

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPLICATION (APL) NO. 679 OF 2019

1. Future Generali India Life Insurance Company Limited, Through its Authorised Signatory Priti Sawant, Having its office at Indiabulls Finance Centre, Tower 3, 6th Floor, Senapati Bapat Marg, Elphinstone Road, Mumbai – 400 013.
2. Madangopal S/o. Banarasilal Jalan, Aged about 58 years, Occ.: Service, Resident of C-1801, Oberoi Woods, Goregaon East, Mumbai.
3. Deepak S/o. Wazirchand Sood, aged about 53, Occupation : Service, Resident of A-1001, Lodha Bellissiommo, N.M.Joshi Marg, Apollo Mill Compound, Mahalaxmi, Mumbai – 400 011.

.... **APPLICANTS.**

// **VERSUS** //

Partha S/o. Sarathy Sarkar,
Aged about 49 years, Occupation:
Professional, Resident of 20,
Surana Layout, Anant Nagar,
Nagpur – 440 013.

.... **NON-APPLICANT.**

Shri D.V.Chauhan Adv. a/b Shri Chaitanya Dhruv, Adv. for Applicants.
The non-applicant in person.

CORAM : ANIL S. KILOR, J.

DATE OF RESERVING THE JUDGMENT : 18/10/2022

DATE OF PRONOUNCING THE JUDGMENT : 28/11/2022

JUDGMENT :

1. Heard.
2. **RULE.** Rule made returnable forthwith. Heard finally by consent of the parties.
3. The applicants in the case at hand have filed the present application under Section 482 of the Code of Criminal Procedure, challenging the correctness and legality of the judgment and order dated 22/01/2019 passed by the District Judge-5 and Additional Sessions Judge, Nagpur dismissing the applicants' revision application and confirming the order dated 28/01/2013, passed by the Judicial Magistrate First Class, issuing process against the applicants for the offence punishable under Section 500 of the Indian Penal Code (IPC). The above referred order dated 28/01/2013 passed by the Judicial Magistrate First Class is also impugned in this application.
4. The brief facts of the present case are as follows:

The non-applicant, while working on the post of General Manager in the applicant No.1 company, was informed vide letter dated 08/02/2011 that his services are no longer required and not to report for duty w.e.f. 09/02/2011.

5. Since the letter of termination dated 08/02/2011 did not speak of any violation of service terms and conditions or it did not give any reason for the termination and allegedly in violation of natural justice, a Special Civil Suit No.69 of 2012 came to be filed in the Court of Civil Judge Senior Division, Nagpur against (1) the Managing Director and Chief Executive Officer of the Company, (2) the Company and (3) the Country Manager of the Company, for declaration and for loss caused on account of illegal termination of employment and for loss of reputation and consequent hindrance of opportunity for suitable employment and for unwarranted mental torture. The non-applicant thereby, claimed Rs.1,00,00,000/- against the defendants with future interest. He further sought declaration that the termination is illegal and thereby he claimed consequential directions of reinstatement. The non-applicant also made other prayers.

6. The defendants filed written statement with parawise reply. In clause (c) of the preliminary objection and in reply to the paragraph No.6 of the plaint, it is stated as under :

“... At this stage, it is essential to point out and to mention that the plaintiff though he was working as General Manager in the defendant company has misused his powers and the plaintiff is also aware of it. Therefore, before issuance of the letter of termination to the plaintiff, the matter was discussed in detail with the plaintiff and it was agreed between the plaintiff and the defendant that the termination simplicitor letter only will be issued to the plaintiff, which was in the interest of the plaintiff. Here it will also not be out of place to mention and at the same

time very essential to point out that there was a complaint against the Plaintiff from one lady subordinate staff, who was working under the plaintiff. After carefully going through the complaint made by the female subordinate staff, who was working under the plaintiff it will be seen that it was nothing but the complaint regarding sexual harassment of female subordinate staff, who was working under the plaintiff. ...” (sic.)

