

In the High Court of Punjab and Haryana at Chandigarh

**CRM-M No. 19457 of 2018 (O&M)
Date of Decision: 05.02.2020**

Diamond Sodhi and others

.....Petitioners

Versus

Mukal Arora

.....Respondent

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. Ankur Bansal, Advocate
for the petitioners.

Mr. Rohit Ahuja, Advocate
for the respondent.

HARNARESH SINGH GILL, J.

This petition has been filed for quashing of criminal complaint No. 23 dated 23.2.2017 titled 'Mukal Arora versus Diamond Sodhi and others' under Sections 406, 420 IPC and Section 24 of Immigration Act and all the consequential proceedings arising therefrom including the summoning order dated 31.5.2017 (Annexure P-2).

Learned counsel for the petitioners submits that on 18.8.2015, the respondent had visited the office of petitioner No. 4 for Australia general skilled Migrant Visa program and petitioner No. 2, being an employee of petitioner No. 4, had filled the registration form dated 18.8.2015. At that time, the respondent was 39 years of age and total 60 points in different fields were required by the respondent for the said migration program. In this regard, a written contract was entered into between petitioner No. 4 and the respondent. All the terms and conditions of

the contract were duly explained to the respondent, who after accepting all

the terms and conditions, had put his signature on the said contract. As per the terms and conditions of the said contract, the respondent had paid Rs. 28,500/- to petitioner No. 4. After registration, the respondent was provided expertise guidance and he was asked to sign the application for skills assessment to be submitted to VETASSESS, which is Australia's leading vocational education and training (VET) assessment provider. The said form was signed by the respondent and he submitted a demand draft of Rs. 810 Australian Dollars in favour of VETASSESS. After assessing the skill points of the respondent, VETASSESS had given the result positive. On 23.12.2015, the respondent visited the office of petitioner No. 4 and paid the second installment of Rs. 80,150/-. As per the contract, the respondent was asked to prepare and appear for PTE (Pearson English Test Academic). The respondent of his own appeared in PTE test but failed to get the band marks as required by the assessing authority.

Learned counsel for the petitioner further contends that the petitioners have been summoned by the trial Court without complying with the mandate of Section 202(1) Cr.P.C. He further submits that *prima facie*, there was no evidence against the petitioners to summon them under Sections 406 and 420 IPC as the amount was received by petitioner No. 4 against proper receipt and for the services rendered by the petitioners to the respondent. Learned counsel also submits that the respondent remained unsuccessful in clearing the PTE test within time i.e. before attaining the age of 40 years and the element of *mensrea* or inducement is missing in the present complaint. It is further argued that the petitioners have been wrongly summoned under Section 24 of the Emigration Act and the provisions of Emigration/Immigration Act are not applicable to petitioner

No. 1 and no prima facie case is made out against the petitioners as per the contract entered into between the respondent and petitioner No. 4.

On the other hand, learned counsel for the respondent submits that the respondent was asked to appear for PTE and obtain 6 bands in each module but after getting 6 bands, the respondent visited the office of the petitioners upon which he was told that he was not eligible for P.R. of Australia due to shortage of points. The petitioners have the intention to cheat the respondent and thus, a prima facie case is made out against them. He further submits that the present petition is not maintainable as the petitioners have the remedy of revision against the summoning order before the Court of Sessions Judge, Kapurthala. Learned counsel further submits that several other FIRs have been registered against the petitioners and their employees under Section 420, 406 IPC for cheating people on account of sending them abroad.

I have heard the learned counsel for the petitioners and the learned counsel for the respondent.

When the respondent applied for program i.e. Australia general skilled migrant visa, his age was 39 years and he was to score 60 points and was required to score 7 bands in IELTS. A written contract was executed between the respondent and petitioner No. 4 i.e. CAAN WINGS Consultants Pvt. Ltd. and the respondent had paid the installments from time to time and a draft in favour of VETASSESS, vocational education and training assessment provider. The respondent appeared in Pearson English Test Academic but secured only 6 bands whereas 7 bands were required. In the meantime, the respondent attained the age of 40 years and for that he lost 10 points.

I find that one of the arguments raised by the petitioners' counsel is that the petitioners are having registered office at Jalandhar and contract between the petitioners and respondent was entered at Jalandhar on 18.8.2015 but the complaint in question was filed at Kapurthala. Before issuing summoning order, the Magistrate was duty bound to hold an enquiry regarding the place of residence of the petitioners and where the contract was executed. I find that in the present case, before issuing summons, no enquiry was conducted by the Magistrate.

It would be relevant to reproduce Section 202 Cr.P.C. which 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, 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.”

The Hon'ble Supreme Court of India in ***Abhijit Pawar versus Hemant Madukar Nimbalkar and another 2017(1) R.C.R. (Criminal) 405*** has held 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 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 v. Najima Mamta, 2014(3) R.C.R.(Criminal) 793 : 2014(4) Recent Apex Judgments (R.A.J.) 459 : (2014) 14 SCC 638 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. 23-6-2006. 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 subsection (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."

Even if the arguments have been raised before this Court for the first time, being a pure legal issue, the same can be tested on the basis of admitted facts on record and can be raised at any stage.

The Apex Court in ***National Textile Corporation Limited versus Nareshkumar Badrikumar Jagad, 2011(2) R.C.R. (Rent) 299 : (2011) 12 SCC 695***, has held as under:-

"Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. "

The petitioners before this Court are operating their office at

New Jawahar Nagar, Jalandhar and the contract for permanent residency in

Australia was signed at Jalandhar by the respondent. In my view, in a complaint filed before the Magistrate at Kapurthala, it was mandatory for the Magistrate to comply with Section 202 Cr.P.C.

In the light of above, the petition is partly allowed. Impugned summoning order dated 31.5.2017 (Annexure P-2) is set aside and the matter is remanded back to the trial Court to pass order afresh after holding an enquiry under Section 202 Cr.P.C. in light of the judgment passed by the Apex Court in *Abhijit Pawar's case (supra)*.

The parties through their counsel are directed to appear before the trial Court on 20.2.2020.

The appearance of the petitioners is exempted and they will have to appear as and when the trial Court finds it necessary.

(HARNARESH SINGH GILL)
JUDGE

February 05, 2020
Gurpreet

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No