

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

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 3042 of 2018

Md. Imran Ali

-vs-

Shareen & Anr.

For the Petitioner

:Mr. Sabir Ahmed
Mr. Mujibar Ali Naskar

For the State

Mr. Ranabir Roy Chowdhury
Mr. Sandip Chakraborty
Mr. Mainak Gupta

Heard on

: 06.07.2022

Judgment on

: 19.07.2022

Ajoy Kumar Mukherjee, J.

1. Present revisional application has been directed for quashing of the proceeding being Complaint case no. C 9760 of 2011 pending before the learned Magistrate, 3rd Court, Alipore, South 24-Parganas under Section 498A/323/500/34 of the Indian Penal Code. Opposite party No.1 remains unrepresented.

2. Mr. Sabir Ahmed, learned advocate for the petitioner submits that it is well-settled principle of law that summoning of the accused in a criminal case is a serious matter and the criminal law cannot be set in motion as a matter of course. Furthermore, the order of the learned Magistrate summoning the accused must reflect that he has applied his mind to the fact of the case and the law applicable thereto. He has to examine the nature of allegation made in the complaint and the evidence both oral and documentary in respect thereof

before initiation of a criminal proceeding. In the present context, aforesaid complaint case no. C-9760 of 2011 was lodged by opposite party no. 2 on the basis of a complaint with a prayer to issue summon under section 500/504 Indian Penal Code on 19th September, 2011. However, it appears vide order no. 1 dated 19th September, 2011, Magistrate observed that a petition of complaint under Section 138 of the Negotiable Instruments Act, 1881 is filed and on perusal of the complaint, the learned Magistrate took cognizance of the same and the case was transferred to the court of learned Judicial Magistrate, 3rd Court, Alipore, South 24-Parganas for disposal in accordance with law. Thereafter, on transfer, the court of learned Judicial Magistrate, 3rd Court, Alipore, South 24-Parganas after taking initial deposition came to a conclusion that there are sufficient materials to proceed against the accused person under Section 498A/323/500/34 of the Indian Penal Code and issued process against the petitioner under section 204 of the Cr.P.C.

3. Mr. Ahmed further submits that from the first recording of the order indicates that the complaint was filed under Section 138 of the Negotiable Instruments Act, 1881 and when it was transferred to the court of learned Chief Judicial Magistrate, 3rd Court, Alipore, South 24-Parganas, the process was issued against the accused going beyond the allegations of sections which comprised of Section 500/504 of the Indian Penal Code. Surprisingly, the order indicates that in a proceedings under Section 138 of the Negotiable Instruments Act, 1881, process issued against petitioner/accused under Section 498A/323/500/34 of the Indian Penal Code though complaint prayed for issuance of process against petitioner/accused before the court under Section 500/504 of the Indian Penal Code. He further submits that the opposite party no.1 already started police case under section 498A IPC on the

basis self same allegation and continuance of second proceeding on the basis of self same cause of action is not permissible in law and issuance of said process under section 204 of the code of criminal procedure has seriously prejudiced petitioner. In this context Md. Ahmed relied upon two judgments ***Babubhai vs. State of Gujarat and others*** reported in (2010) 12 SCC 254 and ***T.T. Antony vs. State of Kerala & others*** reported in (2001) SCC (Cri) 1048.

4. Mr. Roy Choudhury, learned Advocate appearing on behalf of the state submits that order no.1 passed by Magistrate clearly manifests non-application of mind by magistrate before taking cognizance.

