

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

% Decided on: 17th January, 2017

+ CRL.M.C. 1713/2016 & CrI.M.A. 7262/2016 (stay)

RAM SINGH

..... Petitioner

Represented by: Mr. N.Rai with Mr. S.K.
Saurav, Advs.

versus

MADHURI SINGH

..... Respondent

Represented by: Mr. Zakir Husain, Adv.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Cost as imposed vide order dated 25th July, 2016 has been paid to learned counsel for the respondent.
2. A petition under Sections 12 and 23 of the Protection of Women from Domestic Violence Act, 2005 (in short 'PWDV Act') was filed by the respondent before the learned Metropolitan Magistrate wherein the petitioner, who is the husband of the respondent, was summoned. Challenging the order dated 16th October, 2015 summoning the petitioner, the petitioner prefers the present petition.
3. The grounds urged by learned counsel for the petitioner challenging the order of summoning are that since the petitioner is a resident of Bihar, he could not have been summoned by the learned Metropolitan Magistrate without conducting an inquiry under Section 202 Cr.P.C. and the testimony of the complainant cannot be treated as an inquiry. It is further stated that having lived together for 42 years, the allegations of the complainant are false and no documents have been filed to support her allegations.

4. In the complaint under Section 12 of PWDV Act, the respondent stated that she had been residing at Gona House, Mainpura Bagicha, LCT Ghat, PS Patliputra, Patna, Bihar since 11th May, 1988 to 31st August, 2015 and has suffered unabated continuous acts of domestic violence and apprehends repetition of the acts of domestic violence from the petitioner. It is alleged that she has been threatened by the petitioner that she will not be able to enter the matrimonial home and will be tortured if she desires to return. The respondent states that she was facing great financial hardship and exparte ad interim relief be granted. In the complaint, the respondent also alleged that the petitioner has developed extra-marital relationship with his colleague and stopped maintaining the respondent.

5. Section 202 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, [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 Code on an officer in charge of a police station except the power to arrest without warrant.”

6. Holding that the inquiry contemplated under Section 202(1) Cr.P.C. where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction is mandatory, the Supreme Court in the decision reported as (2014) 14 SCC 638 Vijay Dhanuka etc. Vs. Najima Mumtaj etc. also explained the nature of inquiry required to be conducted at the stage of Section 202 Cr.P.C. 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) 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.

*13. In view of the decision of this Court in *Udai Shankar Awasthi v. State of U.P.* [(2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708], this point need not detain us any further as in the said case, this Court has clearly held that the provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment: (SCC p. 449, para 40)*

“40. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were outside his territorial jurisdiction. The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it [Ed.: The matter between the two asterisks has been emphasised in original as well.] mandatory to postpone the issue of process [Ed.: The matter between the two asterisks has been emphasised in original as well.] where the accused resides in an area beyond the territorial jurisdiction of the Magistrate

concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases.”

(emphasis supplied)

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.

15. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.”

7. Section 202 Cr.P.C. provides that in case the accused is residing at a place beyond the area in which the Magistrate exercises its jurisdiction, he shall 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

such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. Sub-section 2 of Section 202 also contemplates that if the Magistrate thinks fit, he may take evidence of witnesses on oath. Thus, for an allegation where the complainant's evidence on oath itself is sufficient, the Magistrate will not reexamine her on oath again following the mandate of Section 202 Cr.P.C. Even though the word 'shall' has been used in Section 202 Cr.P.C. directing the Magistrate to hold an inquiry either himself or direct an investigation through police or any such person however the said mandate does not mean that he is bound to examine and conduct an inquiry where the facts of the case do not warrant any inquiry. Thus, the contention of learned counsel for the petitioner that the impugned order summoning the petitioner is required to be set aside on the ground that mandatory inquiry under Section 202 Cr.P.C. was not conducted deserves to be rejected.

8. The contention of learned counsel for the petitioner that the allegations in the petition and deposition of the complainant are false also deserves to be rejected for the reason falsity or untruthfulness of the allegations cannot be considered at this stage as it will be for the petitioner to take the plea of falsity before the learned Metropolitan Magistrate at appropriate stages.

9. Petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

JANUARY 17, 2017
'v mittal'