

Neutral Citation No. - 2024:AHC-LKO:58172

Reserved

Court No. - 30

Case :- APPLICATION U/S 482 No. - 436 of 2016

Applicant :- Ram Moorti Tewari And Anr.

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

Counsel for Applicant :- Jagrit Sharma

Counsel for Opposite Party :- Govt. Advocate, Mohd. Alam

Hon'ble Om Prakash Shukla, J.

- (1) Heard Shri Jagrit Sharma, learned Counsel representing the applicants and Shri Nirmal Kumar Pandey, learned Additional Government Advocate representing the State-respondents.
- (2) This application under Section 482 Cr.P.C. has been filed by the applicants, **Ram Moorti Tewari, Shailendra Kumar Tiwari alias Sanjay Tewari**, seeking to quash the summoning order dated 23.01.2013, consequential orders 29.10.2015 and 14.12.2015 and entire proceedings of Complaint Case No. 2927 of 2011: *Akhileshwar Singh Vs. Shailendra Kumar Tiwari and others*, under Sections 452, 323, 504, 506 I.P.C., Police Station Cantt, district Lucknow, pending before the Court of Judicial Magistrate-I, Lucknow.
- (3) Apparently, by the order dated 23.01.2013, the applicants have been summoned and by the consequential orders dated 29.10.2015 and 14.12.2015, bailable warrants have been issued against the applicants in Complaint Case No. 2927 of 2011.

- (4) The moot question for consideration of this Court in this case would be the scope and extent of applicability of Section 202 of the Code of Criminal Procedure, 1973 (hereinafter referred to as ‘Cr.P.C.’).
- (5) However, before dealing with the aforesaid, this Court deems it apt to look into the nature of allegations as has been reflected through the aforesaid complaint case. Opposite party no.2 herein is the complainant. Applicants of the present petition are the named accused in the aforesaid complaint case. Opposite party no. 2 has filed an application under Section 156 (3) Cr.P.C. against the applicants and three others, alleging that on 15.09.2011, at 09:00 p.m., he was returning to home from a nearby temple and when he had just reached to the door of his house, Ram Murti Tewari (applicant no.1) armed with licensee gun while pointing it towards him (complainant) told that today he would kill him. Along with that son of Ram Murti Tewari, namely, Shailendra Kumar Tiwari (applicant no.2) armed with country made pistol also ran towards him with intention to kill. Thereupon, he (complainant) ran and entered into a room of his house, wherein Ram Murti Tewari and his son Shailendra Tewari armed with gun, brother-in-law of Shailendra Tewari, namely, Paritosh armed with Hockey stick, and wife of Shailendra Tewari, namely, Rekha Tewari and friend of Shailendra Tewari, namely, R.K. Pal armed with pistol, also

entered inside the house of the complainant with intention to kill. Even, the complainant's wife, when she came forward in order to save complainant, the aforesaid persons misbehaved with her and abused her obscenely. Subsequently, when his wife raised alarm, his neighbours, namely, A.K. Singh, Abhay Kumar Singh, Hem Raj Bhatt, Ram Avtar Prasad Sharma and Smt. Sheela Devi wife of Ajit Singh etc. rushed to the complainant's house and challenged the aforesaid persons. Thereafter, the aforesaid persons while waiving their weapons in the air, ran away by threatening that if anyone will report to the police, then, they will kill their family and by throwing bomb, he would turn the entire house along with the family into a field and will also take care of all the people in the locality.

- (6) The complainant has alleged that he has reported the aforesaid incident to the police station concerned but the same was not registered, leading to filing of the aforesaid application under Section 156 (3) Cr.P.C.
- (7) Although, the learned Trial Court refused to give directions for registration of FIR, however based on the allegations made in the aforesaid application, the trial Court has treated the aforesaid application as complaint case and registered it as Complaint Case No. 2927 of 2011. Thereafter, the trial Court has proceeded to hear the matter and it recorded the statement of the complainant under Section 200 Cr.P.C. and also the

statements of complainant's wife, namely, Kamini Singh and complainant's nephew, namely, Ajay Kumar Singh as P.W.1 and P.W.2, respectively, under Section 202 Cr.P.C. Thereafter, on the basis of their statements, the trial Court has formed opinion that prima facie, offences under Sections 452, 323, 504, 506 I.P.C. have been made out against accused persons including the applicants. As such, vide order dated 23.01.2013, the accused persons including the applicants have been summoned by the trial Court. Subsequently, as the accused persons including applicants have not appeared before the trial Court, bailable warrants have been issued against the applicants and other accused persons except co-accused Rekha Tewari vide orders dated 29.10.2015 and 14.12.2015. It was these orders dated 23.01.2023 and consequent orders dated 29.10.2015 and 14.12.2015, which has been challenged in this application under Section 482 Cr.P.C.

