

30.08.2022

Sl. No. 64

Srimanta

Ct.No. 35

CRR/1959/2019

In the matter of : **Dinesh Roy & Anr.**

...petitioners.

Mr. Saryati Datta, Adv.,
Ms. Rajnandini Das, Adv.,
Mr. Chitrak Biswas, Adv.

...for the petitioners

Mr. Kaushik Chatterjee, Adv.,
Mr. Tirthankar Dey, Adv.

...for the opposite party.

Being aggrieved by the impugned proceeding being Complaint Case No. 73139/2018, under Sections 406/418/506 of the Indian Penal Code pending before the Court of the Learned Metropolitan Magistrate, 19th Court, Kolkata, present application under Section 482 of the Code of Criminal Procedure has been preferred.

The opposite party herein is a Company that provides financial assistance to customers. The opposite party through its representative, registered the aforesaid complaint case alleging, *inter alia*, that the petitioners availed financial assistance from the opposite party to purchase a vehicle. As per agreement the petitioners were obliged to pay back the loan amount to the opposite party in monthly installments. However, the petitioners willfully neglected and failed to make regular payments of the loan amount to the opposite party and as a result had an outstanding due to the tune of Rs.27,870/-.

The opposite party sent its agent to collect the outstanding dues from the petitioners, however, it is alleged that the petitioners verbally abused him and even tried to assault him physically. The agent thereafter approached the Police Station but the Officer-in-Charge refused to register a

case. It is further alleged that finding no other alternative. Present complaint was filed by the opposite party.

Upon receiving the complaint Learned Chief Metropolitan Magistrate was pleased to take cognizance of the offence and was further pleased to transfer the case to the Learned Metropolitan Magistrate, 19th Court, Kolkata who after taking initial deposition of two witnesses under Section 200 of the Code of Criminal Procedure, recorded that a *prima facie* case under Sections 406/418/506 of the Indian Penal Code has been made out against the petitioners and accordingly he issued summons upon the petitioners.

Mr. Saryati Datta, Learned Advocate appearing on behalf of the petitioners submits that all the accused persons/petitioners are residing outside the jurisdiction of the Learned Metropolitan Magistrate, Kolkata and as such Learned Trial Court before proceeding under Section 204 of the Code of Criminal Procedure should have invoked the provision as laid down in Section 202 of the Code of Criminal Procedure. He further submits that learned court below without applying his judicial mind has mechanically passed the impugned order for issuance of summons under Section 204 of the Code of Criminal Procedure.

Mr. Dutta further submits that mere disability to return loan amount cannot give rise to a criminal prosecution under section 406 of the Indian Penal Code unless fraudulent or dishonest intention is shown right at the beginning of the transaction since it is the *mens rea* that is the crux of the offence. Moreover in order to implicate under section 418 of IPC, it ought to be read in the light of section 415 IPC and onus is on opposite party to establish that the petitioners had dishonestly and fraudulently deceived opposite party in executing the hypothecation agreement.

Mr. Kaushik Chatterjee, learned Advocate appearing on behalf of opposite party submits that Magistrate being fully justified about *prima facie* case, issued summon, which does not call for interference.

On perusal of the impugned order dated 29.08.2018 it appears that the order is a cryptic one and does not reflect that the Magistrate has at all applied his judicial mind.

In the present case from the given address in the application, it appears that petitioners reside outside the jurisdiction of the court. Section 202 of Cr.P.C. was amended in the year 2005 with effect from 22.06.2006 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." Thus 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 inquiry or investigation before issuing the process, so that false complaints are filtered and rejected. (*Abhijit Pawar Vs. Hemant Madhukar Nimbalkar & others*, reported in (2017) 3 SCC 528.

The summoning order in the impugned proceeding does not reflect any such inquiry or investigation. In ***Vijay Dhanuka and others vs. Najima Mamtaj & others*** reported in **(2014) 14 SCC 638** the Apex court specifically held in Para 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."

For the aforesaid reasons instead of quashing the complaint case no. 73139/2018, this court is remitting the matter to the Magistrate concerned with direction to the learned Magistrate to take up the matter afresh and pass necessary orders as are permissible in law, after following the procedure contained in section 202 Cr.P.C., at the earliest. Thus order dated 29.08.2018 and all the subsequent orders passed in the impugned proceeding is hereby quashed.

CRR 1959/2019 is accordingly disposed of.

However there will be no order as to costs.

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

(Ajoy Kumar Mukherjee, J.)