5. Let me first go through the contents of complaint. On the basis of an occurrence dated 27.07.2011 at about 11.30 a.m. complainant/opposite party no. 1 lodged a written complaint under the caption “section 504/500 I.P.C.” before chief Judicial Magistrate(CJM), Alipore, South 24 Parganas. The allegation levelled in the said written complaint is that the petitioner and the opposite party no.1 were married according to the Muslim rites and custom and the same was subsequently registered. At the time of marriage considerable cash amount and gold ornaments and other articles were gifted but after marriage, she was subjected to torture in various ways and ultimately on 25.8.2011, her in-laws had driven her from her matrimonial home after assaulting her physically. Subsequently she initiated a proceeding under Section 125 of the Code of Criminal Procedure seeking maintenance and the same is pending for adjudication. The petitioner herein appeared in the said proceeding and abused the opposite party no.1 herein with filthy languages, also threatened her and publicly defamed her by denying their relationship and for which she lodged general diary on July 29, 2011. On the same day, that is,

on July 29, 2011, the accused and his associates also went in front of the house of the complainant and openly declared by shouting that opposite party No. 1 is a divorcee and again abused the opposite party no.1/complainant and for which complainant lost her prestige, goodwill in the locality and became seriously ill and has been suffering from mental agony and she was treated by a local doctor and for which the petitioner committed an offence under Sections 500/504 of the Indian Penal Code.

6. On the basis of said written complaint where in prayer was made by complainant to issue process against the accused person under section 500/504 IPC, order no. 1 dated 19.09.2011 by which cognizance was taken by Magistrate and subsequent orders were passed, in aforesaid C. Case No. 9760 of 2011. Let me reproduce the relevant orders passed by Magistrate.

Order No.1 Date 19/9/11

A petition of Complaint filed u/s 138 N.I. Act. Heard ld. Advocate for the Complainant. Perused the petition of complaint. Considered. Cognizance is taken.

Let the case be transferred to the file of ld. 3rd JM, Alipore for disposal in accordance with law.

Complainant is directed to appear before the transferee court on

Before the Ld. JM 3rd Court Alipore

19-9-11 *Received the record today by transfer from ld. CJM files register Alipore to 14-11-11 for S/A.*

14-11-11 *Complainant is present by filing hazira.
No time today.
Case is adjd.
Fix 16-11-11 for SA.*

16/11/11 *Complaint is physically present. P.O. is engaged in other files.*

Case is adjd. To 19-11-11 for SA.
19/11/11 *Complaint is examined on S/A.
A xerox order sheet of Ld. J.M. 9th Court, Alipore is filed.
Let it be kept with the record.
There are sufficient materials to proceed against the accused u/s – 323/498A/500 r/w 34 IPC.
Issue process accordingly.*

*Requisites at once.
Fix 07/03/12 for S/R appear.*

7. Now order no. 1 as quoted above shows that Magistrate on perusal of complaint found that present complaint relates to an allegation under section 138 of N.I. Act and accordingly he had taken cognizance of offence where complainant had prayed for issuing process under section 500/504 IPC and from order dated 19.11.2011, it further appears that transferee Magistrate after examining complainant on S/A issued process against the accused under section 323 /498A/500/34 IPC.

8. From the entire recital of petition of complaint and also from statement recorded by Magistrate during initial deposition, not even a single word has been used anywhere which can constitute offence under section 138 of N.I. Act.

9. In the catena of judgments it has been reiterated that “taking cognizance of an offence” is not a mere formality. At the time of taking cognizance of the offence, the court is required to consider the averments made in the complaint. Taking of cognizance is thus a *sine quo non* or condition precedent for holding a valid trial. This is evident from the fact that chapter XIV (sections 190-199) of the code deals with under the heading “conditions requisite for initiation of proceeding”, then comes Chapter XVI (Section 204-210) under the heading “commencement of proceeding before Magistrate”. This chapter will apply only after cognizance of an offence has been properly taken by a Magistrate under chapter XIV. So without proper initiation of proceeding under chapter XIV, there cannot be commencement of proceeding before Magistrate under Chapter XVI of the code. In other words, if initiation of proceeding has been made by

Magistrate under section 138 of N.I. Act under Chapter XIV of the code, Magistrate cannot issue process quoting section 323/498A/500/34 I.P.C. by dint of section 204 under aforesaid chapter XVI of the code, because it can be highly prejudicial for the accused, who has right to know the cause of summoning.

