

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

Present:

The Hon'ble Justice Rai Chattopadhyay

CRR 2188 of 2016

With

CRAN 10 of 2022

Aloka Gooptu

Vs.

The State of West Bengal & Ors.

WITH

CRR 2145 of 2016

With

CRAN 7 of 2018 (Old No: CRAN 2397 of 2018)

Aiayasa Mazumder & Anr.

Vs.

The State of West Bengal & Ors.

For the Petitioners

: Mr. Ayan Bhattacharjee,
: Mr Ayan Chakraborty,
: Mr. Sudipta Mahapatra.

For the O.P No.2

: Ms. Kakali Samajpaty,
: Ms. Sangita Jangra,
: Mr. Subhranil Ray.

Heard On : 18/12/2023.

Judgment On : 02/02/2024.

Rai Chattopadhyay, J.

1. The criminal revision cases No. CRR 2145 of 2016 and CRR 2188 of 2016 have been heard together and are now taken up together for adjudication by this common judgment.

2. Both the criminal revisions are to challenge the complaint dated 31/12/2009, which has been registered as the complaint case No. 65555 of 2009 under sections 420/467/468/471 of the Indian Penal Code, 1860. The case is now pending before the Court of Metropolitan Magistrate, 16th Court at Calcutta. The orders made in the said case subsequent to filing of the complaint as above, are also challenged. The petitioners in both the criminal revision cases have prayed for quashing of the entire proceeding along with the complaint, as mentioned above.
3. The moot question for consideration of this Court in this case would be the scope and extent of applicability of the provision of Section 202 of the Code of Criminal Procedure. However, before dealing with the same one has to look into the nature of allegations as has been reflected through the complaint, as above.
4. One Rajkumar Sen/opposite party no. 2 is the complainant. The petitioner in criminal revision No. CRR 2145 of 2016 is the accused person No. 3 in the complaint. The petitioner in criminal revision No. CRR 2188 of 2016 is the accused No. 2 therein. The contentions made therein, may be summarised in the following manner:-

Accused No. 1 is a company namely M/s. Everest Agro Industries Corporation Pvt. Ltd. (hereinafter referred to as "Everest"). Accused No. 4 is another company namely Sencose Food Products Pvt. Ltd. (hereinafter referred to as "Sencose"). Accused No. 2 (petitioner in CRR 2188 of 2016) and accused No. 3 (petitioner in CRR 2145 of 2016) are the directors of "Everest". Two of the directors of "Sencose" have also been arrayed as the accused persons in the said complaint. They are, however, not parties in these two revision applications.

Pursuant to an advertisement in the English newspaper 'The Statesman' dated 21/12/1989, the complainant (opposite party in both

the revisions) responded and expressed interest vide letter dated 22/12/1989, for making investment in “Everest” by way of hypothecation and pledge of fixed deposits and share certificates. As against the same he desired to obtain unsecured loan from “Sencose”.

On 08/04/1991 an agreement was executed, being “Everest” and “Sencose” at one part and the group of companies of the complainant, on the other part. The agreement was executed to make investments by the complainant with the accused companies, named above.

5. Thus, the complainant says, that valuable securities have been parted with by him being deceitfully influenced and prompted by the two accused companies and their directors/persons-in-charge of the day to day business of the companies.
6. Later, on 26/08/2009, the complainant, after obtaining certified copy of the balance sheet of “Sencose”, could come to know that the entire hypothecated fixed deposits and company’s shares kept with the accused company pursuant to the agreement executed between them as above, were not shown by the accused company in their said balance sheet. Allegedly, the present petitioners being the directors of the accused companies had illegally transferred all the amount on account of hypothecated shares, securities and bank deposits, without any knowledge of the complainant and in violation of the terms of the agreements.

It has been further alleged that inspite of specific request by the complaint neither the said hypothecated things or its equivalent has been returned to the complainant by the accused/petitioners. Hence, the complainant has alleged misappropriation by the accused persons of the entrustment of valuable securities of him made to the accused persons, and lodged the said complaint.

