

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 693 of 2020

Mahendra Kumar Agarwal

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Ayan Bhattacharjee,
Mr. Apalak Basu,
Mr. Sangikirto Roy Choudhuri,
Ms. Ritu Das.

For the State : Mr. Imran Ali,
Mrs. Debjani Sahu.

For the Private Opposite Party no. 2 : Mr. Ranajit Roy,
Ms. N. Ghosh.

Heard on : 05.01.2023

Judgment on : 25.01.2023

Shampa Dutt (Paul), J.:

The revision has been preferred praying for quashing of proceeding in Case No. CS No. 21059 of 2019, under Section 138/141 of the Negotiable Instrument Act, 1881 pending before the Learned Metropolitan Magistrate, 6th Court, Calcutta and all orders passed therein in the aforesaid case including the orders dated 29th April 2019, 10th June 2019 and 15th January 2020, whereby a warrant of arrest has been issued by the Learned Magistrate against the petitioner.

The Petitioner's case is that the complainant/opposite party no. 2 had filed a complaint inter alia, alleging commission of offences punishable under Section 138 read with Section 141 of the Negotiable Instruments Act 1881 against the petitioner herein before the Learned Chief Metropolitan Magistrate, Calcutta and the same was registered as CS 2105 of 2019.

The said complaint is to the effect that the complainant/opposite party no. 2 had granted a loan of Rs. 10,00,000/- (Rs. Ten Lacs) to the present petitioner for a period of 120 days bearing interest @ 12% per annum on 12th of August, 2016. The said loan of Rs. 10,00,000/- (Rupees Ten Lacs) was renewed from time to time and was last renewed on August, 2018 and was repayable on December, 2018. The petitioner for discharge of his subsisting liability and debt towards the

complainant/opposite party no. 2 signed and issued a cheque drawn on Axis Bank Limited, Madhapu, Hyderabad – 500081 being Cheque 046791 dated 1st December, 2018 for a sum of Rs. 10,00,000/- (Rupees 10 Lacs) drawn in favour of the complainant towards repayment of the principal amount on the loan. The said cheque was deposited by the complainant/opposite party no. 2 to her bank account in Standard Chartered Bank, Shakespeare Sarani Branch within the validity period of the said cheque for collection of the proceeds and the said cheque on being presented was dishonoured and returned back with the remarks “FUNDS INSUFFICIENT”. The said cheque was returned to the complainant/opposite party no. 2 by her banker on 25th February, 2019. Thereafter the complainant/opposite party no. 2 caused a demand notice dated 12th March, 2019 to be issued through her Learned Advocate addressed to the petitioner herein demanding payment of the said amount of Rs. 10,00,000/- (Rupees 10 Lacs) covered by the abovementioned cheque, but inspite of expiry of 15 days from the date of receipt of the said demand notice the petitioner failed to pay the said amount and hence the complainant/opposite party no. 2 had filed this complaint before the Learned Magistrate.

The petitioner is the accused in this case. Cognizance was taken by the learned Magistrate.

It is the petitioner's case that from the purported examination of the opposite party no. 2 under Section 200 of Cr.P.C. read with Section 145 of the Negotiable Instruments Act, it would be evident that such examination is in complete disregard to the provision of Section 202 of Cr.P.C. It is trite law that examination under Section 202 of Cr.P.C. is an important step in the stage of pre-summoning inquiry. Such examination is held in order to corroborate the allegations leveled in the complaint. Since the order of process under Section 204 of Cr.P.C. is based, inter alia, on the basis of the examination of the opposite party no. 2 the issuance of process itself is, therefore, unsustainable in the eye of law for which further proceeding on the basis thereof is equally bad in law.

The petitioner is a resident of a place beyond the jurisdiction of the Learned Trial Magistrate, however, the learned Magistrate failed to appreciate the settled position of law and as such erred in passing the impugned order of issuance of process upon the petitioner herein vide an order dated 10th June, 2019.

