

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No. 814 of 2017

Avinash Singhania

....

Petitioner

Mr. Manoranjan Mohapatra, Advocate

-Versus-

State of Odisha & Another

....

Opposite Parties

Mr. T.K.Praharaj, SC

Mr. A.N.Samantaray, Advocate for O.P.No.2

CORAM:

MR. JUSTICE R.K. PATTANAİK

ORDER

17.10.2022

Order No.

10. 1. Heard Mr. Mohapatra, learned counsel for the petitioner and Mr. Praharaj, learned counsel for O.P.No.1. None appears for the opposite party No.2.
2. Instant petition under Section 482 of Cr.P.C. is filed by the petitioner assailing the impugned order of cognizance dated 20th May, 2016 under Annexure-2 passed in I.C.C. Case No. 113 of 2016 by the learned J.M.F.C.(P), Kujang on the grounds stated therein.
3. Perused the copy of the complaint which is at Anneuxre-1.
4. Mr. Mohapatra, learned counsel for the petitioner submits that the complaint is filed by opposite party No.2, whereupon, the learned court below proceeded to take cognizance of the offence under Section 138 of N.I. Act. It is claimed that the learned court below did not hold

any enquiry in terms of Section 202 Cr.P.C as is statutorily mandated. In fact, it is submitted that after filing of the complaint supported by an affidavit without holding any enquiry under Section 202(1) Cr.P.C. since the petitioner is staying beyond the jurisdiction of the Court, the learned court below proceeded and passed the impugned order under Anneuxre-2. In support of such contention, learned counsel for the petitioner relied upon decisions of this Court in **L.P.Electronics (Orissa) Pvt. Ltd. & others Vrs. Tirupati Electro Marketing Pvt. Ltd.** reported in 2013(II) OLR-318 and **Parshotam Lal Vadera Vrs. Satyanarayan Sadangi** reported in 102(2006) CLT-530 and besides the above, the following decisions of the Supreme Court, such as, **Abhijit Paawar Vrs. Hemant Madhukar Nimbalkar & another; Vijay Dhanuka Vrs. Najima Mamtaj & others; K.S. Joseph Vrs.Philips Carbon Black Limited & Another** and lastly, **Krishna Lal Chawla and others Vrs. State of Uttar Pradesh & Another** have been cited to contend that it was mandatory on the part of learned court below to hold an enquiry under Section 202(1) Cr.P.C. before taking cognizance of the offence under Section 138 of the N.I.Act. It is further contended that since the learned court below did not hold any such enquiry as is mandatorily required and proceeded to take cognizance of the offence, the same is not tenable in view the of the settled position of law as enunciated by the Apex Court as well as this Court in the decisions (supra).

5. Mr. Praharaj, learned counsel for the State submits that the learned court below proceeded to take cognizance of the offence under Section 138 of the N.I. Act after receiving affidavit evidence from the complainant, namely, opposite party No.2 and hence, it cannot be faulted with.

6. In **L.P.Electronics (Orissa) Pvt. Ltd.** (supra), this Court held that where the accused is residing at a place beyond the jurisdiction of the court, it is mandatory for the Magistrate to hold an enquiry before issuance of process. While concluding so, the Court referred to the decision in **Parshotam Lal Vadera** (supra) and reiterated the position of law. The decision in **Vijay Dhanuka and others** (supra) also supports the holding of enquiry under Section 202 of Cr.P.C. as mandatory. In the aforesaid decision, it has been held that the requirement to conduct enquiry or direct investigation before issuing process where the accused is residing beyond the territorial jurisdiction of Magistrate concerned, it is mandatory.

7. The position of law is reiterated in other two decisions of the Supreme Court wherein it has been held that enquiry must be carried out under Section 202 Cr.P.C. and while observing so, it is held that the word 'shall' is ordinarily mandatory but sometimes taking into account the context, it can also be directory. However, having regard to the fact that the intent and purport of Section 202 (1) Cr.P.C. with expression 'shall' vis-à-vis where the accused residing beyond the jurisdiction of the Court, it has been held that such an enquiry has to be ensured. In fact, considering the amendment of 2006 inserted by Section 19 of the Cr.P.C. (Amendment) Act, the Supreme Court in **Vijay Dhanuka and others** held and observed that 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. It is further held therein that looking to the intention of the legislature, it is clear that the same is aimed to prevent innocent persons from harassment by

unscrupulous persons from false complaints and considering the use of expression 'shall' and the purpose for which the amendment has been brought, enquiry or investigation, as the case may be, is mandatory before issuance of summons to the accused living beyond the territorial jurisdiction of the Magistrate.

8. Having gone through the LCR wherein it is found that after the complaint was filed, apparently, the learned court below without holding any enquiry straightaway took cognizance of the offence under Section 138 of the N.I. Act and passed the impugned order dated 20th May, 2016 and then proceeded to summon the petitioner which in the considered view of the Court is untenable as Section 202(1) Cr.P.C. makes the enquiry mandatory supported by the decisions of this Court in **L.P. Electronics (Orissa) Pvt. Ltd. and Parshotam Lal Vadera** (supra) and the Supreme Court citations and hence, it has to be set aside.

9. Accordingly, it is ordered.

10. In the result, CRLMC stands allowed. Consequently, the impugned order under Anneuxre-2 passed in I.C.C. Case No. 113 of 2016 by the learned J.M.F.C. (P), Kujang is hereby set aside and the matter is remitted back and the learned J.M.F.C. (P), Kujang is hereby directed to follow the provisions of law and then to proceed and pass appropriate orders in accordance with law.

(R.K. Pattanaik)
Judge