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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: January 03, 2011

**Date of Order: February 14, 2011**

**+ Crl. Rev P. No. 8/2010**

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**Abhishek Agrawalla**

**...Petitioner**

**14.02.2011**

Versus

**Boortmalt NV & Anr.**

**...Respondents**

**Counsels:**

Mr. Jayant Bhushan, Sr. Adv. with Mr. Jagdeep Anand for petitioner.  
Mr. Vikas Goel, Mr. Abhishek Kumar and Mr. Ravinder Singhania for respondents.

**JUSTICE SHIV NARAYAN DHINGRA**

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|----|-----------------------------------------------------------------------|------|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the reporter or not?                                | Yes. |
| 3. | Whether judgment should be reported in Digest?                        | Yes. |

**JUDGMENT**

1. This revision petition under Section 397 Cr.P.C has been preferred by the petitioner against an order dated 9<sup>th</sup> October 2009 passed by learned MM in complaint case number 108 of 2008.

2. A complaint was filed against the petitioner who is a resident of Noida adjoining Delhi falling in U.P under Sections 420/406/120B IPC and the learned MM after recording pre-summoning evidence and appreciating documents filed by the complainant came to conclusion that the petitioner and his co-accused entered into a criminal conspiracy and cheated complainant company of several crore of rupees. The learned MM summoned the petitioner and other co-accused under Section 420 IPC.

3. The only ground pressed during arguments of this petition assailing order of learned MM is that the order was bad in law in view of the fact that the trial court failed to

comply with the provisions of Section 202 Cr.P.C whereunder the trial court was supposed to postpone the issue of process and was to conduct an inquiry either himself or direct investigation to be made by the police officials into the allegations since the accused was residing at a place beyond the area in which the trial court had jurisdiction.

4. It is submitted by the counsel for the petitioner that recording of complainant's evidence on oath and evidence of witnesses was required to be done by the Magistrate under Section 200 Cr.P.C and the Magistrate after recording complainant's evidence can issue process in respect of accused person living within the jurisdiction. However, if the accused was living beyond the jurisdiction of the court i.e. accused was not living within Delhi, then in view of Section 202 Cr.P.C mere recording of complainant's evidence and witnesses was not sufficient and an inquiry was required to be conducted mandatorily under the provisions of Section 202 Cr.P.C before issuing process.

5. Section 202 of Cr.P.C reads as under:

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

*(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance of 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 Sessions 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 witness 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 Court on an officer in charge of a police station except the power to arrest without warrant."*

6. The portion in para (1) was introduced by the Parliament by Act No.25 of 2005 and came into effect on 23<sup>rd</sup> June, 2006. The purpose for making this amendment as stated in the noting on the Code of Criminal Procedure Amendment Bill reads as under:

*"Clause 24- 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."*

7. It is submitted by the counsel for the petitioner that the amendment in Section 202 Cr.P.C makes it obligatory on the part of Magistrate to hold an enquiry in a complaint case where the accused resides beyond its jurisdiction. Since in this case, no enquiry was held either by Magistrate himself or through police the summoning order was bad in law.

8. There are two kinds of cases which come before the court, one where the offence is sought to be proved from documents and the oral testimony is given before the court to prove the documents by exhibiting the documents and by deposing as to when the documents were executed and by whom. The other kind of cases are where the case does not depend on documentary evidence and depends upon only the oral testimony. These are cases of physical hurt, injuries, threats etc. In order to protect an innocent person being summoned by the Magistrate on the basis of oral testimony of a person