7. The non-applicant found the above referred underlined portion of written statement as defamatory attracting the offence under Section 499 of the IPC. He, therefore, filed a Criminal Complaint under Section 200 of the Code of Criminal Procedure (Cr.P.C.) for the offence punishable under Section 500 of the IPC, against the applicants herein and against Dr. Kim Chai Ooi and the Branch Manager of the company.

8. The learned Judicial Magistrate First Class (JMFC) vide order dated 28/01/2013 issued summons against the accused Nos. 1 to 4 for the offence punishable under Section 500 of the IPC. Whereas, the complaint against accused No.5 i.e. the Branch Manager, was dismissed for want of *prima facie* case.

9. The applicants carried the said order dated 28/01/2013 in Criminal Revision. The same was dismissed vide judgment and order dated 22/01/2019 passed by the learned District Judge-5 and Additional Sessions Judge, Nagpur. Hence, this application.

10. I have heard Shri Devendra Chauhan, learned counsel for the applicants and the non-applicant in person.

11. The non-applicant in person, at the outset, has raised the following preliminary objections to the maintainability of the present application:

- a) The applicants cannot be termed as 'persons aggrieved' as the applicants did not suffer any legal injury or deprivation / denial of a legal right. In support, he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Ravi Yashwant Bhoyar ..vs.. Collector*, reported in **(2012)4 SCC 407**.
- b) It is mandatory to make the State as party in the proceedings filed under Section 482 of Cr.P.C. Whereas, State is not made party in the present proceedings.
- c) When the remedy under Section 397 of Cr.P.C. by way of revision is available, application under Section 482 of the Cr.P.C. is not maintainable.

12. Before touching to the merits of the matter, I will first deal with Preliminary Objection to the maintainability. The Hon'ble Supreme Court of India in the case of *Kartik Chandra Majee.. vs. State of*

Jharkhand, reported in **AIR 2017 SC 3096**, has held that judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with malafide and proceeding is malicious, instituted with an ulterior motive, High Court will not hesitate in exercise of its jurisdiction under Section 482 of the Cr.P.C. to quash the proceeding under category seven as enumerated in *State of Haryana ..vs.. Bhajan Lal*, reported in **AIR 1992 SC 604**.

13. In the present case, it is the case of the applicants that the trial Court ought not to have issued process as no *prima facie* case of defamation is made out by the non-applicant. It is submitted that therefore, issuance of process and continuation of criminal proceedings against the applicants is nothing but permitting the non-applicant to use a judicial process to degenerate into a weapon of harassment.

14. It is a settled law that issuance of process in a criminal case is a serious matter and Criminal Law cannot be set into motion as a matter of course. Hence, it cannot be said that the applicants are not aggrieved persons. Accordingly, the first objection to the maintainability is rejected. In the circumstances, the judgment in the case of *Ravi Yashwant Bhoyar* (supra) is of no help to the non-applicant.

15. As far as second objection that in the proceedings under Section 482 of the Cr.P.C. it is mandatory to add the State as party, the said submission is misconceived as the provision does not say so. Moreover, the present proceeding is arising out of a complaint between private parties, therefore, the State is not the necessary party in the present proceedings. Accordingly, the second objection is rejected, as well.

16. The third objection is also liable to be rejected in view of the judgment of the Hon'ble Supreme Court of India in the case of *Prabhu Chawla ..vs.. State of Rajasthan*, reported in (2016) 16 SCC 30, wherein the Hon'ble Supreme Court of India has held that there is no total ban on exercise of inherent power where abuse of process of Court or other extraordinary situation warrants exercise of inherent jurisdiction.

17. Now, moving further to examine the merits of the matter. On merit, the learned counsel for the applicants makes the following submissions:

- a) The learned trial Court has committed error in issuing process in ignorance of the law;
- b) In absence of *prima facie* case, issuance of process by the trial Court and confirmation of the same by the revisional Court is erroneous.

- c) Sufficient pleadings to fulfill the prerequisites of offence under Section 499 of the IPC, are absent.
- d) The alleged defamatory statement made in the written statement was made in defence and in good faith, therefore, the ninth exception to Section 499 of the IPC would apply to the present case.
- e) The *mens rea* and intention are the *sine qua non* and in absence of pleadings to that effect, the complaint itself is not maintainable.