7. The complainant was registered as complaint case No. 65555 of 2009 under Sections 420/467/468/471 of the Indian Penal Code, 1860.
8. It is necessary that certain orders of the Magistrate passed in the said complaint case should be reproduced which are as under:-

Sl No.	Date	Order
1.	06/04/2010	Complainant is present. He is examined on S/A. At this stage complainant prays for time to adduce more witness on the date fixed. Heard, considered. Time is allowed. Fixing 27/5/10 for further inquiry.
2.	24/06/2010	Complainant is present. Witness is present. She is examined on S/A. Complainant files a petition and praying for time on the ground stated therein. Prayers for time to produce some documents. Heard, considered and time is allowed.
3.	01/10/2010	Complainant is present and files documents. No other witness is founded. Heard ld. lawyer for the complainant. Considering all aspects and materials u/s 420, 467, 468 and 471 I.P.Code against the accused person. Accordingly the summons upon the accused person fixing 5/2/11 the S/R acknowledges.
4.	30/06/2016	Considering the nature and the circumstances of the case, I think without issuing of W/A against the accused persons no fruitful result can be

		achieved. Thus Issue Warrant of arrest against the accused No. 2 and 3. As said above no representative send for the accused No. 1 and 4. Let the property of the accused No. 1 and 4 be attached in this case for the interest of justice. Issue reminder for death report of accused No. 5.
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- 9.** The first and foremost point raised on behalf of the petitioners by Mr. Ayan Bhattacharjee, learned Advocate, is that the Magistrate has erred in law by not causing an enquiry in this case as envisaged under Section 202 of the Code of Criminal Procedure. This is for the reason, that all the accused persons named in the said complaint, reside outside the jurisdiction of the said Magistrate who has taken cognizance of the offence in this case. It has been submitted that as per the judicial pronouncements settling the law to govern the field as on date, it is a mandate upon the Magistrate and an unavoidable procedure to be adopted by him, before he could issue process against the accused persons. The Magistrate having not undertaken the said process, his orders as mentioned above suffer from gross illegality, Mr. Bhattacharjee submits.
- 10.** It has further been submitted that in other proceedings between the parties with respect of self-same issue, the complainant has however not been able to show any supporting documents and proof regarding his claim and contention of entrustment of valuable securities with the present petitioners.
- 11.** Mr. Bhattacharjee says that the points raised by him in this case is supported by the following judgments :-

- (i) ***National Bank of Oman vs. Barakara Abdul Aziz & Anr.***, reported in ***(2013) 2 SCC 488***;
- (ii) ***Abhijit Pawar vs. Hemant Madhukar Nimbalkar & Ors.***, reported in ***(2017) 3 SCC 528***;
- (iii) ***Jay Sankar Jha vs. The State***, reported in ***1982 CRI. L. J. 744***;
- (iv) ***S. S. Binu vs. State of West Bengal & Anr.***, reported in ***2018 CRI. L. J. 3769***.

12. In the case of ***Jay Sankar Jha (supra)***, the Hon'ble Division Bench of this Court was pleased to hold that an illegality remain an illegality, irrespective of the fact of any objection to such alleged illegal action having been raised or not by the accused, within a reasonable time. The Court was hearing on the point, if cognizance of offence taken by the Magistrate was bad in law or not. The Court has held, in case the cognizance taken of offences was bad in law, all the subsequent proceedings pursuant to the same, would become illegal and abuse of the process of Court.

13. Thereafter Mr. Bhattacharjee has referred to the judgment of ***S. S. Binu (supra)***, which is a Division Bench verdict of this Court. There the Court was deciding on five points of reference before it. Let those be extracted as herein below:-

The Court has answered all points, and the entire verdict is summed up as follows:-

“(1) Whether the amendment of Section 202 of the Code of Criminal Procedure, 1973 as enacted vide Section 19 of the Criminal Procedure (Amendment) Act, 2005 (25 of 2005) casts a mandatory duty upon the Magistrate to conduct an inquiry under Section 202 of the Code before issuing process under Section 204 of the Code qua an accused who resides outside the territorial limit of the Court of the said Magistrate?”

