

05.04.2019
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Item No.1

IN THE HIGH COURT AT CALCUTTA CIRCUIT BENCH AT JALPAIGURI

C.R.R. 5 of 2019

Mr. Kamal Krishna Banerjee
Mr. Bhaskar Roy Mahashaya

.....For the petitioner

Mr. Sourav Ganguly

...for the State

The petitioner no. 1 is the husband, petitioner no. 2 is the father-in-law and the petitioner no. 3 is the mother-in-law who have been arrayed as accused persons in a proceedings being C.R.Case No. 733 of 2018 on the basis of a complaint which the petitioners have assailed in this revisional application.

Mr. Kamal Krishna Banerjee, learned advocate assisted by Mr. Bhaskar Roy Mahashaya, learned advocate for the petitioner submits that the complaint has been filed to harass and defame the petitioners by getting process under Section 406/34 of the Indian Penal Code against them. The purpose of filing the complaint was only to get issuance of search warrant against the petitioners to recover Stridhan properties of the complainant/Opposite Party which she left in her matrimonial home on her own.

The grounds in this revisional application are two fold, one is that the order dated 17.08.2018 passed in the proceeding under reference simply reveals that record was put up and complainant was examined under Section 204 of the Code of Criminal Procedure. This

is the mistake technically on the part of the learned Magistrate who can only record evidence on solemn affirmation of the complainant or his or her witness under the provisions of Section 200 of the Code of Criminal Procedure. A dispute cropped up that there is no reflection from the said order that whether or not the complainant was at all examined under Section 200 of the Code of Criminal Procedure. So in order to understand this court by its order dated 02.04.2019 called for the report from the learned Magistrate with a copy of the statement of SA of the complainant and that was filed before this Court through the Registrar, Calcutta High Court Circuit Bench at Jalpaiguri and has been found that Section 200 of the Code of Criminal Procedure has been technically applied though mistake crops up in the order aforesaid that the complainant was examined under Section 204 of the Code of Criminal Procedure instead of Section 200 of the Code of Criminal Procedure.

Since this Court finds that the complainant/wife was examined under Section 200 of the Code of Criminal Procedure by recording her statement on solemn affirmation and other than the process under Section 406/34 of the Indian Penal Code was issued it can safely be held that the order substantially cannot be faulted with. However, second fold of argument as advanced by the learned advocate for the petitioner is essentially important to take note of in reference to the cited decisions relied on by the learned advocate for the petitioner.

It is submitted that the learned Magistrate issued process in a mechanical manner without holding inquiry as contemplated under Section 202 of the Code of Criminal Procedure and issued the process beyond the territorial jurisdiction of the learned Judicial Magistrate,

Siliguri. It is submitted that because title of this revisional application and so also the petition of complaint will clearly reveal that the petitioners are the resident of Pandapara Police Station Kotwali in the Jalpaiguri District and the matrimonial house of the complainant is also situated in Jalpaiguri at the said address. Therefore, the learned Chief Judicial Magistrate, Jalpaiguri had the jurisdiction to entertain such an application of complaint instead of the learned Judicial Magistrate, Siliguri entertain such a complaint by starting a specific case and by issuing a process without inquiry as to whether he at all any territorial jurisdiction to entertain such a complaint. It is further submitted that by so issuing the process of the summon upon the petitioner without holding prior inquiry has caused prejudice to the interest of the petitioners and the same is vitiated in view of the mandate as provided under Section 202 of the Code of Criminal Procedure. Accordingly it is prayed on behalf of the petitioner that the entire process be quashed. In support of the contention learned advocate for the petitioner refers to decision in the case of Vijay Dhanuka & Ors. Vs. Najima Mamtaj & Ors. Reported in (2014)14SCC 638 and invites my attention to the observation made in paragraph 12 which reads thus-

“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.”

It has been held that Section 192 of the Code of Criminal Procedure empowers in Chief Judicial Magistrate to transfer the case for inquiry after taking cognizance to a competent Magistrate subordinate to him. In the case in hand what is understood is that the Additional Magistrate, Siliguri having taken cognizance on the complaint and transfer the case to the court of Judicial Magistrate, 1st Court, Siliguri for trial and disposal but fact remains that the learned ACJM had no territorial jurisdiction in given facts of the case. I absolutely agree with the contention of the learned advocate for the petitioners that provision of Section 202 of the Code of Criminal Procedure has to be mandatorily applied and the report to conduct enquiry or to direct investigation before issuing process where accused persons are residing beyond the territorial jurisdiction of the Magistrate concerned. The whole purpose is to give protection to the innocent persons residing at a far off places from being harassed.

Learned advocate for the petitioner refer to a decision in the case of Abhijit Pawar Vs. Hemant Madhukar Nimbalkar & Anr. reported in (2017) 3 SCC 528 wherein it has been held that admitted position in law is that in those cases where the accused is residing at a place beyond the area in which the learned Magistrate exercised his jurisdiction it is mandatory on the part of the learned Magistrate to conduct an inquiry or investigation before issuing the process. Section 202 of the Code of Criminal Procedure was amended in the year 2005 by the Code of Criminal Procedure Amendment Act, 2005 with effect from

22.06.2006 by adding the words 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 and objection behind this amendment namely two word of “false complaint 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 learned Magistrate to conduct an enquiry or direct investigation before issuing the process so that false complaint are filtered and rejected.

The aforesaid purpose is specifically mentioned in the note appended to the bill proposing the said amendment.

Learned advocate for the petitioner has relied upon the observation in the context of the application of provision of Section 202 of the Code of Criminal Procedure to the observation made in paragraph 24 which reads thus-

“24. The essence and purpose of this amendment has been captured by this Court in Vijay Dhanuka v. Najima Mamtaj, 2014 14 SCC 638 in the following words: (**SCC p. 644**, paras 11-12)

“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.”

In the context above, and further upon hearing Mr. Sourav Ganguly, learned advocate for the State that in a case like this Section 406 of the Indian Penal Code does not apply if the entrustment is not shown.

Since I agree with all such contention on this score that in a case of split ville between the spouse due to marital discord when the wife is found to have left her matrimonial home on her own leaving her Stridhan property in her matrimonial home it can not be said that the husband or the inmates of his home has misappropriated the Stridhan properties. Bearing in mind the order in respect of the search warrant issued by the impugned order I find that search warrant has already been executed and the Stridhan Properties have recovered and possession of the complainant in compliance of that order. So I once again reiterate agreeing with the contention of the learned advocate for the petitioner that the complaint was purposefully filed only to get the issuance of warrant of search.

With the observation I find that the learned Magistrate has failed to hold inquiry by investigating all the facts in the interest of justice to do between the parties and the process having been issued without adhering to the mandatory provision of Section 202 of the Code of Civil Procedure. The

cognizance taken over the proceeding by the learned ACJM and thereafter the learned Judicial Magistrate, 1st Court, having taken the exercise of further prosecute the petitioners in the complaint case, I am inclined to quash the proceeding in entirety.

However, with this observation that since the Stridhan properties has been received by the complainant she can enjoy her properties as her own and if she desires she can have reconcile with her husband to maintain a spontaneous tie between the petitioner and herself.

Ergo the proceeding being C.R.Case No. 733 of 2018 and orders passed in connection with the said proceedings are quashed and set aside.

With these above observation this revisional application being CRR No. 5 of 2019 is allowed.

Urgent photostat certified copy of this order be given to the parties, if applied for, on the usual undertaking.

(Shivakant Prasad, J.)