

Court No. - 85

Case :- MATTERS UNDER ARTICLE 227 No. - 12678 of 2024

Petitioner :- Ballu And 3 Others

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Dharm Singh Parmar

Counsel for Respondent :- G.A.

Hon'ble Saurabh Srivastava,J.

1. Heard Sri Dharm Singh Parmar, learned counsel for the petitioners and learned AGA for the State.

2. The present petition has been preferred with the following relief:-

"I. Set aside the order dated 25.06.2024 passed by learned Session Judge, Hamirpur in Criminal Revision No. 72 of 2023 (Ballu and others Vs. State of U.P. and another) by which the learned Judge has rejected the revision of the petitioners, which was preferred against the order dated 20.11.2019 passed by Chief Judicial Magistrate, Hamirpur in Complaint Case No. 34 of 2019 (Ramdas Vs. Ballu and others) Under section 302 I.P.C., Police Station Rath, District Hamirpur."

3. Brief facts of the case are that the petitioner no. 1 was married to one Vineeta (daughter of respondent no. 2) as per Hindu rites and customs. After some years of marriage, on 15.11.2018, daughter of respondent no. 2 committed suicide. On 01.12.2018, respondent no. 2 moved an application under Section 156(3) Cr.P.C. before the learned Chief Judicial Magistrate, Hamirpur which was treated as complaint case whereupon statement under Sections 200 and 202 Cr.P.C. were recorded and considering the said statements, learned Magistrate summoned the petitioners for offence under Section 302 IPC vide its order dated 20.11.2019. Being aggrieved with the same, petitioners preferred Criminal Revision No. 72 of 2023 before learned Session Judge, Hamirpur and the same was rejected vide its order dated 25.06.2024, which impugned the present petition.

4. While challenging the order dated 25.06.2024 passed by learned revisional court, learned counsel for the petitioners submitted that only on the basis of statements of fact witnesses and complainant, summoned the petitioners under Section 302 IPC without summoning the doctor who conducted the autopsy, under Section 202 Cr.P.C., since offence as alleged is triable by Court of Session and as such, procedure mentioned in Section 202(2) Cr.P.C. has not been followed, therefore, the order impugned is illegal. Learned counsel for petitioners further submitted that Section 202(2) Cr.P.C. enjoins the Magistrate to call upon the complainant to

produce all of his witnesses and examined them on oath and also as per the list of witnesses submitted by the complainant, doctor was a necessary witness from the side of complainant but the learned court concerned did not find necessary to call upon the complainant to examine all his witnesses and as such, order of summoning the petitioners has been passed in a mechanical manner without applying judicial mind. It has also been submitted by learned counsel for the petitioners while rejecting the criminal revision preferred at the behest of the petitioners, learned revisional court failed to consider the ground taken up by petitioners that the summoning order has been passed without following the procedure as mentioned in law and as such both the orders are bad in the eye of law and same may be set aside. In support of his submissions, learned counsel for the petitioners relied upon a judgment passed by coordinate Bench of this Court in case of *Amit Kumar vs. State of U.P. And another (2024 0 AHC 28426)*.

5. Per contra, learned AGA vehemently opposed the prayer sought through the instant petition by submitting that if the Magistrate is satisfied that there are sufficient ground for proceeding, he can summon the accused and in the present case, learned court concerned found that prima facie case is made out and as such, impugned orders are just and proper

6. Here, this Court find that if Complainant wanted to examine only four witnesses in support of complaint and on that Magistrate was satisfied, it cannot be said that unless all persons named in complaint are examined as witnesses, no order of summoning could have been passed by Magistrate.

7. From perusal of complaint and statements of complainant and witnesses recorded under Section 200 and 202 Cr. P. C., respectively, it cannot be said that no prima facie case relating to offences in which petitioners have been summoned, is made out.

8. Before considering arguments advanced by learned counsel for petitioners it would be appropriate to examine scheme of Cr.P.C. when a Magistrate proceeds on complaint, particularly when it is a case exclusively triable by Court of Sessions.

