

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

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

C.R.R. 1662 of 2020

Shaukat Khan @ Mithu @ Shaukat Ali Khan

-vs-

The State of West Bengal & Anr.

For the Petitioners : Md. Nauroz Rahber
Ms. Anjana Meheub
Mr. Muhammad Jawwad

Heard on : 29.7.2022

Judgment on : 03.08.2022

Ajoy Kumar Mukherjee, J.

1. The present revisional application under Section 397/401 read with Section 482 of the Code of Criminal Procedure has been preferred for quashing of proceedings in connection with C.S. case no. 45734 of 2019 under Sections 406/506 of the Indian Penal Code, presently pending before the court of the learned 12th Metropolitan Magistrate, Calcutta.

2. The opposite party no. 2 filed a written complaint against the petitioner herein and the sum and substance of the written complaint is as follows:

- i)** Accused petitioner is cousin brother of opposite party no. 2/ complainant who used to visit Kolkata at his place each and every month.
- ii)** On or about 2nd March, 2019 petitioner came to the opposite party no. 2's place and requested him to lend a sum of Rs. 60,000/- and opposite party no. 2 told the petitioner to come to his office at Kolkata -16 at 12.30 hours In the presence of colleagues of the opposite party, the opposite party paid Rs. 60,000/-to the petitioner.
- iii)** At the time of receiving the said amount, the petitioner promised to pay the loan amount within 15 days but when it is not paid on expiry of 15 days the opposite party requested the petitioner to repay but, the petitioner abused the opposite party no. 2 with filthy languages and threatened the opposite party no. 2 with dire consequences.
- iv)** On or about 22.7.2019 petitioner came to the office of the opposite party no. 2 and again threatened opposite party no. 2 with dire consequences and further threatened that in case of further demand of the said amount of Rs.60, 000/-, he will kill him and his family members.

3. On the basis of the aforesaid complaint dated 12.9.2019, learned Metropolitan Magistrate, Calcutta on 01.2.2020 was pleased to take cognizance of the offence and issued summon upon sole accused/petitioner as

Magistrate was satisfied that *prima facie* case under Sections 406/506 of the Indian Penal Code has been made out.

4. Learned advocate for the petitioner Mr. Rahber submits that the aforesaid complaint is the counter blust to the Title Suit no. 399 of 2019 filed by the petitioner against the opposite party no. 2 and ten others, which is pending before the learned Sub-judge, Gopalganj, Bihar. In the said case, the petitioner herein prayed for declaration and demarcation of his share in the said place and also for order of stay not to alienate or to transfer the suit property during pendency of the suit. In the said suit, the opposite party no. 2 herein entered appearance on 19.6.2018.

5. He further submits that the present criminal proceeding has been initiated on the basis of false fabricated and concocted allegation in order to force him to withdraw said Title suit no. 399 of 2019. The present criminal complaint has also been filed to harass, disturb and for creating pressure upon the petitioner. On 22.7.2019, the petitioner was suffering from various illness and was bedridden and the allegation that on that day, he came to Kolkata to the office of complainant is baseless. At no point of time, the petitioner borrowed money from opposite party no. 2. After filing aforesaid Title Suit no. 399 of 2019 the relation of the petitioner and the opposite party no. 2 became strained and for which the complaint case has been filed by complainant only to harass the petitioner and in order to enjoy more than his share in the scheduled mentioned property of the suit.

6. The petitioner further submits that the averments made in the complaint case even if considered to be true in its entirety it does not at all make out the case of criminal breach of trust or criminal intimidation as required to constitute offence under Section 406/506 of the Indian Penal Code. The whole dispute is rooted from the aforesaid Title Suit which emanates from a civil dispute and no criminality involves in the issue and the said criminal case has been foisted upon the petitioner to settle the civil dispute under duress.

7. It is further submitted that learned Magistrate had passed the impugned order dated 1.2.2020 in a routine and haste manner, without considering the circumstances of the case and without appreciating the materials available on record. As the criminal proceedings are not a shortcut of other remedies available in law, the learned Magistrate before issuing process, ought to have exercised great deal of caution and he should not have converted a civil dispute into a criminal proceeding. Accordingly the petitioner has prayed for quashing of said proceeding.

8. In spite of service, the opposite party is not represented.

9. Admitted position in the present case is that the petitioner is a resident of Bihar and the allegation in the written complaint is that the petitioner has committed offence after coming from Bihar, though the petitioner had denied the same. It further appears that the learned Magistrate while considering the issue of taking cognizance and for issuance of summon, did not consider it necessary to comply Section 202 of the Code of Criminal Procedure as amended in 2005. By that amendment of Section 202 of the Code of Criminal

Procedure, any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under Section 192 of the Code of Criminal Procedure, 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 enquire 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.

10. For better understanding of the issue, let me quote the relevant orders passed by the learned Magistrate on 12.9.2019 and 1.2.2020 which read as follows:

“Order dated 12.9.2019

complainant filed a complaint along with certain documents seeking prosecution of Shaukat Khan @ Mittu.