18. On the other hand, the non-applicant in person makes the submissions as under:

- a) The order of issuance of process by the learned Judicial Magistrate First Class, and the judgment and order of the revisional Court, confirming the same is absolutely legal.
- b) In view of the specific findings recorded by both the Courts below that a *prima facie* case is made out attracting the offence under Section 499 of IPC, the order of issuance of process is sustainable in the eyes of law.

- c) If the averments make out an offence and there is no legal impediment to the trial, this Court cannot stifle a prosecution at its very threshold. In support, he relied on the judgment of High Court of Madras in the case of *Dr. J. Sudershan ..vs..R. Shankaran*, reported in **1992 Cr.L.J. 2427**.
- d) When exercising jurisdiction under Section 482 of Cr.P.C. this Court would not ordinarily embark upon an inquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained. It is the function of the trial Judge. Therefore, this Court should not interfere with it under Section 482 of Cr.P.C.
- e) Whether the case falls within ninth exception or not and other grounds raised by the applicants are the matter of evidence which can be established at the trial. He relied on the judgments of Hon'ble Supreme Court of India in the cases of *M.N.Damani ..vs.. S.K. Sinha & oth.* reported in **AIR 2001 SC 2037**, *Central Bureau of Investigation ..vs.. Shri Ravi Shankar Srivastava*, reported in **AIR 2006 SC 2872**, *Jeffrey J. Diermeier and Anr..vs.. State of West Bengal*

& Anr., reported in **(2010) 6 SCC 243** and the judgment of the High Court of Bombay in the case of *Rahul Gandhi ..vs.. Rajesh Mahadev Kunte*, reported in **2015(2) Bom.C.R. (Cri.) 273**.

- f) Any defamatory matter stated in the written statement or in any legal proceedings, amounts to publication and as such in the present case the prerequisite to attract the offence under Section 499 of the IPC can be said to be complied with. He relied on a judgment of the Madhya Pradesh High Court in the case of *Trichinopoly Ramaswamy Ardhanani & oth. ..vs.. Kripa Shankar Bhargava*, reported in **1990 Cri.L.J. 2616**, and the judgment of Bombay High Court in the case of *Shri Sopullo Datta Naik Dessai..vs..Shri Yashwant Govind Dessai and another*, reported in **MANU/MH/1182/2009**.

19. In the backdrop of rival contentions of the parties I have perused the relevant documents and the judgments with the able assistance of the learned counsel for the applicants and the non-applicant in person.

20. The whole controversy revolves around a question whether the learned Magistrate before issuing the process has applied his mind to the material available on record, to *prima facie* get satisfied that the essential ingredients of defamation Section 499 of the IPC are present to constitute the offence?

21. Law of defamation seeks to protect individual reputation. The word “defamation” is the generic name for the wrong; Libel and Slander are forms of it. Defamation therefore, is of two kinds viz. Libel and Slander.

22. Broad distinction between the two is that libel is addressed to the eye while as slander to the ear.

23. Slander is the publication of defamatory statement in a transient form, which may be spoken words. Libel is a representation made in some permanent form e.g. writing, printing, picture.

24. In the above referred backdrop, at this juncture it would be appropriate to refer to Section 499 and 500 of the IPC which read thus :

“499. Defamation —

Whoever, by words, either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

Explanation 1 —It may amount to defamation to impute anything to a deceased person, if the imputation would harm

the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2 —It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3 —An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4 —No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

First Exception —Imputation of truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception—Public conduct of public servants.—It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception — Conduct of any person touching any public question.—

It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Fourth Exception — Publication of reports of proceedings of Courts.—It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation —A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.

It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Sixth Exception—Merits of public performance.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation —A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Seventh Exception —Censure passed in good faith by person having lawful authority over another —

It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Eight Exception —Accusation preferred in good faith to authorised person.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Ninth Exception : Imputation made in good faith by person for protection of his or other's interests.

It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person , or for the public good.

Tenth Exception : Caution intended for good of person to whom conveyed or public good.

