

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

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

**CRR 1374 of 2016
Dr. Dilip Kumar Pahari
Vs
The State of West Bengal & Anr.
With
CRR 442 of 2016
Medica Super Speciality Hospital
Vs.
The State of West Bengal & Anr.**

For the Petitioner in
CRR 1374 of 2016

: Mr. Sandipan Ganguly
Mr. Sabyasachi Banerjee
Mr. Anirban Dutta
Mr. Victor Chatterjee
Mr. Amit Ghosh

For the Petitioner in
CRR 442 of 2016

: Mr. Milon Mukherjee
Mr. Biswajit Manna

For the State

: Mr. Debasish Roy
Mr. Saryati Datta
Mr. Anand Kesari

Heard on

: 23.04.2025

Judgment on

: 19.05.2025

Dr. Ajoy Kumar Mukherjee, J.

1. Complainant herein who was the director of health services lodged the instant complaint being no. 4109 of 2014, presently pending before Judicial

Magistrate 4th Court, Alipore, against twelve accused persons out of which accused no.1, Medica Super Speciality Hospital preferred the application being CRR 442 of 2016 and Dr. Dilip Kumar Pahari, being accused no.7 has preferred the other application being CRR 1374 of 2016 and in both the applications the petitioners/accused persons have prayed for quashing the aforesaid impugned complaint case no. AC 4109 of 2014.

2. Filing court after taking cognizance upon the offence alleged against the petitioners punishable under section 19, 20, 21 of the Transplantation of Human Organs and Tissues Act, 1994 (in short of Act of 1994) read with section 181,182,120B/34 of the IPC, transferred the matter to the court of learned Judicial magistrate 4th court for further proceeding.

3. It is alleged in the written complaint that the accused persons in connivance and in criminal conspiracy with each other as well as in furtherance of their common intention committed the activities which are offence in terms of chapter VI of the Act of 1994. The allegation against the petitioner of CRR 1374 of 2016 is that he has a link with various touts as well as the accused no.3 in transplanting kidneys against consideration and the allegation against accused no.1 is abatement of commission of offence in the said hospital. The complainant alleged in the complaint that on assessment of the result of the enquiry, it is evident that the activity of the accused persons include commercial dealings in human organs like kidney for the purpose of making unlawful gain in contravention of the provisions of section 19, 20, 21 of the Act of 1994 read with section 181/182/120B/34 of IPC.

4. The aforesaid transferee court examined complainant Dr. Biswaranjan Satpati on 21.01.2015 under section 200 Cr.P.C. and thereafter decided to postpone the issuance of process and considering the nature of the offence and graveness of the allegations, directed Joint Commissioner of police (crime) Kolkata to cause an inquiry into the case by himself and to collect the available materials in terms of section 202 of Cr.P.C. and to submit a report by the next date. Thereafter on the basis of said order, one A.K. Das, Assistant Commissioner of Police, Detective Department who is below the rank of Joint Commissioner, on 22.05.2015, sent a report after making alleged enquiry, through Additional C.P. and Joint C.P. (Crime) to the court concerned.

5. Thereafter the court below on perusal of the report submitted by Mr. Das, issued process against all the accused persons under section 204 of the Code of Criminal Procedure. Being aggrieved by the said proceeding, Mr. Ganguly on behalf of the petitioner of CRR 1374 of 2016 and Mr. Mukherjee on behalf of petitioner of CRR 442 of 2016, argued that on perusal of the order of cognizance dated 23rd December, 2013 it would appear that the learned Magistrate while taking cognizance did not apply his judicial mind. The said order is itself bad in law on the score of the same lacking any reasoning as well as the same being a typed order, where the magistrate had only put his signature. In fact no case has been made out against the petitioners under any of the provisions of the Act of 1994. It is unclear from the contents of the complaints as to what role, if any, has been played by the petitioner for which the ingredients of section 19,20 or 21 of the Act of 1994 or any of the provisions of IPC attracts against the aforesaid

petitioners. The complaint is completely silent as to how and in what manner the petitioners have committed the alleged offence and the concerned magistrate had mechanically proceeded without going through the material and/or statement made in the petition of complaint, which does not attract the commission of offence. Such act of magistrate in a mechanical and in a hasty manner is untenable in the eyes of law. They further pointed out that it is apparent from the order sheet that the magistrate did not satisfy himself about issuance of process against the accused persons including the petitioners herein and for which he ought to have resorted to section 203 of the Cr.P.C but instead of that he erroneously resorted to the provisions of section 202 of the Cr.P.C. directing the Joint Commissioner of Police to cause an enquiry by himself and to collect available materials in terms of section 202 of Cr.P.C. and to submit a report.