- (8) While entertaining the instant application, a Co-ordinate Bench of this Court has passed the following order on 02.02.2016 :-

"Heard learned counsel for the petitioners and learned Additional Government Advocate.

Learned counsel for the petitioners states that the present complaint has been filed as a counter blast. Earlier, Shailendra Kumar Tiwari had lodged F.I.R. against opposite party no. 2, his son and others under Sections 354, 452 and 506 I.P.C.

Issue notice to opposite party No. 2 returnable at an early date.

List in the week commencing 14th March, 2016.

Till next date of listing, further proceedings in complaint case no. 2927 of 2011 (Akhileshwar Singh versus Shailendra Kumar Tiwari and others) under Sections 452, 323, 504, 506 I.P.C. pending before the learned Judicial Magistrate-I, Lucknow shall remain stayed.”

(9) The first and foremost point raised by the learned Counsel for the applicants is that the Magistrate has erred in law by not instituting an inquiry in this case as envisaged under Section 202 Cr.P.C. prior to summoning the accused persons including the applicants. According to the learned Counsel, applicant No. 1, who is the father of the applicant No.2 and Paritosh Kumar Pandey *alias* Kaptan, who is the brother-in-law of the applicant no.2, were not residing within the territorial jurisdiction of the trial Court, who has taken cognizance of the offence in this case, hence the impugned summoning order as well as consequential orders are bad in law. In this regard, he has placed reliance upon the judgment of the Apex Court in **ODI Jerang Vs. Nabajyoti Baruah and others** (Special Leave to Appeal (Crl.) No. 2135 of 2022, decided on 22.08.2023).

(10) The next submission of the learned Counsel for the applicants is that applicant no. 2-Shailendra Kumar Tewari had lodged an F.I.R., bearing No. 185 of 2011, under Sections 354, 452, 506 I.P.C. at police station Cantt, district Lucknow against the opposite party no.2 and his associates on 03.08.2011 and thereafter, the opposite party no.2 has filed an application under Section 156 (3) Cr.P.C. as a counterblast of the case, which was

treated as complaint case, bearing No. 2927 of 2011, by the Judicial Magistrate-II, Lucknow vide order dated 02.11.2011. Thereafter, in the said complaint case, complainant/opposite party no.2 had recorded his statement under Section 200 Cr.P.C. and in support of his complaint, he had produced his wife Kamini Singh and his nephew Ajay Kumar Singh as witnesses, who have recorded their respective statement under Section 202 Cr.P.C. Based on the aforesaid statements, the learned trial Court has mechanically passed the impugned summoning order dated 23.01.2023 without applying the judicial mind. He submits that there is no injury or medical report of the complainant/opposite party no.2 to substantiate the oral allegations of the complainant and there is no allegation in the entire complaint or statements under Section 200 Cr.P.C. or Section 202 Cr.P.C. to substantiate the allegations pertaining to the offence under Section 323 Cr.P.C.

- (11)** Learned Counsel for the applicants have further submitted that the applicants have never made any deliberate attempt to avoid their presence before the trial Court as they had never been served with any summon of the case and without any service of summons upon the applicants, the trial Court has straightaway issuedailable warrants against the applicants by means of the impugned orders dated 29.10.2015 and 14.12.2015. According to the learned Counsel, the applicants came to know the

bailable warrants when the local police has reached to the house of the applicants in their absence. His submission is that the impugned bailable warrants have been issued against the applicants in a routine manner and without application of mind.

(12) Learned A.G.A., on the other hand, opposed the aforesaid submissions of the applicants and has submitted that it is the discretionary power of the trial Court to pass the summoning order, thus the impugned summoning order has been passed by the trial Court after applying judicial mind.

(13) Having regard to the rival submissions of the learned Counsel for the parties and after perusing the record available before this Court, it is manifest that the learned trial Court, vide order dated 02.11.2011, treated the application of the complainant filed under Section 156 (3) Cr.P.C. as a complaint case. The complainant was examined under Section 200 Cr.P.C. and that his wife Kamini Singh and his nephew Ajay Kumar Singh were examined under Section 202 Cr.P.C. as PW-1 and PW-2, respectively. Thereafter, accused persons including applicants have been summoned vide impugned order dated 23.01.2013 for offences under Sections 452, 323, 504, 506 I.P.C.

(14) The provisions of Section 202 Cr.P.C. reads as under :-

"(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has

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

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

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

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

(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant."

- (15) It may be pointed out that 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 in the above section by way of amendment by the Code of Criminal Procedure (Amendment) Act, 2005, with effect from 23 June 2006. In the case of **Vijay Dhanuka v. Najima Mamtaj** : (2014) 14 SCC

638, the Apex Court, while interpreting the above legal provision, held that :

"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."