The Purpose of the said inquiry and/or investigation is to prevent undue harassment of arrest of persons who are residents of places far of from the tentacles of false complaint. The object of the said investigation and/or inquiry is limited to the ascertainment of truth or falsity of the allegations made in the complaint. **No such inquiry or**

investigation was either made by the Magistrate or by anybody else at the behest of the Learned Trial Magistrate in order to meet the statutory purpose of such enactment.

Thus the continuation of the impugned proceedings in this case shall amount to an abuse of the process of the court and it is expedient in the interest of justice that the impugned proceedings and all orders passed therein including the impugned orders dated 29th April, 2019, 10th June, 2019 and 15th January 2020 be quashed and/or set aside in order to prevent the abuse of the process of court or otherwise to secure the ends of justice.

Mr. Ayan Bhattacharya Learned counsel for the petitioner has submitted that the continuation of the impugned order/proceedings will be gross abuse of process of law, as from the purported examination of the representative of the opposite party no. 2 under Section 200 of Cr.P.C., it would be evident that such examination is in complete disregard to the provisions of Section 202 of Cr.P.C. It is trite law that examination under Section 202 of Cr.P.C. is an important step in the pre-summoning inquiry. Such examination is held in order to corroborate the allegations levelled in the complaint. When the complainant, during his examination under Section 202 of Cr. P.C., fails to corroborate the allegations of the complaint, no reliance can to be placed on such purported complaint. Since, the order of process

under Section 204 of Cr. P. C. is passed inter alia on the basis of examination of the complainant, the issuance of process is therefore, legally unsustainable in the eye of law for which the further proceeding arising out of order of process is equally bad in law.

It is apparent from the complaint that the petitioner hails from a place which is outside the territorial jurisdiction of the Learned Trial Magistrate. The amended Section 202 of Cr.P.C. prescribes that any Magistrate, on receipt of a complaint, shall in case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issuance of process against the accused person and either enquire 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. It is, thus, manifest that where the accused resides outside the territorial jurisdiction of the Court of the Magistrate, the Magistrate is required to either inquire himself or direct investigation by a police officer or other person deemed fit by the Magistrate.

Thus the said impugned order was passed without application of mind and without complying with the provisions of Sec. 202 Cr.P.C. and in a very mechanical manner thereby issuing warrant of arrest without hearing the petition filed by the petitioner.

That the order dated 29th April, 2019 of taking cognizance so passed by the Learned Chief Metropolitan Magistrate at Calcutta is bad in law inasmuch as the same does not reflect the application of mind. It is settled law that order of cognizance is a judicial act which requires application of mind.

The petitioner/accused has thus prayed for quashing of the proceedings in C – 21059 of 2019.

Mr. Ranajit Roy Learned advocate for the private opposite party has submitted that the proceeding as initiated by the Learned Magistrate is in accordance with law.

The conduct of the accused/petitioner is an abuse of the process of court/law and should not be encouraged, and as such the criminal revision is liable to be dismissed.

Considered the submissions of learned counsels for both sides and the materials on record.

Section 202 Cr.P.C. makes it obligatory upon the Magistrate that before summoning the **accused residing beyond** his jurisdiction he shall inquire 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 is sufficient ground for proceeding against the accused.

The orders relevant in the present revision dated 29.04.2019 of the Chief Metropolitan Magistrate, Calcutta and order dated 10.06.2019 of the Metropolitan Magistrate, 6th Court, Calcutta are reproduced here:

Order dated 29.04.2019

“Complaint Filed Along With An Affidavit And Documents By The Complainant Seeking Prosecution Of Accused U/S138/141 of the Negotiable Instrument Act 1881

Considered.

Cognizance is taken

Let The Record Be Transferred To The File Of Ld. Metropolitan Magistrate 6th Court For Enquiry And Disposal According To Law.”

Dictated

*Sd/-
Chief Metropolitan Magistrate
Calcutta*

Order dated 10.06.2019

“The case record is received from the Court of Ld. C.M.M. by way of transfer and taken up for inquiry U/S 200 Cr.P.C.

Complainant is present together with Ld. Advocate.

Perused the petition of complaint and the initial deposition filed by the complainant by way of affidavit U/S 145 of the N.I. Act for the purpose of inquiry U/S 200 of Cr.P.C. Also perused the documents in photocopy filed by the complainant.