It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

500. Punishment for defamation — Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.”

25. The above definition is subject to four explanations and ten exceptions. If a person is found guilty of having committed defamation in terms of Section 499 of the IPC, the punishment is stipulated in Section 500 of the IPC. The offence is non-cognizable and bailable.

26. It becomes evident from the reading of Section 499 of IPC that, mere publication of an imputation by itself may not constitute the offence of defamation unless such imputation has been made with the intention, knowledge or belief that such imputation will harm the reputation of the person concerned. Therefore, the intention or knowledge to cause harm are the essential ingredients to constitute the offence under Section 499 of IPC.

27. Let us examine the law on issuance of summons. The Hon'ble Supreme Court of India, time and again reiterated that Criminal case is a serious matter and Criminal Law cannot be set into motion as a matter of course. The Magistrate has to therefore, carefully scrutinize the evidence brought on record before issuance of summons. For instance I may refer to some of the judgments of the Hon'ble Supreme Court of India, in this regard, namely:

28. The Hon'ble Supreme Court of India in the case of *Pepsi Foods Ltd. ..vs.. Special Judicial Magistrate*, reported in (1998) 5 SCC 749, has 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. 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.”

29. The Hon'ble Supreme Court of India in the case of *Mehmood Ul Rehman ..vs.. Khazir Mohammad Tunda*, reported in (2015) 12 SCC 420, has held as under :

“22. ... In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC 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.”

30. *The Hon'ble Supreme Court of India in the case of Sunil Bharti Mittal ..vs.. CBI, reported in (2015) 4 SCC 609, has held as under:*

“52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient grounds for proceeding" appearing in the Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.” (emphasis supplied)

31. *The Hon'ble Supreme Court of India while examining what care shall be taken by the Magistrate while exercising discretion to issue process, the Apex Court of India in the case of Subramanian Swamy ..vs.. Union of India, reported in (2016) 7 SCC 221, has held thus:*

“207. ... In Punjab National Bank v. Surendra Prasad Sinha it has been held that judicial process should not be an instrument of oppression or needless harassment. The Court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in

exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. ...”

32. The Hon’ble Supreme Court of India in the case of *Birla Corpn. Ltd. ..vs.. Adventz Investments & Holdings Ltd.*, reported in (2019) 16 SCC 610, has held as under :

“35. 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 v. Surendra Prasad Sinha, it was held that the issuance of process should not be mechanical nor should be made an instrument of oppression or needless harassment.”

33. From the above referred judgments of the Hon’ble Supreme Court of India it becomes evident that 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 is best demonstrated by disclosure of mind on the satisfaction. The Magistrate would be judicious in exercising discretion lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and

order in the society are the prime objects of criminal justice, but it would not be the means to wreak personal vengeance as it is a serious matter affecting one's dignity and reputation in the society.

34. In the teeth of above referred well settled law, I will examine whether the learned Magistrate in the case at hand has taken necessary care before exercising discretion to issue process. I, therefore, revert back to the facts of the case.

35. It is the case of the non-applicant that the order of termination dated 08/02/2011 did not speak of any violation of service terms and conditions and that it did not give any reason for the termination of the non-applicant.

36. In defence, the applicant No.1 company in its written statement refer to the discussion held with the non-applicant before issuance of termination order and also referred to a complaint of a lady subordinate staff, which according to the applicant No.1, was nothing but the complaint regarding sexual harassment.

37. The non-applicant considering the said defence as defamatory in nature, filed a criminal complaint vide Summary Criminal Case No. 21326 of 2012 in the Court of Judicial Magistrate First Class, Court No.10, Nagpur.

38. The Hon'ble Supreme Court of India in the case of *S. Khushboo .vs.. Kaniamal and another*, reported in **AIR 2010 SC 3196**, after considering the key ingredients of the offence contemplated by Section 499 of IPC, has held that the definition makes it amply clear that the accused must either intend to harm the reputation of a particular person or reasonably know that his/ her could cause such harm.

