the credit of the Central Government,—*

(a) the tax deducted at source by him as required by or under the provisions of Chapter XVIIB; or

(b) the tax payable by him, as required by or under,—

(i) subsection (2) of Section 115O; or

(ii) the second proviso to Section 194B, he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine."

7.5 At the outset, it is required to be noted that all these cases are with respect to the belated remittance of the TDS though deducted by the assessee and therefore, Section 271C(1)(a) shall be applicable. At the cost of repetition, it is observed that it is a case of belated remittance of the TDS though deducted by the assessee and not a case of non-deduction of TDS at all.

7.6 As per Section 271C(1)(a), if any person fails to deduct the whole or any part of the tax as required by or under the provisions of Chapter XVIIB then such a person shall be liable to pay by way of penalty a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid. So far as failure to pay the whole or any part of the tax is concerned, the same would be with respect to Section 271C(1)(b) which is not the case here. Therefore, Section 271C(1)(a) shall be applicable in case of a failure on the part of the concerned person/assessee to ***"deduct"*** *the whole of any part of the tax as required by or under the provisions of Chapter XVIIB. The words used in Section 271C(1)(a) are very clear and the relevant words used are "fails to deduct." It does not speak about belated remittance of the TDS. As per settled position of law, the penal provisions are required to be construed strictly and literally. As per the cardinal principle of interpretation of statute and more particularly, the penal provision, the penal provisions are required to be read as they are. Nothing is to be added or nothing is to be taken out of the penal provision. Therefore, on plain reading of Section 271C of the Act, 1961, there shall not be penalty leviable on belated remittance of the TDS after the same is deducted by the assessee. Section 271C of the Income Tax Act is quite categoric. Its scope and extent of application is discernible from the provision itself, in unambiguous terms. When the non deduction of the whole or any part of the tax, as required by or under the various instances/provisions of Chapter XVIIB would invite penalty under Clause 271C(1)(a); only a limited text, involving sub-section (2) of Section 115O or covered by the second proviso to Section 194B alone would constitute an instance where penalty can be imposed in terms of Section 271C(1)(b) of the Act, namely, on nonpayment. It is not for the Court to read something more into it, contrary to the intent and legislative wisdom.*

7.7 At this stage, it is required to be noted that wherever the Parliament wanted to have the consequences of nonpayment and/or belated remittance/payment of the TDS, the Parliament/Legislature has provided the same like in Section 201(1A) and Section 276B of the Act.

7.8 Section 201(1A) provides that in case a tax has been deducted at source but the same is subsequently remitted may be belatedly or after some days, such a person is liable to pay the interest as provided under Section 201(1A) of the Act. The levy of interest under Section 201(1A) thus can be said to be compensatory in nature on belated remittance of the TDS after deducting the same. Therefore, consequences of non payment/belated remittance/payment of the TDS are specifically provided under Section 201(1A).

7.9 Similarly, Section 276B talks about the prosecution on failure to pay the TDS after deducting the same. At this stage, it is required to be noted that Section 271C has been amended subsequently in the year 1997 providing Sections 271C(1)(a) and 271C(1)(b). As observed hereinabove, fails to pay the whole or any part of the tax would be falling under Section 271C(1)(b) and the word used between 271C(1)(a) and 271C(1)(b) is "or". At this stage, it is required to be noted that Section 276B provides for prosecution in case of failure to "pay" tax to the credit of Central Government. The word "pay" is missing in Section 271C(1)(a).

