

CRR 1024 of 2018

In the matter of: Bharti Telemedia Ltd. & Ors.

....Petitioners.

Mr. Pradip Kumar Ghosh
Mr. Sabyasachi Banerjee
Mr. Ayan Bhattacharjee
Mr. Arindam Chandra
Mr. Atish Ghosh
Ms. Antara Dey

... for the Petitioners.

Mr. Sandipan Ganguly
Mr. Dipanjan Dutt

... for the Opposite Party No.2.

This revisional application under Section 482 of the Code of Criminal Procedure has been filed seeking quashing of the proceeding of Case No.CN/785/17 under Sections 406/420/120B of the Indian Penal Code pending before the court of learned Metropolitan Magistrate, 8th Court at Calcutta including the orders dated December 6, 2017 and December 16, 2017 in connection therewith.

The petitioners have contended that the instant dispute which is purely civil in nature has been clothed and engineered as criminal proceeding by the opposite party no.2, as the civil remedies were unavailable to the opposite party due to efflux of time. The opposite party no.2 who initiated and pursued the instant prosecution is fully aware that the criminal prosecution is unwarranted in the present context and he has initiated the proceeding against the petitioners in order to harass the petitioners and the said proceeding has been actuated with malice.

The petitioner no.1 is a company having its registered office at Bharti Crescent, 1, Nelson Mandela Road, Vasant Kunj, Phase-II, New Delhi-110070 and having its another office at Gurgaon. The petitioner

no.1 contended that his company is a leading global telecommunication company, and is, inter alia, engaged in the business of distribution of satellite television channels through Direct-to-Home (DTH) platform to the Direct-to-Home (DTH) subscribers. The service of the petitioner no.1 and its subscriber base are constantly increasing and the petitioner no.1 offers various channels approximately including High Definition (HD) channels and non-linear services. The petitioner no.1 is one of the leading innovators of the industry and it had launched various innovative services and has also been nominated for International Broadcasting Convention Award. They have goodwill and reputation in their job and the petitioner nos.2 to 6 are the directors of the company.

On December 6, 2017, the opposite party no.2 has filed a complaint before the court of learned Additional Chief Metropolitan Magistrate alleging commission of offences punishable under Sections 406/420/120B of the Indian Penal Code against eleven persons including the petitioners herein, who were arrayed as accused nos.1 to 6, 9, 10 alleging inter alia that despite compliance and payment being made in advance for Rs.25,50,000/-, the channel of the opposite party no.2 was not placed in the genre assumed by the petitioners. On the contrary, the channel of opposite party no.2 was placed in the last category of the entire Bouake of channel. The petitioners dishonestly terminated agreement and stopped broadcasting the channel of opposite party no.2 on its DTH platform. Further allegation is petitioners deceived and fraudulently inducted the opposite party to part with a sum of Rs.9,54,167/- on false pretext etc.

On perusal of the impugned order, it appears that the complaint was filed on December 6, 2017 and the learned Magistrate took

cognizance under Sections 406/420/120B of the Indian Penal Code. The petitioners herein who are arrayed as accused of the said case admittedly are not residing within the jurisdiction of learned Magistrate.

It further appears that learned Magistrate, without complying the provisions as laid down under Section 202 regarding an enquiry about substance of the allegation, had issued summon against the present petitioners under Section 204 of the Code of Criminal Procedure.

Before going further let me reproduce Section 202 of the Code of Criminal Procedure, which runs as follows:-

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 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.

In the present context, after taking cognizance under Sections 406/420/120B of the Indian Penal Code, Magistrate issued process

under Section 204 of the Code by the order impugned which runs as follows:-

“Order dated -16-12-2017

Received the case record from Ld ACMM, Calcutta.

The complainant is present with his Ld. Advocate.

Mr. Kaushik Kishore Ghose as P.W.1 and Prasanta Nath as P.W.2 have been initially examined on S.A. u/s. 200 Cr.P.C.

It appears that the allegation u/s.406/420/120B of I.P.C. has been established prima facie against the accused persons.

Issue summon at once u/s. 204Cr.P.C. upon the accused persons.

To 29-01-2018 for S/R.

Requisite at once.”

It is apparent from the face of complaint, that the petitioners herein, the principal accused persons are not residing within the jurisdiction of learned Magistrate. It is well-settled that since it is a process of taking a judicial notice of certain facts which constitutes an offence, there has to be application of judicial mind, whether the materials brought before the court would constitute the offence and whether there are sufficient grounds for proceeding against the accused and obviously such endeavour is not a mechanical process.

In *Birla Corporation Ltd. vs. Adventz Investments and Holdings Limited* reported in (2019) 16 SCC 610, it was held that object of an enquiry under Section 202 Cr.P.C. is for the Magistrate to scrutinize the materials produced by the complainant to satisfy himself that the complainant is not frivolous and that there is evidence/material which forms sufficient ground for the Magistrate to proceed to issue process under Section 204 Cr.P.C. It is the duty of the Magistrate to elicit

every fact that would establish the bona fides of the complaint and the complainant.

In *Abhijit Pawar vs. Hemant Madhukar Nimbalkar & Anr.* reported in (2017) 3 SCC 528, Supreme Court observed that it is mandatory on the part of the Magistrate to conduct an inquiry on investigation before issuing the process in such case. The relevant portion of the judgment runs 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.”

Apex Court also held that the word “shall” used in the provision is mandatory and it was observed in *Vijay Dhanuka & Ors. vs. Najima Mamtaj & Ors.* reported in (2014) 14 SCC 638 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.”

In view of aforesaid discussion, instead of quashing the complaint, Magistrate may be directed to pass fresh orders following the provisions of Section 202 Cr.P.C.

Accordingly, impugned order dated 16.12.2017 and all subsequent orders in the said proceeding is hereby quashed. The matter is remitted to the Magistrate concerned for passing fresh orders uninfluenced by any observation made by this Court herein and learned Magistrate will pass such fresh orders after complying with the procedure laid down in Section 202 Cr.P.C. within three months from the date of receipt of this order.

CRR 1024 of 2018 along with the connected application, if any, is accordingly disposed of.

However, there will be no order as to costs.

Urgent photostat certified copies of this order may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(Ajoy Kumar Mukherjee, J.)