- (2) What will be the nature of such inquiry under Section 202 of the Code qua an accused who resides outside the territorial limit of the said Court?*
- (3) Whether non-compliance of such inquiry in terms of Section 202 (as amended vide Section 19 of the Criminal Procedure (Amendment) Act 2005 (25 of 2005) will invalidate or vitiate the order of process so issued?*
- (4) Whether non-compliance of such inquiry in terms of Section 202 (as amended vide Section 19 of the Criminal Procedure (Amendment) Act 2005 (25 of 2005) can be raised only at the initial stage of the proceedings or after much deliberation as well?*
- (5) Whether the amendment of Section 202 of the Code of Criminal Procedure, 1973 as enacted vide Section 19 of the Criminal Procedure (Amendment) Act 2005 (25 of 2005) will apply in case of offences punishable under Section 138/141 of the Negotiable Instruments Act, 1881?"*

The points on reference were answered in the following manner:-

"19. In view of the above discussion, our answers to the questions posed in the reference are as under:

- (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.*
- (b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.*
- (c) The answer to Question (c) has to be in affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."*

- 14.** Two other prior judgments of the Hon'ble Supreme Court in the case of ***National Bank of Oman (supra)*** and ***Abhijit Pawar (supra)*** have also been referred to, in support of the arguments of mandatory compliance of the provision of Section 202 of the Code.

In all the cases as above the petitioners could find support to their contentions and arguments that the requirements under Section 202 Cr.P.C are mandatory and there is no escaping from due compliance of the same in an appropriate case by the Magistrate.

- 15.** Section 202 Cr.P.C was amended by the Code of Criminal Procedure (Amendment) Act, 2005 and at present that reads in the manner as follows:-

“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 Sessions; 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 witness 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."

The notes on clauses for the above mentioned amendment to Section 202 Cr.P.C would reads as follows:-

"The notes on clauses for the abovementioned amendment read 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 amendment has come into force w.e.f. 23-6-2006 vide Notification No. S.O. 923(E) dated 21-6-2006."

16. Ms. Kakali Samajpaty, learned Advocate is appearing on behalf of the opposite party, i.e, complainant. Vehement objection has been raised as to the contentions and prayers of the revisionist in these two revision cases, by her. It has been submitted that the revisions are only to satisfy the dilatory tactics as has been undertaken by the revisionist/petitioners. She submits that her client had transferred all the valuable securities (as mentioned hereinabove) to the accused companies and the other accused persons being responsible for that, as the directors of those companies, pursuant to the agreement executed between them. However, allegedly, though having compelled the complainant deceitfully to part with his valuable properties and compelling those to be entrusted with the petitioners/accused persons, they have misused the same and gained unlawfully. Allegedly, behind back to the complainant and in derogation of the agreed terms and conditions, the entire valuable securities (as mentioned above), have

been transferred to the third party. She says that due to such fraudulent act on part of the present petitioners, her client has been pushed to the verge of financial breakdown of his business and is a victim of the offence committed by the said accused persons/revisionists, as above.

17. The following judgements have been relied on by Ms. Samajpaty, i.e.,:-

- (i) ***Vasanti Dubey vs. State of Madhya Pradesh***, reported in **(2012) 2 SCC 731**;
- (ii) ***Vijay Dhanuka & Ors. vs. Najima Mamtaj & Ors.***, reported in **(2014) 14 SCC 638**;
- (iii) ***Abhijit Pawar vs. Hemant Madhukar Nimbalkar & Ors.***, reported in **(2017) 3 SCC 528**.

18. She has submitted that from the order passed by the Magistrate it appears that necessary and adequate enquiry as to the genuineness of the complaint has been made by the Magistrate in due course. Thus, she says that entire argument of petitioners is only baseless and the present revision is only a purported attempt by them to avoid the Court's process particularly the warrant of arrest issued against them. She has insisted for dismissal of the present revision case and immediate trial.

19. Provision under Section 202 of the Cr.P.C, has already been mentioned earlier. The object of the amendment brought into the said provision has been to eradicate possibilities of false complaints, by unscrupulous persons.

20. The necessary requirement for the Magistrate to comply with the said provisions under Section 202 of the Cr.P.C would be his satisfaction and finding it fit regarding the necessity to cause an enquiry as provided therein and mandatorily in a case, where the accused is residing beyond the area of territorial jurisdiction of the said Magistrate.

The mandatory nature of the provision has been categorically adjudicated by different Courts, in the judgments as referred to in the case, by the petitioners, as mentioned above.