and considering that a large number of false complaints were being filed at far-off places just to harass the people, the Parliament had amended Section 202 so that the summoning orders were not issued mechanically by the Magistrates and whenever the accused was of other State an investigation or enquiry into the allegations was mandatorily conducted either by the Magistrate himself or through police. Say for example, a person files a complaint that on telephone he had been threatened by a person seeking ransom or he had been threatened to be killed and the person who allegedly threatened him was living outside the jurisdiction of the court. Before acting on this oral statement of the victim, it would be incumbent upon the court to make an enquiry about the call details, about the telephone and about telephone number from which the threat was allegedly received and the telephone number of the complainant. The call details for period around the date of incident would show if the calls had been made frequently or it was a solitary call and the Magistrate can also make enquiry about the person in whose name the telephone was standing. This would enable the Magistrate to find out if there was credibility in the statement given by the complainant. The Magistrate can summon the officials of service provider telephone company and make this enquiry himself. Similarly there may be a case where a person alleges that while he was at X place, Y a resident of other State had come there and beaten him or abused him or threatened him or caused injuries to him etc. The person produces his MLC and makes an oral statement. The court in such a case, if the accused is of outside his jurisdictional area, would have to get an enquiry made through police if the accused was living at the address given and if the accused had visited the place where it was alleged that he had beaten or threatened. The Magistrate can also get a fact finding enquiry done from police of that State or police of his own State. However, where the commission of offence is disclosed only from the documents, no further enquiry except scrutinizing the documents proved before the court by testimony of complainant is feasible, I consider that the enquiry envisaged under Section 202 Cr.P.C in such cases is

an enquiry by way of recording statement of complainant and careful scrutiny of documents relied upon by the complainant. Say, if a case against the accused is filed under Section 138 of Negotiable Instruments Act and the accused lives in Noida while the complainant lives in Delhi. The Magistrate in such a case has only to consider if prima facie offence was committed or not and if it has jurisdiction based on the documents i.e. whether the cheque was dishonoured, whether the proper demand notice was sent and still payment was not made etc. Similarly there are several statutes where the offence is of technical nature and the commission of offence can be made out from the documents, say the offences under the Companies Act, against the directors of the company for violating the mandatory provisions regarding filing of returns etc. The company may be registered in Delhi but the director may be living in Noida or Gurgaon. In such a case, the commission of offence has to be inferred only from the documents and the enquiry under Section 202 Cr.P.C has to be limited to scrutiny of the documents and recording of statement of the complainant and cannot go beyond that.

9. What is the import of provisions of Section 202 Cr.P.C can be seen from the decision of the Supreme Court in *2000(2) SCC 230 Rozy and another vs. State of Kerala*. In this case another provisions of sub Section 202, which is also couched in mandatory language had come into question i.e. Section 202(2) proviso. This proviso provides that where the offence was triable by the court of Sessions, the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. The proviso is couched in mandatory words and the mandate is *“He shall call upon the complainant to produce all his witnesses and examine them on oath”*. The Supreme Court in this case observed that the issue of complying with proviso to Sub Section 2 of Section 202 Cr.P.C would arise only in cases where the Magistrate before taking cognizance of the case, decides to hold enquiry and after enquiry if he decides to take the evidence of witnesses on oath. The object and purpose of holding an enquiry or

investigation under Section 202 Cr.P.C is to find out whether there was sufficient ground for proceeding against the accused or not and that holding enquiry or investigation is not an mandatory course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have fallen upon on mere perusal of the complaint and consideration of complainant's evidence on oath.

10. The Supreme Court further observed that the enquiry under Section 202 is of a limited nature. Firstly it is to find out whether there was a prima facie case against a person accused of the offence in the complaint and secondly to prevent the issuance of process in all such complaints that are false or intended only to harass a person. In *Kewal Krishan v Suraj Bhan 1980 Supp. SCC 499*, the Supreme Court observed that what the Magistrate has to do is to see whether on a cursory perusal of the complaint of the complaint and the evidence recorded under preliminary enquiry under Section 200 and 202 Cr.P.C there is prima facie evidence in support of the charges leveled against the accused. About use of the word 'shall' in the proviso to sub section 2, the Supreme Court made following observations:

*"17. At initial stage, if objection is raised and it is found by the Sessions Court that by non-holding of inquiry, prejudice is caused to the accused, he may direct the Magistrate to follow the procedure prescribed under the proviso. It is no doubt true that by the use of the words "shall", it appears that language used in the proviso is of mandatory nature. At the same time, it is a procedural law and it is to be read in context of Section 200 which enables the Magistrate to issue process without holding any inquiry and that inquiry under Section 202 is itself discretionary one giving option to examine or not to examine witnesses. Hence, proviso to the said sub-section is required to be read accordingly though couched in mandatory term by using the word 'shall'. Normally, the procedure prescribed therein*