39. It is therefore, for inviting the provisions contained in Section 499/500 of the IPC which is penal in nature, the Magistrate has to consider if the requirement of *mens rea* which is a mandate for criminal defamation punishable under Section 500 of the IPC was fulfilled. If *mens rea* or criminal intention is lacking or is missing in the act of the accused, he cannot be held guilty for an offence of defamation within the meaning of Section 499 of IPC.

40. The Hon'ble Supreme Court of India in the case of *Subramaniam Swamy* (supra) has held that in the matters of criminal defamation the heavy burden is on the Magistrate to scrutinize the complaint from all aspects. The Magistrate has also to keep in view the language employed in Section 202 of Cr.P.C. which stipulates about the residence of the accused at the place beyond the area the Magistrate exercises his jurisdiction. He must be satisfied that the ingredients of

Section 499 of Cr.P.C. are satisfied. Application of mind in case of complaint is imperative.

41. To examine whether the complaint filed by the non-applicant under Section 200 of Cr.P.C. satisfies the ingredients of Section 499 of the IPC, I will refer to the relevant paragraphs of the complaint, which read thus :

“19. The complainant now states that the accused persons thereafter filed their written statements before the Hon’ble Court at Nagpur on 03/08/2012. The said written statement which is a public document and can be viewed by any one was filed by the above accused persons. The said written statement is annexed as DOCUMENT NO.2 for the kind perusal of this Hon’ble Court.

20. On a bare perusal of the written statements, it may be seen that the defendants in their written statements have on page 5, page 9 and at other places of the written statements have categorically stated that the complainant has harassed a subordinate female staff and that there was a complaint of sexual harassment by the female staff against the complainant. According to the accused persons the main reason for termination of the complainant was the allegations of sexual harassment by a lady. However, in the entire written statement or reply no such document of complaint has been filed nor any enquiry conducted by the accused persons is filed by them. The only explanation given in the written statement is that in order to not further raise the issue the name of the female employee is not disclosed.

21. The complainant now states that by using the words such as sexual harassment of a female employee, what the accused persons have done is that they have maligned the image of the complainant in the eyes of the society, as this document/ written statement can be viewed by all being a public document. Similarly, the allegations made by the accused persons in their reply are not at all supported by any cogent evidence and hence under these facts and circumstances the accused persons have made a false and frivolous allegations against the complainant to justify their decision of termination. Such a justification which is totally incorrect and false is defamatory in nature also. The above imputations have lowered down the image of the complainant in the eyes of the public at large and that people have started to under-estimate him in all spheres of life, pertaining to his act and character. Likewise in view of such false allegations the complainant is unable to secure a suitable/ respectable job in any other organization on account of such

baseless, false, frivolous and defamatory publication.

22. In view of the above fact, the accused persons have committed an offence prima facie to hold them liable for an offence committed under Section 500 of the IPC. On a plain and simple reading of Section 499 and 500 of the IPC, it may be seen that the instant false allegations of sexual harassment leveled falsely against the complainant by the accused persons is without any support and hence the instant publication is made without any base or truth. However, doing such an act prima facie constitutes criminal defamation by the accused persons. Such an allegation being totally incorrect. It has maligned the image of the complainant and hence under the above circumstances the instant case falls under the scope and ambit of Section 499 and 500 of the IPC. In view of the above, the accused persons are liable to be punished severally under the above Sections, as they have committed the offence jointly and hence they should be punished as per Section 34 of the IPC by causing criminal defamation with a common intention. It is stated that the accused No.1 has filed the instant written statement in the court after getting proper and due permission from the accused Nos.2, 3, 4 and 5. Thus, all the accused persons in furtherance of a common intention have done a criminal act jointly and hence, they may be tried jointly according to the process of law for committing an offence of defamation.”

42. The next question that arises for consideration is whether reading the above referred relevant paragraphs of the complaint can it be said that a prima-facie case exists for issuance of process by the learned Magistrate.

43. It is evident from the complaint at no place it is averred that the alleged imputation is with the intention of causing harm to the reputation of the non-applicant or it was with knowledge or reason to believe that the imputation will harm the reputation of the person to whom it pertains. Hence, it can safely be said that the complaint does not fulfill the prerequisites of Section 499 of the IPC.