9. Chapter XIV, Cr.P.C. deals with subject of power of taking cognizance of offence and conditions for the same. Section 190 Cr.P.C. specifies power of Magistrate to take cognizance of offence. Three sources are indicated therein which are of distinct nature. What is material in taking cognizance is the phrase "Upon receiving a complaint on facts which constitutes such offence". The purpose of taking cognizance of offence implicits an exercise to decide whether process should be issued to the

accused or not. Section 204 Cr.P.C. envisages issue of process and it means only issuing either summons or warrant for the purpose of bringing the accused before Magistrate. It says that summons or warrants need be issued only if Magistrate is of the opinion that there exists sufficient ground for proceeding. Sub Section 3 of Section 204 Cr.P.C. only contemplates that proceeding if instituted of complaint made in writing, summons or warrants issued shall be accompanied by a copy of such complaint. Before issue of process which is part of Chapter XVI, there are four provisions in Chapter XV, i.e. Sections 200, 201, 202 and 203 Cr.P.C. Section 200 Cr.P.C. deals with examination of Complainant, Section 201 Cr.P.C. provides procedure by Magistrate not competent to take cognizance of the case and Section 202 Cr.P.C. provides postponement of issue of process. Lastly, Section 203 Cr.P.C. confers power upon Magistrate that if offence is not sufficient to make out for proceeding, he shall dismiss the complaint after recording his reasons briefly. Sections 200 to 203 Cr.P.C. are reproduced here below :

"200. Examination of complainant.-A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

"201. Procedure by Magistrate not competent to take cognizance of the case. If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,-

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court."

"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, 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."

"203. Dismissal of complaint.*-If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."*

10. A cumulative and in depth reading of aforesaid provisions would show that Section 200 requires Magistrate for taking cognizance of an offence on a complaint, to examine upon oath the complainant and the witnesses present, if any. When a complaint is made in writing, proviso to Section 200 provides that it would not be necessary for Magistrate to examine complainant and witnesses if complainant is a public servant, acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or if Magistrate makes over a case for enquiry or trial to another Magistrate under Section 192. Second proviso takes care when a Magistrate makes over the case to another Magistrate under Section 192 after examining complainant and witnesses and provides that latter Magistrate need not re-examine them. Section 201 is not necessary to be discussed for the issue in question and this Court straight way comes to Section 202.

11. Before discussing Section 202 of Cr.P.C., it would also be necessary to mention that a Magistrate when satisfied that there is sufficient ground for proceeding, he can straight way issue notice and at this stage he has three

options : (i) Straight way issue process; (ii) he can postpone the issue of process for having holding an enquiry; and (iii) he can direct an investigation to be made. If the offence is triable by Court of Sessions, it is impermissible for the Magistrate to direct investigation. In such a case, Magistrate not only has discretion but compelling duty to comply with requirements of Section 202 (2) Cr.P.C. and record statements of all witnesses. In other words, if Magistrate decides to hold inquiry, proviso of Section (2) of Section 202, would come into picture and where the offence is triable exclusively by Court of Sessions, Magistrate himself has to hold inquiry and no direction for investigation by police shall then be made. Inquiry can be held by recording evidence on oath and if Magistrate thinks fit, Section 202 (2) gives discretion to Magistrate to take evidence of witness on oath. Thereafter, the next stage where Magistrate would pass order of dismissal of complaint or issue process, in effect is, when a complaint is received, Magistrate by following procedure prescribed under Section 200 may issue process against accused or dismiss the complaint. Section 203 specifically provides that after considering statement on oath, if any, of complainant and witnesses and the result of enquiry of investigation, if any, under Section 202 Cr. P.C., if Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. Section 204 provides that no summons or warrants are to be issued against accused until a list of prosecution witnesses has been filed. The object and purpose of holding enquiry or investigation under Section 202 Cr.P.C. is to find out whether there exists sufficient ground for proceeding against accused or not. Holding of enquiry or investigation is not an indispensable force before issue of process against accused or dismissal of the complaint. It is an enabling provision to form an opinion whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of complaint and the consideration of complaint's evidence on oath.