Complainant is present with his Ld. Advocate.

Perused the petition and other material on record.

Considered.

Cognizance is taken.

Let the case be transferred to the court of Ld. M.M. 12th Court, Calcutta for enquiry and disposal according to law.

Order dated 1.2.2020

Today is fixed for S/A.

The authorised representative of the complainant namely Changhaz Khan was examined on S/A.

Perused the complaint and the initial deposition of the complainant. The complainant has been able to make out a prima facie case u/s 406/506 of the IPC against the sole accused.

Cognizance is taken.

Issue summons upon the sole accused.

To 8.4.20 for appearance and S/R . Requisite at once.

12th Metropolitan Magistrate, Calcutta”

11. Aforesaid cryptic order dated 01.02.2020, which relates to taking cognizance for the second time, without mentioning the offence, under which Magistrate has taken cognizance, hardly suggests that the Magistrate concerned had at all exercised his judicial discretion before issuing process against accused person. There is also no reflection in the order as to why Magistrate did not feel it necessary to comply the mandatory provision of inquiry and/or investigation before issuance of process against accused/petitioner who admittedly resides far away at Bihar

12. In ***Abhijit Power Vs. Hemant Madhukar Nimbalkar and another*** reported in **(2017) 3 SCC 528** their lordship was pleased to observe in this context 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.”

13. The Supreme Court in another judgment in ***Birla Corporation Limited Vs. Adventz Investments Holdings Limited and others*** reported in **(2019) 16 SCC 610** was pleased to discuss the object of the said amendment and also

the significance of using the term “shall” by the legislature in the said amended provision of 202 of the code of criminal procedure. Para 31 and 32 of the said judgment runs as follows:

“31. *The by Code of Criminal Procedure (Amendment) Act, 2005, in Section 202 CrPC of the principal Act with effect from 23-6-2006, in sub-section (1), the words*

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

were inserted by Section 19 of the Criminal Procedure Code (Amendment) Act, 2005. In the opinion of the legislature, such amendment was necessary as false complaints are filed against persons residing at far off places in order to harass them. The object of the amendment is to ensure that persons residing at far off places are not harassed by filing false complaints making it obligatory for the Magistrate to enquire. Notes on Clause 19 reads as under:

False complaints are filed against persons residing at far off places simply to harass them. In order to see that the 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.”

“32. *Considering the scope of amendment to Section 202 CrPC, in Vijay Dhanuka v. Najima Mamta [Vijay Dhanuka v. Najima Mamta, (2014) 14 SCC 638 : (2015) 1 SCC (Cri) 479] , it was held as under : (SCC p. 644, para 12)*

“12. ... 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.”

Since the amendment is aimed to prevent persons residing outside the jurisdiction of the court from being harassed, it was reiterated

that holding of enquiry is mandatory. The purpose or objective behind the amendment was also considered by this Court in Abhijit Pawar v. Hemant Madhukar Nimbalkar [Abhijit Pawar v. Hemant Madhukar Nimbalkar, (2017) 3 SCC 528 : (2017) 2 SCC (Cri) 192] and National Bank of Oman v. Barakara Abdul Aziz [National Bank of Oman v. Barakara Abdul Aziz, (2013) 2 SCC 488 : (2013) 2 SCC (Cri) 731]”

14. In the present case petitioner has specifically averred on oath that he visited Calcutta for the first time for filing this revisional application and on 22.07.2009 i.e. alleged date of occurrence, he was suffering from various illness and was bed ridden which he supported by Annexure P-5 (doctor's prescription). Petitioner made definite allegation that present case is the counter blast to the said suit relating to property dispute. In the above backdrop about initiation of criminal proceeding as alleged by petitioner, it appears that Magistrate ought to have carried out an inquiry or order to investigate under section 202 of the code, before issuing process. When the accused resides outside the jurisdiction of the Magistrate, it is an obligation on his part 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.

15. In view of the aforesaid facts and circumstances of the case and also in view of the fact that the learned Judicial Magistrate has not applied his judicial mind by not adhering mandatory provision of section 202 of the code before making a direction for issuance of process against the accused persons, I am of the view that instead of quashing the complaint, it would be appropriate if the Magistrate is directed to pass a fresh order following the provision of Section 202 of the Code of Criminal Procedure. Accordingly, the matter is send

back to the Magistrate for passing fresh order uninfluenced by any observation made by this court and the court of learned 12th Metropolitan Magistrate, Calcutta will pass fresh order in C.S. Case No. 45734/2019 after complying with the procedure laid down in Section 202 of the Code of Criminal Procedure, within two months from the date of the receipt of the order. The order dated 01.02.2020 and all the subsequent orders are hereby set aside.

16. Accordingly, CRR 1662 of 2020 along with connected application are disposed of.

However, there will be no order as to the costs.

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

(AJAY KUMAR MUKHERJEE, J.)