

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1404 OF 2016

1. Asma w/o Moinoddin
@ Shaker Quazi
Age : 26 Yrs., Occ. :
Household, R/o : Plot
No. 28, New Ansar
Colony, Lane No. 2,
Padegaon, Aurangabad.
2. Shafiyoddin Ahmed Shaikh
Age : 50 Yrs., Occ. Service,
R/o : Plot No. 28, New Ansar
Colony, Lane No. 2,
Padegaon, Aurangabad.
3. Mehruneesa w/o Shafiyoddin
Shaikh, Age : 45 Yrs.,
Occ. Household, R/o : Plot
No. 28, New Ansar
Colony, Lane No. 2,
Padegaon, Aurangabad.
4. Azaroddin s/o Shafiyoddin
Shaikh, Age : 23 Yrs.,
Occ. Student, R/o : Plot
No. 28, New Ansar
Colony, Lane No. 2,
Padegaon, Aurangabad.

..... PETITIONERS

VERSUS

1. The State of Maharashtra
Through Police Inspector,
Police Station, Udgir,
Dist. Latur.

2. Moinoddin @ Shaker s/o
Shirajoddin Quazi
Age : 32 Yrs., Occ. Govt.
Service, R/o : H.No. 382/2,
Siddharth Nagar,

..... RESPONDENTS

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Mr. R.S.Deshmukh, Advocate for Petitioners.

Mr. G.O.Wattamwar, A.P.P. for R – 1 – State.

Mr. Ajinkya S.Reddy, Advocate for R – 2.

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CORAM : V.L.ACHLIYA, J.**DATE OF JUDGMENT : 28/09/2017**

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ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. By
consent heard finally.

2. Heard the learned counsel for the petitioners,
A.P.P. for respondent No. 1 – State and learned counsel

for respondent No. 2.

3. In view of the limited challenge raised in the petition confined to issuance of process without conducting inquiry as contemplated u/s 202 of Cr.P.C., it is not necessary to discuss the facts in detail.

4. Heard the learned counsel for the petitioners, respondent No. 2 and A.P.P. for State and perused the impugned order.

5. Mr. R.S.Deshmukh, the learned counsel for the petitioners invited attention to the impugned order and submitted that in view of the amendment made to section 202 of Code of Criminal Procedure which is brought into effect from 23/06/2006 before passing order of issuance of process, it is mandatory on the part of learned Magistrate to conduct inquiry by himself or to direct to make investigation by the police officer and then to form opinion that sufficient grounds exist to proceed against the accused. It is contended that the impugned order is passed without conducting the mandatory inquiry as contemplated u/s 202 of Cr.P.C. The accused are residents of Aurangabad. The complaint was filed at

Udgir, District : LaturIn view of the mandate of section 202 of Code of Cr.P.C., the Magistrate ought to have postpone the process and conducted enquiry on his own or ordered investigation as contemplated u/s 202 of Code of Criminal Procedure before issuing process.

6. On the other hand, learned counsel representing respondent No. 2 has supported the order passed by the trial Court.

7. Having appreciated the submissions advanced, in the light of the order passed, I am of the view that the order is not sustainable in law. Section 202 of Code of Criminal Procedure 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, [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. "

8. Thus, the plain reading of the provision spell out that if the accused are not residing within the jurisdiction of the Magistrate, then it is incumbent upon the Magistrate to postpone the process and conduct enquiry on his own or through the investigating agency or any other person. Only after conducting the investigation, if the Court is satisfied that there are sufficient grounds to proceed against the accused, then only the order of issuance of process can be passed. In the case of **Abhijit Pawar Vs. Hemant Madhukar Nimbalkar reported in 2015 SCC On Line SC 1533**, the Apex Court has considered the purport of section 202 of Code of Criminal Procedure vis-a-vis the amendment made to section 202 and ruled that the compliance of section 202 is mandatory. In para Nos. 32 and 34, the Court has

observed as under :

" 32. 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 of the Cr.P.C. was amended in the year by the Code of Criminal Procedure (Amendment) Act, 2005 with effect from 22nd June, 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. The essence and purpose of this amendment has been

captured by this Court in Vijay Dhanuka Vs. Najima Mamta in the following words :

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. 23/06/2006. 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) 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 ."*

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."

34. The requirement of conducting enquiry or directing investigation before issuing process is, therefore, not an empty formality. What kind of 'enquiry' is needed under this provision has also been explained in Vijay Dhanuka case, which is reproduced hereunder :

14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2 (g) of the Code, the same reads as follows :

"2. (g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"

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. "

9. In this view, the impugned order is liable to be set aside and the matter needs to be remanded back to the trial Court with a direction to conduct enquiry as contemplated u/s 202 of Code of Criminal Procedure and then to pass appropriate order. Hence, the following order is passed.

ORDER

[i] The petition is allowed.

[ii] The impugned order is set aside. The case is remanded back to the trial Court. The learned Magistrate is directed to conduct enquiry u/s 202 of Code of Criminal Procedure and then to pass appropriate order as deem fit and proper in the facts and circumstances of the case.

[iii] Rule made absolute in above terms.

[V.L.ACHLIYA, J.]

KNP/Cr.W.P. 1404.2016 - [J]