12. In *Ranjit Singh Vs. State of Pepsu (now Punjab)*, AIR 1959 SC 843, similar argument was raised that Magistrate did not hold inquiry as required under Section 200 and 202 Cr.P.C. Court negated the contention and said as under :

"that contention is equally untenable because under Section 200, proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither Section 200 nor Section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained."

13. In *Rosy and others vs. State of Kerala and others*, 2000 (2) SCC 230, Hon'ble M. B. Shah, J (another opinion by Hon'ble K. T. Thomas, J) recorded a separate but concurrent judgment and said as under :

"It is settled law that the inquiry under Section 202 is of limited nature. Firstly, to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. the accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made." (emphasis added)

14. In para 20 of *Rosy and others vs. State of Kerala (supra)*, Hon'ble M. B. Shah, J. deduced certain principles as under :

I. (a) Under Section 200 Magistrate has the jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present.

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses.

(c) In such case Court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person accused. Such inquiry can be held by him or by the police officer or by other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, the proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by the complainant under Section 204 (2) before issuance of the process,

(c) The irregularity or non-compliance therewith would not vitiate further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. If he fails to raise such objection at the earliest stage, he is precluded from raising such objection later."

15. Thus, evidently statement recorded under Section 202 Cr.P.C. is not for punishing the accused. The purpose of Section 202 Cr.P.C. is that Magistrate has not to ascertain truth or falsehood of complaint as in old Code, but to decide whether or not there is sufficient ground for proceeding. Issue of process should not be mechanical and it should be based on some material.

16. The words "all his witnesses" contained in Sub sec (2), proviso to Section 202 Cr.P. C. cannot be read as "all witnesses". It has been held in ***Satyadeo Pandey and others v. State of U. P. and another, 1987 (1) AWC 572*** that words "all his witnesses" connote that all the witnesses of the complainant, associated or connected with his interest and those witnesses who are material and relevant to prove prosecution case, must be examined. The words "all his witnesses" under proviso to Section 202 Cr.P.C. do not refer literally to all prosecution witnesses in number rather all his witnesses (i.e. of complainant) and to whom he considers material to prove his case.

17. In ***Chhotey Lal v. State of U. P., 2006 CRI.L.J. 2265***, Court held that all the witnesses in Sub Sec (2) Proviso to Section 202 Cr. P. C. do not mean "all the witnesses" named by complainant but all the witnesses which complainant chooses to examine.

18. In ***Kallu Pal and others v. State of U. P. and Anr., 2008 CRI.L.J. 3229 (Allahabad)***, this Court said that formal witnesses like Doctor, Investigating Officer etc. are not under the command of the complainant and they are not the witnesses of complainant's confidence, therefore, they cannot be termed as "his witnesses" and are not covered by proviso to Section 202 (2) Cr.P.C.

19. In ***Dudh Nath Mishra and others v. State of U. P. and another, 2003 CRI.L.J.1087 (Allahabad)***, Court said that it is not necessary to examine all the witnesses who are named in complaint petition.

20. In ***Gopal Singh v. Dhanraji Devi and another, 1994 CRI.L.J. 1652 (Allahabad)***, this Court said that it is discretion of complainant to examine some witnesses and give up rest of the witnesses. Even when all the witnesses are not examined in a case when it is exclusively triable by

Court of Sessions it has been held that process issued by Magistrate to accused is not per se illegal. This is what has also been held in **Abdul Hamidkhan Pathan and others v. State of Gujrat and others, 1989 CRI.L.J. 468 (DB).*

21. The issue raised in this application also came up for consideration in *Shivjee Singh vs. Nagendra Tiwary and others, 2010 (7) SCC 578*. The question up for consideration formulated by Court in the judgment reads as under :

"Whether examination of all witnesses cited in the complaint is sine qua non for taking cognizance by a Magistrate in a case exclusively triable by the Court of Sessions?"