44. In the light of the above observation, let us move to the findings recorded by the learned Magistrate while issuing process, to examine whether the learned Magistrate has applied his mind to get satisfied that whether the ingredients of Section 499 of IPC are satisfied or not. For this purpose, it is appropriate to refer to the order passed by the learned Magistrate, issuing process against the applicants, which reads thus:

“ORDER BELOW EXH.1 IN SCC NO.21326/2012

(Passed on this 28th day of January 2013)

1. *Heard learned Advocate for complainant. Perused complaint, verification and documents filed on record.*
2. *It is the case of complainant that accused no.1 is Private Limited Company and accused no.3 is Managing Director and Chief Executive Officer of the said Company. It is further case of the complainant that accused no.4 is country manager of accused no.1. They are responsible for day to day affairs for accused no.1 Company. The complainant was previously working in the said company and he was terminated by the accused persons. Hence he has filed Special Civil Suit bearing No.69/2011 against the company in which accused no.1, accused no.3 and accused no.4 are parties. It is the case of complainant that accused no.2 for and on behalf of accused no. 1, 3 and 4 has filed written statement in the said suit. The said written statement contents some defamatory statement against the complainant without having any base for the same. Hence the complainant prayed for issue of process against all the accused for the offence punishable under Section 500 of Indian Penal Code.*
3. *I have perused copy of said written statement filed on record as document no.2 vide list of document exh.3. It reveals that at page 5 of the said Written Statement, it is mentioned that there were complaint regarding sexual harassment of female subordinate staff against the complainant and on the basis of same the complainant was terminated from his job. The said Written Statement is signed by accused no.2 and it is for and on behalf of accused nos. 1, 3 and 4. Hence, prima facie case is made out against accused nos. 1 to 4 for issuance of process. As defendant No.5 is neither signatory to the said written statement nor he is party in the said suit and no allegation is there as to how he can be made accused in the present matter, hence under such circumstances the complaint against the accused no.5 needs to be dismissed. In view of the above, following order is passed.*

Order

1. Issue summons against accused nos. 1 to 4 for the offence punishable Under Section 500 of Indian Penal Code on P.F.

2. The complaint filed against accused no.5 is hereby dismissed.

Sd/-

(R.B.Raja)

Judicial Magistrate First Class

Court No.10, Nagpur

Dt.28/1/2013”

Dt.28/1/2013.

45. In the impugned order, there are no findings recorded by the learned Magistrate that the alleged imputation is prima facie with the intention of causing harm to the reputation of the person to whom it pertains or with knowledge or reason to believe that the imputation will harm the reputation of the person to whom it pertains.

46. It is evident from the impugned order that the learned Magistrate has not at all dealt with the mens rea or criminal intention. Even he has not considered whether sufficient pleadings are made by the non-applicant as regards mens rea or criminal intention of the applicants as the *mens rea* is *sine qua non* to attract Section 499/ 500 of IPC.

47. Admittedly, there are no pleadings in the complaint about the *mens rea* or intention of the applicants. Thus, I have no hesitation to hold that in this case *mens rea* or criminal intention is lacking or for want of necessary pleadings it is missing in the act of the applicants and therefore, they cannot be held guilty for the offence of defamation within the meaning of Section 499 of IPC.

48. Now moving further to examine that when a Company, an artificial person acts through its officers, directors, managing directors chairman etc., if commits an offence, who would be responsible for any action. In this regard, the Hon'ble Supreme Court of India in the case of *Sunil Bharti Mittal ..vs.. CBI*, reported in **(2015) 4 SCC 609** has held as under :

“42. No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

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. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.

45. ...

45.1 ...

45.2. *Sham Sunder v. State of Haryana*

"9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

45.3. ...

45.4. *Maksud Saiyed v. State of Gujarat*

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

45.5. *R. Kalyani v. Janak C. Mehta*

"32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created."

45.6. ...

45.7. ...