It was further observed by the Hon'ble Supreme Court as under :-

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

(16) In the case of Abhijit Pawar v. Hemant Madhukar Nimbalkar and another : (2017) 3 SCC 538, the Hon'ble Supreme Court held that such an inquiry or investigation was

mandatory when the accused person resides outside the jurisdiction of the Magistrate, by observing 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 CrPC 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."

- (17) On the issue of the scope of such inquiry, it may be pointed out that as mentioned in Section 202(1) Cr.P.C. itself, such inquiry is to be conducted for the purpose of deciding whether or not there is sufficient ground for proceeding. Sub-section (2) of Section 202 further enables the Magistrate to take evidence of witnesses on oath during such inquiry, and where the offence is triable by Sessions Court, it is mandatory for the Magistrate to "call upon the complainant to produce all his witnesses and examine them on oath" during such inquiry.

- (18) In *Vijay Dhanuka v. Najima Mamtaj* (Supra), after referring to the definition of the word "inquiry" in Section 2(g) of the Cr.P.C., the Supreme Court held that:

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

- (19) From the above-stated pronouncements, it is quite apparent that the necessary requirement for the Magistrate to comply with the said provisions under Section 202 of the Cr.P.C. would be his satisfaction and finding it fit regarding the necessity to cause an inquiry as provided therein and mandatorily in a case, where the accused is residing beyond the area of territorial jurisdiction of the said Magistrate.

- (20) In the instant case, it is quite clear that after examination of complainant under Section 200 Cr.P.C., two witnesses, namely, PW-1 Kamini Singh and PW-2 Ajay Kumar were examined and based on their statements recorded under Section 200 and 202 Cr.P.C., the trial Court, without instituting any inquiry as envisaged under Section 202 Cr.P.C., issued summons to the

accused persons including the applicants, which is contrary to the law laid down by the Apex Court in **Odi Jerang Vs. Nabajyoti Baruah and others (supra)**, hence the impugned summoning order and consequent impugned orders are liable to be set-aside.

- (21) So far as these contentions are concerned that complainant has made false allegations and that this case was filed as a counterblast, it may be stated that the legal position on the issue of quashing of criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases. However, where the allegations made in the FIR or the complaint and material on record even if taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused, the charge-sheet may be quashed in exercise of inherent powers under Section 482 of the Cr.P.C. In well celebrated judgment reported in AIR 1992 SC 605 : **State of Haryana and others Vs. Ch. Bhajan Lal**, Hon'ble Supreme Court has carved out certain guidelines, wherein FIR or proceedings may be quashed but cautioned that the power to quash FIR or proceedings should be exercised sparingly and that too in the rarest of rare cases.
- (22) In the instant case, the submissions raised by learned counsel for the applicants call for determination on questions of fact

which may be adequately adjudicated upon only by the trial court and even the submissions made on points of law can also be more appropriately gone into only by the trial court. Adjudication of questions of facts and appreciation of evidence or examining the reliability and credibility of the version, does not fall within the arena of jurisdiction under Section 482 Cr.P.C. In view of the material on record, it can also not be held that the impugned criminal proceeding are manifestly attended with *mala fide* and maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

- (23) After considering arguments raised by the learned counsel for parties and perusing the impugned complaint and the materials in support of the same, this Court does not find it to be a case which can be determined or gone into in an application under Section 482 Cr.P.C. This Court cannot hold a mini trial in an application under Section 482 Cr.P.C. No such ground appears to be available to the applicants, on the basis of which the impugned complaint can be quashed going by the settled law in **R.P. Kapur Vs. State of Punjab**, A.I.R. 1960 S.C. 866, **State of Haryana Vs. Bhajan Lal**, 1992 SCC (Cr.) 426, **State of Bihar Vs. P.P.Sharma**, 1992 SCC (Cr.) 192 and **Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another** 2005 SCC (Cr.) 283.

(24) In view of the aforesaid discussion, since compliance of provisions under Section 202 of the Cr.P.C. is mandatory and unavoidable for a Magistrate before issuance of summons in the case of alleged offender who resides outside his territorial jurisdiction, this Court find that the impugned order directing issuance of summons in this case dated 23.01.2023 and consequent orders dated 29.10.2015 and 14.12.2015 are unsustainable in the eyes of law.

(25) Accordingly, the impugned summoning order dated 23.01.2013 and impugned consequent orders dated 29.10.2015 and 14.12.2015 are hereby set-aside. The matter is remitted to the learned Magistrate concerned for proceeding in Complaint Case No. 2927 of 2011 in due compliance with the settled provisions of law.

(26) With the aforesaid observation and direction, this application under Section 482 Cr.P.C. stands **disposed of** along with pending applications, if any.

(Om Prakash Shukla, J.)

Order Date : 28th August, 2024
Ajit/-