*should be followed, but non-observance of the said procedure may not vitiate further proceedings in all cases. In a case where a complaint is filed, not by the public servant, and where the offence is exclusively triable by the court of Session the Magistrate should follow the proviso to sub-section (2) of Section 202 and call upon the complainant to produce all his witnesses and examine them on oath. This would be in consonance with the provision of Section 208 which inter alia provides for supply of copy of statements and documents to accused. This would also facilitate the Sessions Court in framing the charge or discharging the accused. In the Sessions triable case, under Section 226 the prosecution has to open its case by describing the charge brought against the accused and stating by what evidence it proposes to prove the guilt of the accused. On such submission, the Sessions Court is required to consider the record of the case and the documents submitted therewith and after hearing the submissions of the accused and prosecution in this behalf, to decide whether there is sufficient ground or not for proceeding against the accused. Upon such consideration, if the court finds that there is no sufficient ground for proceeding against the accused, he shall be discharged as provided under s. 227. In case, where there is sufficient ground, court is required to frame the charge as provided under s. 228. Hence, for the purpose of framing the charge also the recording of such evidence is necessary. It also facilitates the accused to know allegation made against him as well as evidence in support thereof. However, in a case where complaint is filed by a public servant after holding inquiry and recording the statements, question of recording of such evidence may not arise. Hence, compliance of proviso by the Magistrate in all Sessions triable cases is not a must and would not vitiate the further trial unless prejudice caused to the accused is established.”*

11. I, therefore, consider that in the present case where disclosure of commission of offence was based on documentary evidence produced by the complainant before the court and from the documents it was prima facie clear that a commission of offence under Section 420 IPC has taken place, no further enquiry could have been held by the Magistrate.

12. The learned counsel for the petitioner argued that in this case, the allegations made by the complainant was that the accused had purchased land on cheap rates and sold the same to the joint venture company owned by him at very exorbitant rates. The Magistrate should have called for a report from the Local SDM or police about the rates of land. I consider that this argument is too far-fetched. What the learned MM had considered was based on the documents itself and the testimony of the complainant. It was not incumbent upon the Magistrate to make an enquiry about the prevalent rates of land before issuing summons. The documents and other evidence given by the complainant was sufficient to show that prima facie a fraud was played upon by the accused/ petitioner.

13. In *Rosy v State* (supra) the Supreme Court also agreed with the submission of counsel for the appellant that the provisions under Section 465 Cr.P.C would play a role at any stage and observed as under:

*“18. Further, the aforesaid interpretation would be in consonance with Chapter XXXV of the Cr.P.C., which deals with irregularities in the proceedings, which may or may not vitiate the proceedings. Sections 460 and 461 provide which irregularities would or would not vitiate the proceedings. In these sections, there is no mention of Section 202, For our purpose reference to Section 465 would suffice, which inter alia specifically provides that irregularity in the complaint, summons, warrant, order or other proceedings before or during trial or in any inquiry shall not be a ground for reversing order passed by the competent Court, unless in the opinion of that Court a failure of justice has in fact been occasioned thereby. Sub-section (2) further provides that in determining whether any irregularity in proceeding has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier*

*stage in the proceedings. Hence, the statute does not expressly provide for nullification of the order as a consequence of non-compliance of proviso to sub-section (2) of Section 202, but provides that unless prejudice is caused, the order is not to be set aside. This would mean that during inquiry under Section 202 when Magistrate examines the witnesses on oath, as far as possible the proviso is to be complied with but the mandate is not absolute.”*

14. I consider that the learned MM rightly issued summon as against the petitioner/accused in this case and no further enquiry apart from the enquiry already held by way of examination of witnesses of complainant and examined documents was feasible in this case. The enquiry or investigation under Section 202 Cr.P.C has to be done in all those cases where the case is based only on oral evidence and accused lives beyond jurisdiction of court verification about presence of accused or about such other factors like use of telephone etc is involved and the Magistrate in all such cases mandatorily hold an enquiry either himself or through police.

15. I find no force in this petition. The petition is hereby dismissed.

**February 14, 2011**  
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**SHIV NARAYAN DHINGRA, J**