10. It is well-settled that when a Magistrate receives a complaint, he is not bound to take cognizance unless the fact alleged in the complaint discloses the commission of offence. This is clear from the use of the words 'may take cognizance' in section 190 of the code. The word 'may' gives a discretion to the Magistrate in the matter. The expression 'taking cognizance of an offence' by a Magistrate within the contemplation of Section 190 has not been defined in the Code. But from the marginal heading of the Section 190 and from the caption of Chapter XIV under which Section 190-199 occurred, it is clear that case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. In short, when on receiving a complaint, the Magistrate applies his mind for the purpose of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code, he said to have taken cognizance of the offence within the meaning of Section 190(1) (a) of Code of Criminal Procedure.

11. In the present case, Magistrate received a complaint which discloses an allegation that the petitioner herein has defamed her *inter alia* by describing her as ex-wife in open place and also by threatening her and if the Magistrate on receiving such complaint would have spent few seconds in order to go through the same and further had he spent his time to apply his judicial mind, then by no stretch of imagination, he could have observed that the case filed under section 138 of N.I. Act. It is needless to say that the Magistrate

takes cognizance not upon the offender but upon the offence, that too after taking notice of the acquisition and after applying his mind to the allegations made in the complaint. Order no. 1 itself shows that Magistrate was not aware about contents of allegation in the complaint and for which initiation of proceeding by taking cognizance without mentioning under which offence he is taking cognizance and without knowing as to whether facts disclose in the complaint at all constitutes offence or not, must be held to be illegal taking of cognizance or illegal initiation of proceeding.

12. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in the complaint. From the aforesaid impugned order no.1 it is palpably clear that the Magistrate had not at all applied his judicial mind before taking cognizance and as such, taking cognizance in the aforesaid C. Case No.9760 of 2011 is bad in law and as such present proceeding from its very inception, that is at the time of taking judicial notice upon the allegation, itself is bad in law and when order no.1 itself does not reflect that Magistrate after being satisfied about the contents of complaint intended to initiate judicial proceeding on the basis of allegation levelled in the complaint against the petitioner, the basis of initiating the judicial proceeding cannot have any leg to stand. It is true that while taking cognizance of an offence, the court is not required to pass a reasoned order, but It must be apparent from the order that Magistrate has applied his judicial mind. A cognizance of an offence taken by a Magistrate without applying judicial mind upon the complaint cannot justify the subsequent stage of proceeding. Such illegality of taking cognizance is not safeguarded under Section 460 of the Code of Criminal Procedure.

13. Furthermore, Rule 183 of the Calcutta High Court Criminal Rules and Order specifically provides that the orders requiring the exercise of judicial discretion and the final order shall be recorded by the Magistrate in his own hand or typed by him, others may be recorded under his direction by the Bench Clerk. Here copy of the impugned order no.1 clearly reflects that the concerned Magistrate only filled up vacant space of a printed order. Magistrate only filled up order number, date of order and the name of the court and then transferred the case for disposal. This is clear violation of the aforesaid Rule 183 of the Calcutta High Court Criminal Rules and Order and glaring example of initiation of a criminal proceeding by a Magistrate against a person without applying his judicial mind.

14. Having considered the aforesaid facts and circumstances of the case and also considering the fact that this Court under section 482 Cr.P.C. not competent to pass a direction upon the Magistrate to take cognizance upon a complaint on a particular section from a particular statute, the remedy of the opposite party no.1, who failed to question the order No.1 passed by the Magistrate for not taking cognizance of the offence in respect of which she lodged the complaint against the petitioner, is to file a fresh complaint against the petitioner on the basis of selfsame allegation, if so advised.

15. Hence, CRR 3042 of 2018 is allowed and the proceeding in C. Case No.9760 of 2011 pending before the learned Magistrate, 3rd Court, Alipore, South 24-Parganas under Sections 498A/323/500/34 of the Indian Penal Code is hereby quashed. Connected applications are accordingly disposed of.

16. However, this order will not preclude complainant to lodge fresh complaint in respect of self-same cause of action before the jurisdictional Magistrate. In the event, such complaint is made by the opposite party

no.1/complainant, the concerned Magistrate will deal with the said complaint in accordance with the relevant provisions as laid down in the Code of Criminal Procedure.

17. However, there shall 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.)