

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 129 of 2019

***Vivek Agarwal*
-vs-
*Raja Acharji***

For the Petitioner : Mr. Arnab Sengupta
For the Opposite Party : Mr. Shayamal Kr. Mukherjee
Mr. Subas Ray
Heard On : 29.06.2022.
Judgment On : 30.06.2022

Ajoy Kumar Mukherjee, J.

1. The present revisional application has been directed for quashing the impugned proceeding being C. Case No. 3436 of 2018 under Sections 389 of the Indian Penal Code pending in the court of 10th Judicial Magistrate, Alipore, South 24 Parganas.

2. The subject matter under challenge in the present revisional application mainly relates to order dated 13.09.2018 passed in C. Case No. 3436 of 2018 by the learned 10th Judicial Magistrate, Alipore, South 24 Parganas, wherein the learned Magistrate was pleased to issue summon under Section 204 of the Code of Criminal Procedure (in short “the code”) against the petitioner/accused

person for the offence committed under Sections 389 of the Indian Penal Code (in short “IPC”).

3. For better understanding regarding the contents of the impugned order, let me reproduce the relevant order passed by the concerned Magistrate.

“Order Dated: 13.09.2018

Today is fixed for S/A.

Complainant is present by filing hazira.

The record is taken for S/A.

The complainant has been examined on dock and discharged.

Perused the materials on record carefully and the deposition.

Prima facie it appears that a case under Section 389 of IPC has been well established against the accused persons.

Issue process accordingly.

Fix 04.12.2018 for S/R & Appearance.

Requisite at once.

10th Judicial Magistrate, Alipore”

4. Mr. Arnab Sengupta learned counsel for the petitioner argued that issuance of process in the instant case is bad in law as the petitioner is not residing within the territorial jurisdiction of the learned Magistrate, but learned Magistrate without adhering to the mandatory provision under Section 202 of the code had issued process. Non-application of mind before issuing process has been clearly manifested from the aforesaid order.

5. On perusal of the order impugned, it appears that the learned Magistrate examined the complainant only under Section 200 of the code, on solemn affirmation and after considering the complaint as well as the statement made

by the complainant on solemn affirmation came to a conclusion that *prima facie* case having been made out against the petitioner herein under Sections 389 IPC and as such, issued process against the accused person under Sections 389 IPC without adhering to Section 202 of the code , inspite of the fact that the cause title speaks that petitioner is not residing within the territorial jurisdiction of the concerned Magistrate.

6. Mr. Sengugpta argued that the consistent view of the Hon'ble Apex Court is that 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 inquiry or investigation before issuing process. In the present context, learned Magistrate without making inquiry under section 202 of the code had issued summon against the petitioner/accused person and did not ascertain whether there are grounds to proceed or not and as such the entire proceeding is liable to be quashed.

7. It is well settled in catena of decisions that summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course. (***Pepsi Foods Ltd. and another Vs., Special Judicial Magistrate and others***, reported in (1998) 5 SCC 749).

8. Apex Court reminded the notes on clauses for the code of criminal procedure (amendment) Act, 2005 in connection with section 202 of the code in ***National Bank of Oman Vs. Barakara Abdul Aziz and Another*** reported

in **(2013) 2 Supreme Court Cases (Cri) 731**, wherein it was held by the Hon'ble Apex Court in paragraphs 9 and 10 as follows :

“9. The duty of a Magistrate receiving a complaint is set out in Section 202 CrPC and there is an obligation on the Magistrate to find out if there is any matter which calls for investigation by a criminal court. The scope of enquiry under this section is restricted only to find out the truth or otherwise of the allegations made in the complaint in order to determine whether process has to be issued or not. Investigation under Section 202 CrPC is different from the investigation contemplated in Section 156 as it is only for holding the Magistrate to decide whether or not there is sufficient ground for him to proceed further. The scope of enquiry under Section 202 CrPC is, therefore, limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

- (i) on the materials placed by the complainant before the court;*
- (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and*
- (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have”.*

“10. Section 202 of the Cr.P.C. was amended by the Code of Criminal Procedure (Amendment) Act, 2005 and the following words were inserted:

“and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,”

The notes on clauses for the abovementioned amendment read 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 amendment has come into force w.e.f. 23-6-2006 vide Notification No. S.O. 923(E) dated 21-6-2006.”

9. In this context it is the consistent view of Supreme Court that it is mandatory on the part of the Magistrate to inquire or investigate before issuing process where accused does not reside within his jurisdiction. In ***Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and Another*** reported in **(2017) 2 Supreme Court Cases (Cri) 192**, it was held by the Hon'ble Apex Court in paragraph 23 as follows :

“23. 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.”

10. Using of the word “shall” by code of criminal procedure (Amendment Act), 2005 has to be read or mandatory before summons are issued against the accused living beyond the territorial jurisdiction of Magistrate. In ***Vijay Dhanuka and Others Vs. Najima Mamtaj and Others*** reported in **(2015) 1 Supreme Court Cases (Cri) 479**, it was held by the Hon'ble Apex Court in paragraph 12 as follows:

“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”.

11. Supreme Court also reminded that in order to protect innocent persons from being harassed by unscrupulous persons the said amendment provision has been made mandatory. In ***Udai Shankar Awasthi Vs. State of Uttar Pradesh and Another*** reported in **(2013) 2 Supreme Court Cases (Cri) 708**, it was held by the Hon’ble Apex Court in paragraph 40 as follows :

“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 mandatory to postpone the issue of process 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. (See also Shivjee Singh v. Nagendra Tiwary [(2010) 7 SCC 578 : (2010) 3 SCC (Cri) 452 : AIR 2010 SC 2261] , SCC p. 584, para 11 and National Bank of Oman v. Barakara Abdul Aziz [(2013) 2 SCC 488 : JT (2012) 12 SC 432] .)”

12. Learned Counsel for the opposite parties submits that the accused person have not paid his certain dues and when he demanded for payments the accused person put him in fear to commit extortion and had threatened him over telephone. Contents of the complain clearly attracts section 389 of the Indian Penal Code and as the content of complain discloses offence, so the proceeding cannot be quashed at its threshold, invoking power under Article 482 of the Code of Criminal Procedure. The truthfulness of the allegation will be adjudicated at the trial but at this stage it cannot be said on the basis of materials that the elements of section 389 of the I.P.C. are not present.

13. Having regard to the aforesaid settled principle of law as has been enunciated time and again by the Apex Court, I am of the opinion that the learned Magistrate should have conducted an inquiry under Section 202 of the code, in order to ascertain the complicity of the present petitioner who are admittedly residing outside the territorial jurisdiction of the court, before issuing process against the petitioner under section 204 of the code.

14. In view of the above, the order dated 13.09.2018 and all other subsequent orders passed in C. Case No. 3436 of 2018 by the learned 10th Judicial Magistrate, Alipore , South 24 Parganas are hereby set aside.

15. Learned 10th Judicial Magistrate, Alipore, South 24 Parganas is directed to take up the matter afresh and pass necessary order following the provision of Section 202 of the code.

16. The revisional application being CRR 129 of 2019 is, accordingly, disposed of.

However, there will be no order as to costs.

Urgent photostat certified copy of this judgement, if applied for, be given to the parties upon compliance of all formalities.

(AJAY KUMAR MUKHERJEE, J.)