

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

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 474 of 2019

***Priyanka Handa & Ors.
Vs.
Sri Kamal Nain Nangia***

For the Petitioners : Mr. Souvik Mitter
Mr. Samrat Choudhury
Mr. Debarshi Brahma
Ms. Ankita Das Chakraborty
Mr. Sagnik Mukherjee

For the Opposite Party : Mr. Sabir Ahmed
Mr. Mujibar Ali Naskar
Mr. Hillol Saha Poddar
Mr. Shouriyo Mukherjee,
Ms. Sruti Datta

Heard On : 22.06.2022.

Judgment On : 27.06.2022

Ajoy Kumar Mukherjee, J.

1. The present revisional application has been directed for quashing the impugned proceeding being C.R. Case No. 934 of 2018 under Sections 500/34 of the Indian Penal Code pending in the court of learned Judicial Magistrate, 1st Court, Siliguri.

2. The subject matter under challenge in the present revisional application mainly relates to order dated 12.10.2018 passed in C.R. Case No. 934 of 2018 by the learned Judicial Magistrate, 1st Court, Siliguri wherein the learned Magistrate was pleased to issue summon under Section 204 of the Code of Criminal Procedure (in short “the code”) against the accused persons for the offence committed under Sections 500/34 of the Indian Penal Code (in short “IPC”).

3. For better understanding regarding the contents of the impugned orders, let me reproduce the first two relevant orders passed by the learned Magistrate.

“Order Dated: 14.09.2018

This is a complaint case filed this day by the complainant duly supported by an affidavit through Ld. Advocate along with vokatnama and list of documents as per list against the accused persons mentioned in the complaint for the committing offence U/S. 500/34 IPC praying for taking cognizance and issuing process upon the accused persons on the ground as stated in the complaint.

Perused and heard.

Cognizance is taken.

Let the case be registered as C.R. Case.

Let the case record be transferred to the Court of the Ld. Judicial Magistrate, 1st Court at Siliguri.

To 12.10.2018 for appearance of the complainant before the transferee Court.

Additional Chief Judicial Magistrate
Siliguri”

“Order dated 12.10.2018

The Complainant is present. The complainant was examined under section 200 of Cr.P.C. on S.A.

Perused the complaint petition and considered the statements made by the complainant on SA. Complainant produced the documents in original and also filed photocopies of all the documents. The original documents were verified and returned to the complainant by a petition. Let the photocopies of the documents be kept in the record.

Considered. A *prima facie* case having been made out against the accused persons u/S. 500/34 I.P.C. Act, cognizance of the offence is taken.

Let the summons under section 204 Cr.P.C. be issued against the accused persons for the offence u/S. 500/34 I.P.C.

Requisites at once.

Issue the same.

To 20.2.19 for S/R and appearance.

J.M. 1st Court, Siliguri”

4. Mr. Mitter, learned counsel for the petitioners argued that issuance of process in the instant case is bad in law as the petitioners are not residing within the territorial jurisdiction of the learned Magistrate, but learned Magistrate without adhering to the provision of Section 202 of the code had issued process.

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 and the documents, came to a conclusion that *prima facie* case having been made out against the accused persons under Sections 500/34 IPC and as such, issued process against the accused persons under Sections 500/34 IPC without adhering to Section 202 of the code , inspite of the fact that the accused persons are not residing within the jurisdiction of concerned Magistrate.

6. Mr. Mitter strenuously 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 has misused his power by not adhering to Section 202 of the code and had issued summons against the accused persons without ascertaining as to whether there are grounds to proceed 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.

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 Cr.PC 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 of the code 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.”

12. Mr. Ahmed, learned counsel for the opposite party argued that in Section 202 of the code the terms used is *“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”*. This procedure as established in the said Section makes itself clear that a Magistrate is empowered to inquire into the case

himself. Accordingly, in the present context, there is sufficient reason to believe that the Magistrate has taken the responsibility of inquiring himself the complaint, the documents as well as the statement made on solemn affirmation and after making inquiry of all these, he has found that there are grounds to proceed and as such, he had issued process under Section 204 of the code. In this context, Mr. Ahmed further argued that Section 2(g) of the code defines the term “inquiry” which means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. Accordingly, he argued that under the said definition of “inquiry” as given in the Code, Magistrate himself has made inquiry and on being satisfied that there exists ground for proceeding, he has rightly issued summons upon the accused persons. He further argued that the word “and” inserted by way of 2005 amendment is to be read in conjunction with other clauses of the section. I am not agreeable with the aforesaid interpretation of law made by Mr. Ahmed in view of aforesaid consistent view of the Apex Court.

13. Having regard to the aforesaid settled principles 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 petitioners who are residing outside the territorial jurisdiction of the court, before issuing process against the petitioners.

14. In view of the above, the order dated 12.10.2018 and all other subsequent orders passed in C.R. Case No. 934 of 2018 by the learned Judicial Magistrate, 1st Court Siliguri are hereby set aside.

15. Learned Judicial Magistrate, 1st Court, Siliguri 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 474 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.)