

Court No. - 92

Case :- APPLICATION U/S 482 No. - 31883 of 2023

Applicant :- Danish Khan And 2 Others

Opposite Party :- State Of U.P. And Another

Counsel for Applicant :- Sudhir Kumar Singh

Counsel for Opposite Party :- G.A.

Hon'ble Anish Kumar Gupta,J.

1. Heard Sri Sudhir Kumar Singh, learned counsel for the applicants and Sri K.K. Tripathi, learned A.G.A. for the State.

2. The instant application has been filed seeking quashing of the summoning order dated 05-03-2022 passed by learned learned Additional Civil Judge (J.D.)/Judicial Magistrate, Court No.4, Pilibhit in Complaint Case No. 3921 of 2019, Mohd. Yusuf Jamal Khan Vs. Danish Khan, arising out of case crime no. 323, 504 IPC, P.S. Pooranpur, district Pilibhit.

3. Learned counsel for the applicants has raised a purely legal question with regard to an inquiry as contemplated under Section 202 (1) Cr.P.C., which has not been conducted in the instant case by the learned Magistrate before issuing summons. In view of the purely legal submissions involved, which is already determined by the co-ordinate Bench of this Court as well as by the Apex Court, therefore, the instant application is being disposed of without issuing notice to the opposite party no.2.

4. The brief facts of the case are that in the instant case the opposite party no.2 is the husband of the sister of the applicants herein. Due to the matrimonial discord between the opposite party no.2 and sister of the applicants, various matrimonial cases are pending against each other. In the said matrimonial complaints, allegedly a compromise has taken place between the sister of the applicants and the opposite party no.2. In pursuance of the said settlement the applicants are alleged to have went to the house of the opposite party no.2 and allegedly taken back the various articles given during the marriage, thereafter, some dispute arisen between them with regard to the divorce on which allegedly the applicants have abused and tried to abduct the opposite party no.2. On which the other persons came there and saved the opposite party no.2. After the said complaint was filed the statements of the complainant as well as the statements under Section 202 Cr.P.C. were recorded by the Magistrate and thereafter vide impugned order dated 05-03-2022 the learned Magistrate has summoned the applicants herein.

5. Learned counsel for the applicants further submits that since the applicants herein were residing outside the jurisdiction of the Magistrate at Pilibhit who has issued summons against the applicants and as per Section 202 (1) Cr.P.C. as

amended in the year 2006 it was mandatory to conduct an inquiry before passing any summoning order.

6. In support of his submissions, learned counsel for the applicants has relied upon a judgment of co-ordinate Bench of this Court dated 04-02-2022 passed in an application u/s 482 No. 1230 of 2022, **Smt. Geeta and 4 Others Vs. State of U.P. and another**, wherein the co-ordinate Bench of this Court after relying upon another judgment of co-ordinate bench of this Court in **Sayed Sibte Haider Vs. Mohammad Askari Ali and another** passed in Criminal Misc. Application under Section 482/378/407 Cr.P.C. no. 115 of 2018 dated 28-02-2019 and relying upon the judgments of the Apex Court in **Vijay Dhanuka Vs. Najima Mamta**, reported in (2014) 14 SCC 638 and **Abhijir Pawar Vs. Hemant Madhukar Nimbalkar and another**, (2017) 2 SCC 528 and **Sunil Todi Vs. The State of Gujarat** reported in 2021 SCC online SC 1174 has held that the provisions of Section 202 (1) Cr.P.C. are mandatory where the accused is residing at a place beyond the area of its jurisdiction prior to issuance of process, the Magistrate is required to conduct an inquiry under Section 202 (1) Cr.P.C.. Section 202 (1) Cr.P.C. reads as under:

"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, 1 [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."

6. In **Vijay Dhanuka Vs. Najima Mamta (supra)**, the Apex Court has held as under:-

"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) 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 (2014) 14 SCC 638 find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints."

7. In **Abhijir Pawar Vs. Hemant Madhukar Nimbalkar and another (Supra)**, the Apex Court has held as under:-

"Admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it is mandatory on the part of the Magistrate to conduct an enquiry or investigation before issuing the process. Section 202 Cr.P.C. was amended in the year 2005 by the Code of Criminal Procedure (Amendment) Act, 2005, with effect from 22-6-2006 by adding the words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction?". There is a vital purpose or objective behind this amendment, namely, to ward off false complaints against such persons residing at a far-off places in order to save them from unnecessary harassment. Thus, the amended provision casts an obligation on the Magistrate to conduct enquiry or direct investigation before issuing the process, so that false complaints are filtered and rejected. The aforesaid purpose is specifically mentioned in the note appended to the Bill proposing the said amendment."

8. In view of the aforesaid settled position that where the accused in a complaint case is residing outside the jurisdiction of the learned Magistrate, it is mandatory for the Magistrate to conduct an inquiry under Section 202 (1) Cr.P.C. and only after such inquiry the Magistrate is empowered to issue summons against the accused persons in a complaint case.

9. In the instant case the learned Magistrate has not conducted any inquiry and has directly summons the applicants herein on the basis of the statements recorded under Sections 200 and 202 Cr.P.C., therefore, the impugned order prima facie is vitiated and is not sustainable in the eye of law and is liable to be quashed.

10. Accordingly, the instant application under Section 482 Cr.P.C. is **allowed** and the impugned order dated 05-03-2022 passed by learned learned Additional Civil Judge (J.D.)/Judicial Magistrate, Court No.4, Pilibhit is hereby **quashed**. The matter is remanded back to the learned Magistrate for further proceedings in accordance with law especially in view of the provisions of Section 202 (1) Cr.P.C. as discussed above. The concerned Magistrate may pass appropriate orders in accordance with law after giving due opportunity of hearing to both the parties .

Order Date :- 19.10.2023