22. In *Chandra Deo Singh vs Prokash Chandra Bose alias Chabi Bose & Anr, AIR 1963 SC 1430*, Court held, that where there is prima facie evidence, Magistrate was bound to issue process, even though the person charged of an offence in the complaint might have a defence, such defence has to be taken into consideration and left to be decided by appropriate forum at an appropriate stage. At the stage of issue of process, Magistrate can refuse to issue process only when he finds that evidence led by complainant is self contradictory or intrinsically untrustworthy.

23. In *Kewal Krishan Vs. Suraj Bhan and another, AIR 1980 SC 1780*, scheme of Sections 200 to 204 Cr.P.C. was examined and Court said :

"At the stage of Section 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202, Criminal Procedure Code, there is prima facie evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges." (emphasis added)

24. In *Mohinder Singh vs Gulwant Singh And Others, 1992 (2) SCC 213*, Court said that the scope of inquiry under Section 202 Cr.P.C. is extremely restricted. It is only to find 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 complainant and his witnesses, if any. But the enquiry at this

stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 Cr.P.C. calling upon the proposed accused to answer the accusation made against him for adjudging the guilt or otherwise of the said accused person. Further, the question, whether evidence is adequate for supporting conviction, can be determined only at the trial and not at the stage of enquiry contemplated under Section 202 Cr.P.C. To say in other words, during the course of enquiry under Section 202 of Cr.P.C., Magistrate has to satisfy himself simply on the evidence adduced by prosecution, whether prima facie case has been made out so as to put the proposed accused on a regular trial. At that stage no detailed enquiry is called for.

25. Considering the word "shall" in proviso to Section 202 (2) Cr. P.C., Supreme Court in ***Shivjee Singh (supra)*** Court said :

"The use of the word 'shall' in the proviso to Section 202 (2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Section 226 and 227 and Section 465 would show that non-examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so." (emphasis added)

26. In ***Shivjee Singh (supra)*** Court further said that in proviso to Section 202 (2) word 'all' is qualified by the word "his". This implies that complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say, whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against accused. In taking above view, Court has followed and relied its earlier decisions in ***Rosy and others vs. State of Kerala (supra)***, ***Chandra Deo Singh (supra)*** and ***Kewal Krishan (supra)***. Court also approved judgment of ***Madras High Court in M. Govindaraja Pillai v. Thangavelu Pillai 1983 CriLJ 917***, and approved the ratio that Section 202 is an enabling provision. Court pointed out

divergent two opinions expressed by Hon'ble Justice M. B. Shah and Hon'ble Justice K. T. Thomas in two separate but concurrent judgments in *Rosy and others vs. State of Kerala (supra)* and then in para 30 said as under :

"30. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of proviso to Section 202 (2) but there is no discord between them that non-examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202 (2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance with the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance with the proviso to Section 202(2)." (emphasis added)

27. Similar view has been taken in *Vijay Dhanuka Etc vs Najima Mamtaj Etc, 2014 (14) SCC 638* which has been followed in *Abhijit Pawar Vs. Hemant Maudhukar Nimbalkar and Another, 2017 (3) SCC 528*.

28. Recently, this aspect has been considered by this Court in *Application under Section 482 Cr.P.C. No. 4419 of 2004 (Shiv Poojan and Others Vs. State of U.P. and Others)* decided on 04.07.2019.

29. In view of above discussions, this Court is of the view that even though in complaint, several persons were named as witnesses but only four persons were examined under Section 202 Cr.P.C. and consequently, process was issued, the procedure adopted by learned court concerned cannot be said to be vitiated in law and submission to that effect is clearly erroneous and contrary to above discussions, hence, rejected.

30. The petition sans merit and is hereby **dismissed** accordingly.

Order Date :- 13.12.2024

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