46. It is stated at the cost of repetition that in the present case, while issuing summons against the appellants, the Special Magistrate has taken shelter under a so-called legal principle, which has turned out to be incorrect in law. He has not recorded his satisfaction by mentioning the role played by the

appellants which would bring them within criminal net. In this behalf, it would be apt to note that the following observations of this Court in the case of GHCL Employees Stock Option Trust v. India Infoline Ltd.:

"19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. (Thermax Ltd. v. K.M. Johny followed) xx xx xx

21. In the instant case the High Court has correctly noted that issuance of summons against Respondents 2 to 7 is illegal and amounts to abuse of process of law. The order of the High Court, therefore, needs no interference by this Court."

49. From the above referred observations of the Hon'ble Supreme Court of India, it becomes evident that an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Moreover, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Even under a special statute when the vicarious criminal liabilities fastened on the person on the premise that he was incharge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled.

50. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Director of the company when the accused is a company. Moreover, there

are no pleadings how the vicarious criminal liability is fastened on them on the premise that they are in charge of the affairs of the applicant No.1 company and responsible to it. There are no pleadings to prima facie disclose their active role coupled with criminal intent.

51. It is evident from the impugned order of the learned Magistrate that the Magistrate has not recorded his satisfaction about the *prima facie* case as against the applicant Nos. 2 and 3 and the role played by them in the capacity of Company Secretary and Legal Head and applicant No.3 as Managing Director and Chief Executive Officer of the applicant No.1 company, which is *sine qua non* for initiating criminal action against them.

52. Thus, on this ground also in absence of necessary pleadings to show that there is any vicarious criminal liability, on the premise that they are in-charge of affairs of the company and responsible for it coupled with their criminal intent, the complaint itself is not maintainable against the applicant Nos. 2 and 3 and issuance of process against the applicant Nos. 2 and 3 is illegal and amounts to abuse of process of law.

53. The non-applicant cited following judgments of Hon'ble Supreme Court of India, High Court of Bombay and High Court of

Madhya Pradesh in the cases of :

(i) *M.N.Damani ..vs.. S.K. Sinha & oth.* (AIR 2001 SC 2037), (ii) *Central Bureau of Investigation ..vs.. Shri Ravi Shankar Srivastava*, [AIR 2006 SC 2872], (iii) *Jeffrey J. Diermeier and Anr..vs.. State of West Bengal & Anr.*, [(2010) 6 SCC 243] (iv) *Rahul Gandhi ..vs.. Rajesh Mahadev Kunte*, [2015(2) Bom.C.R. (Cri.) 273], (v) *Shri Sopullo Datta Naik Dessai..vs..Shri Yashwant Govind Dessai and another*, [MANU/MH/1182/2009], (vi) *Trichinopoly Ramaswamy Aradhanani & oth. ..vs.. Kripa Shankar Bhargava*, [1990 Cri.L.J. 2616].

54. After going through the aforesaid judgments, it is revealed that the said judgments cited by the non-applicant in support of his case are distinguishable on facts and not of any help to the non-applicant.

55. In view of the above referred observations and in absence of necessary pleadings, I do not think it necessary to go into the issue whether the alleged imputation amounts to defamation or whether it falls within the ninth exception of Section 499 of IPC.

56. In light of the above referred findings recorded, I have no hesitation to hold that the learned Magistrate has mechanically issued the process against the applicant Nos. 2 and 3 without applying his mind to the essential ingredients of Section 499 of the IPC and without

examining the role of the applicant Nos. 2 and 3 and whether there is any vicarious liability against them.

57. Hence, in exercise of inherent powers of this Court under Section 482 of Cr.P.C. for ends of justice and to prevent abuse of the process of the Court, I am of the considered view that the present application needs to be allowed. Accordingly, I pass the following order :

- i) The Criminal Application is allowed.
- ii) The impugned judgment and order dated 22/01/2019 passed by the District Judge-5 and Additional Sessions Judge, Nagpur in Criminal Revision Application No.141 of 2013 is quashed and set aside, consequently, the impugned order dated 28/01/2013, passed by Judicial Magistrate First Class, Court No.10, Nagpur in Summary Criminal Case No. 21326 of 2012 is hereby quashed and set aside.

Rule is made absolute accordingly.

Pending applications, if any, shall stand disposed of.

JUDGE