8. *Now so far as the reliance placed upon the CBDT's Circular No. 551 dated 23.01.1998 by learned ASG is concerned, at the outset, it is required to be noted that the said circular as such favours the assessee. Circular No. 551 deals with the circumstances under which Section 271C was introduced in the Statute, for levy of penalty. Paragraph 16.5 of the above Circular reads as follows:*

"16.5: Insertion of a new section 271C to provide for levy of penalty for failure to deduct tax at source under the old provisions of Chapter XXI of the Income Tax Act no penalty was provided for failure to deduct tax at source. This default, however, attracted prosecution under the provisions of Section 276B, which prescribed punishment for failure to deduct tax at source or after deducting failure to pay the same to the Government. It was decided that the first part of the default, i.e., failure to deduct tax at source should be made liable to levy of penalty, while the second part of the default, i.e., failure to pay the tax deducted at source to the Government which is a more serious offence, should continue to attract prosecution. The Amending Act, 1987 has accordingly inserted

a new Section 271C to provide for imposition of penalty on any person who fails to deduct tax at source as required under the provisions of Chapter XVIIB of the Act. The penalty is of a sum equal to the amount of tax which should have been deducted at source.

On fair reading of said CBDT's circular, it talks about the levy of penalty on failure to deduct tax at source. It also takes note of the fact that if there is any delay in remitting the tax, it will attract payment of interest under Section 201(1A) of the Act and because of the gravity of the mischief involved, it may involve prosecution proceedings as well, under Section 276B of the Act. If there is any omission to deduct the tax at source, it may lead to loss of Revenue and hence remedial measures have been provided by incorporating the provision to ensure that tax liability to the said extent would stand shifted to the shoulders of the party who failed to effect deduction, in the form of penalty. On deduction of tax, if there is delay in remitting the amount to Revenue, it has to be satisfied with interest as payable under Section 201(1A) of the Act, besides the liability to face the prosecution proceedings, if launched in appropriate cases, in terms of Section 276B of the Act.

Even the CBDT has taken note of the fact that no penalty is envisaged under Section 271C of the Income Tax Act for non deduction TDS and no penalty is envisaged under Section 271C for belated remittance/payment/deposit of the TDS.

8.1 Even otherwise, the words "fails to deduct" occurring in Section 271C(1)(a) cannot be read into "failure to deposit/pay the tax deducted."

8.2 Therefore, on true interpretation of Section 271C, there shall not be any penalty leviable under Section 271C on mere delay in remittance of the TDS after deducting the same by the concerned assessee. As observed hereinabove, the consequences on non payment/belated remittance of the TDS would be under Section 201(1A) and Section 276B of the Act, 1961."

27. The Income Tax Tribunal held:-

It is evidently clear that assessee received the rent income, and the Tenant (Deductor) has deducted TDS but has not deposited the TDS so deducted into the Central Government Account. Considering these facts, we note that issue under consideration is no longer res integra. The Hon'ble High Court of Gujarat in the case of Kartik Vijaysinh Sonavane held that where TDS has

been deducted by employer of assessee, it will always been open for department to recover same from said employer and credit of same could not have been denied to assessee.

28. As such the proper approach for the complainant was to inform the Income Tax Authority as an assessee is not liable under the Act for the deposit of TDS.

29. Thus, the ingredients required to constitute the offences alleged under Sections 406/420/120B is clearly absent in the present case.

30. Surprisingly, none of the parties herein have produced the document relating to either full payment (as claimed by the petitioners) or with TDS (as claimed by the complainant), which relates to the dispute.

31. Thus there being no prima facie case made out against the petitioners in respect of the offences alleged, the interference of this court is necessary in the interest of justice and the proceedings liable to be quashed in respect of the petitioners.

32. The Revisional Application being CRR 510 of 2020 is accordingly allowed.

33. The proceeding being Complaint Case No. CNS/376 of 2019 (M/s. Greatful Infrastructures Pvt. Ltd. vs. M/s. Varaha Infra Ltd. and Ors.) dated 25.09.2019 under Sections 120B/420/406 of the Indian Penal Code along with all orders passed herein presently pending before the Court of the leaned 12th Court of Metropolitan Magistrate at Calcutta herein for sheer abuse of the process of law, is quashed.

34. All connected applications, if any, stands disposed of.

35. Interim order, if any, stands vacated.

36. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

37. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)