21. In the light of the law, thus settled by the Courts, the factual background of this case has to be tested, in order to come to a conclusion, in the case.

22. The territorial jurisdiction of the Chief Metropolitan Magistrate, would be as provided under Section 16 (3) of the Cr.P.C, 1973, as follows:-

“16.Courts of Metropolitan Magistrates.

*(1) ******

*(2) ******

(3) The jurisdiction and powers of every Metropolitan Magistrate shall extend throughout the metropolitan area.”

23. The petitioner’s place of business/residence, has been shown in the said complaint, as mentioned herein below:-

(i) Petitioners in CRR 2145 of 2016:- At New Alipur, Kolkata, Maheshtala, 24 Parganas (South) respectively,

(ii) Petitioners in CRR 2188 of 2016:- At Middleton Street, P.S-Park Street, Kolkata.

24. Therefore none of the petitioners are residing within the territorial jurisdiction of the Chief Metropolitan Magistrate’s Court and the same is an admitted fact in this case.

25. The case of the opposite party no. 2 is principally based on the premise that the “inquiry” as defined under Section 2 (g) of the Cr.P.C, 1973, i.e, *“every inquiry, other than a trial, conducted under this Code by a Magistrate or Court”*, would not reveal any specific mode and manner of

inquiry. Also that, any such mode or manner has not been provided under Section 202 of the said Code. Therefore, the opposite party has pleaded that, the inquiry already undertaken by the Magistrate in this case would be sufficient for the purpose of Section 202 of the Cr.P.C, 1973 as well.

26. By referring to the respective orders of the Magistrate in this case one can find that the complainant was examined on S/A on 24/06/2010 on the very first date. On the next date fixed, i.e, 01/10/2010, which was fixed for further inquiry, the Court has recorded as mentioned above and issued summons. From either of the said orders it is not apparent if the “further inquiry” as directed vide order dated 24/06/2010 is contemplated under Section 202 or not. Satisfaction of the Magistrate in terms of Section 202 of the Cr.P.C, 1973, has also not been recorded in either of the said two orders and before issuance of summons.

27. Definitely when the legislature provides for a mandate for the Magistrate to postpone the process for the purpose of causing inquiry and with a specific purpose, as written herein above, it is incumbent that the orders of the Magistrate explicitly show that the statutorily provided and mandated process has been undertaken by him. It is also expected that the Magistrate records his finding of the inquiry *vis-à-vis* the purpose of the said provision of law. Anything otherwise, cannot be considered to be due exercise of the power vested in law and would render Magistrate’s action as *dehors* the law and not sustainable.

28. In this particular case, no such speaking or explicit order of the Magistrate is available. It is not comprehensible if the Magistrate, has at all contemplated for compliance of the provisions under section 202 of the Cr.P.C, by making an enquiry or causing it to be made in the manner as envisaged in law, before issuance of process. Under such

circumstances this Court is unable to accept the submission made on behalf of the opposite party no. 2 that whatever process has been undertaken by the Magistrate, is an inquiry having been done by him under Section 202 of the Cr.P.C, 1973. On the other hand it is specifically noted that on the first date of the submission of the complaint vide order dated 24/06/2010, the Magistrate has reduced into writing the substance of examination of the complainant. The same would be in compliance with the provisions under 200 of the Cr.P.C, 1973 and not otherwise.

- 29.** Since it has already been discussed that the compliance of provision under Section 202 of the Cr.P.C, 1973, is compulsory and unavoidable for a Magistrate before issuance of summons in case of alleged offender who resides outside his territorial jurisdiction, this Court find that the order directing issuance of summons in this case dated 01/10/2010 and subsequent orders are unsustainable in the eye of law. Hence, the said order dated 01/10/2010 and all subsequent order passed in Complaint Case No. 65555 of 2009 are set aside.
- 30.** The Complaint Case No. 65555 of 2009 is remanded back to the Magistrate for proceeding in the same in due compliance with the settled provision of law.
- 31.** With the observation and direction as above this revision being CRR 2188 of 2016 with CRR 2145 of 2016 is disposed of along with pending applications, if any.
- 32.** Urgent photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

RAI

CHATTOPADHYAY

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(Rai Chattopadhyay, J.)