Considering all above including submissions of Ld. Advocate for the complainant, I find existence of sufficient grounds for proceeding against the accused person(s) for commission of an offence under Section 138 of the N.I. Act.

Hence, issue summons accordingly upon the accused person(s).

To 08.08.2019 for S/R and appearance.

Complainant to put in Requisites at once.”

D/C by me

***Sd/-
Metropolitan Magistrate
6th Court, Calcutta***

From the order of the Magistrate it is clear that **an inquiry was held under Section 200 Cr.P.C. and not Section 202 Cr.P.C.**

Section 200 Cr.P.C. lays down:-

“200. Examination of complainant.-A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

Section 202 Cr.P.C. lays down:-

"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.”

It is clear from the said orders that admittedly no inquiry under Section 202 Cr.P.C. The Magistrate held an inquiry under Section 200 Cr.P.C.

Thus the Magistrate did not comply with the provision of Section 202 Cr.P.C., even though the petitioners reside outside the jurisdiction of the court, (the only address being in the State of Jharkhand).

The proceedings in this case is under Section 138 of the Negotiable Instruments Act. A Five Judge Bench of the Supreme Court in expeditious trial of cases (for proceedings u/s 138 N.I. Act) has held in respect of compliance of the provision under Section 202 Cr.P.C. in such cases as follows:-

“12. Another point that has been brought to our notice relates to the interpretation of Section 202 (2) which stipulates that the Magistrate shall take evidence of the witness on oath in an inquiry conducted under Section 202 (1) for the purpose of issuance of process. Section 145 of the Act provides that the evidence of the complainant may be given by him on affidavit, which shall be read in evidence in any inquiry, trial or other proceeding, notwithstanding anything contained in the Code. Section 145 (2) of the Act enables the court to summon and examine any person giving evidence on affidavit as to the facts 12 | P a g e contained therein, on an application of the prosecution or the

accused. It is contended by the learned Amici Curiae that though there is no specific provision permitting the examination of witnesses on affidavit, Section 145 permits the complainant to be examined by way of an affidavit for the purpose of inquiry under Section 202. He suggested that Section 202 (2) should be read along with Section 145 and in respect of complaints under Section 138, the examination of witnesses also should be permitted on affidavit. Only in exceptional cases, the Magistrate may examine the witnesses personally. Section 145 of the Act is an exception to Section 202 in respect of examination of the complainant by way of an affidavit. There is no specific provision in relation to examination of the witnesses also on affidavit in Section 145. It becomes clear that Section 145 had been inserted in the Act, with effect from the year 2003, with the laudable object of speeding up trials in complaints filed under Section 138. If the evidence of the complainant may be given by him on affidavit, there is no reason for insisting on the evidence of the witnesses to be taken on oath. On a holistic reading of Section 145 along with Section 202, we hold that Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of 13 | Page examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202. SECTIONS 219 AND 220 OF THE CODE.”

In the present case as seen from the order the Magistrate conducted inquiry under Section 200 Cr.P.C. but did not Conduct any inquiry into the case himself or direct an investigation as required under Section 202 Cr.P.C. before directing the issue of process and as

such to let the said order continue would be an abuse of the process of law/Court.

Thus considering the facts and circumstances in the present case, the nature of case pending between the parties, the non-compliance of Section 202 Cr.P.C. by the Magistrate before issuance of process as discussed is prima facie an abuse of process of Court/law.

Accordingly in the interest of justice the order dated 29th April, 2019, 10th June 2019 and 15th January 2020 in CS No. 21059 of 2019 pending before the Court of Metropolitan Magistrate, 6th Court, Calcutta, are hereby set aside/quashed.

The matter is remitted to the learned Magistrate for considering the **matter afresh** as per the relevant provision of law, under Section 202 Cr.P.C. and as per the guidelines of the Supreme Court in the judgment **expeditious trial of cases (Supra)** referred to in this order/judgment without being influenced by the order of this Court and also being guided by the said judgment of the Supreme Court.

CRR 693 of 2020 is disposed of.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)