6. In this context Id. Counsel for the petitioners of both the applications vehemently argued that issuance of process under section 204 of Cr.P.C. is not an empty formality and learned Magistrate prior to issuance of summons under section 200 must consider whether from the material available from the report under section 202, constitutes an offence against the petitioner or not. They further submit that on perusal of the report, it is apparent that the report submitted by Mr. Das is a mere table work with the documents which were already existing and presumably learned magistrate on the 21st of January, 2015, perusing the same refused to issue summon. On the basis of such report based on table work the magistrate concerned ought not to have issued process against the petitioners. Both Mr. Gangully and Mr. Mukherjee on behalf of the respective petitioners strenuously

argued that on perusal of the order and the materials which were being considered by the learned Magistrate, it is evident that it is only due to an alleged link with various touts and certain phone calls without there being any transcription of the same, the Magistrate issued process under the said provisions of the Act of 1994 as well as under the various provisions of the IPC, against the petitioners. They further argued that there is no other materials, which would show, any conspiracy or any active participation or any illegal benefit derived by the petitioner, for which the petitioners can be charged under the abovementioned penal offences. Learned Magistrate infact did not consider that the materials which were placed before the ld. Magistrate in the form of an annexure to the purported report are all pre dates the filing of the complaint and as such no independent enquiry and or new materials were ever being attempted to be collected by the investigating agency for filing of the purported report before the Magistrate. Accordingly they submit that in the absence of such materials, the order issuing summon deserves to be set aside.

7. They further argued that on perusal of all the documents it is surprising to note that none of the documents even remotely alleges any act to have been committed by the petitioners herein which attracts penal offence with allegation of commercialization of transplantation of a human organ. The basic elements to constitute offence under the Act of 1994 are completely absent. In this context relying a judgment passed by this High Court in **Grives Cotton Mills Ltd. Vs. the State of West Bengal** reported in **2023 SCC OnLine Cal 454**, the petitioner contended that when the assertion made with the complaint along with pre-summoning evidence led

by the complainant, failed to establish the incident of penal liability of the petitioners as observed by the court below, the question of making inquiry under section 202 does not arise. Referring the ratio as laid down in para 15 of the judgment, petitioners contended that if in a case where the complaint itself and the examination under section 200 Cr.P.C. fails to make out any offence and do not attract any culpability to an accused, mere non-compliance of section 202 of Cr.P.C. would never deter the High Court from exercising his inherent power in such cases where persons are asked to face a criminal trial without any substantive cause of action, being made out. They further argued that none of witnesses spoke about any advertisement which has been caused by the hospital/accused and or the petitioner/accused herein. None of the witnesses spoke about the direct interaction with the petitioner herein. Out of 15 witnesses 6 witnesses named the petitioner of CRR 1374 of 2016 in a single sentence to be one of the doctors who was present in a Board Meeting along with other Doctors and officers of the Hospital. There is no allegation against either of the petitioners herein by the witnesses to have induced and/or aided the said witnesses who are either donor or donee to commercialize transplantation of human organ. None of the alleged recipient or donor, who allegedly made statements, has been made an accused in the impugned proceeding. In this context Mr. Mukherjee and Mr. Ganguly also demonstrated the administrative procedure to be followed in the case of kidney transplantation and contended that petitioners' role only involved in checking as to whether a person is in need of kidney transplantation for his sustenance and whether the donor is competent and/or physically capable of giving kidney

and except that petitioners cannot have any role to play. Infact the authorization committee created in terms of Rule 7 of the Act of 1994, which is a body consisting of officers attached to the state machinery who are the ultimate and final authority for granting approval for such transplantation and no transplantation would have taken place in absence of authorization which can only be given by the Authorization Committee in terms of Rule 7 of the Transplantation of Human Organ Rules. In view of aforesaid check and balance, which have been established under the law and which have been followed for the purpose of transplantation, the allegation against the petitioners have got no substance and as such the aforesaid impugned proceeding is liable to be quashed qua the petitioners.

8. Learned Counsel appearing on behalf of the complainant opposed the submission made on behalf of the petitioners and contended that in the report, specific role has been attributed against each of the 12 accused persons and Id. Magistrate on being satisfied issued process against all the accused persons and the truth will come out only after trial. He further submits that out 12 accused persons only 2 are being aggrieved by the impugned proceeding and as such the proceeding as a whole cannot be quashed without giving an opportunity to the complainant to establish during trial, the role played by each accused in committing the offence.

9. I have considered submissions made by both the parties.

10. On perusal of the order sheet it appears that by the order dated 21.01.2015 the court below observed that the available materials fails to satisfy the court to issue process against the accused at that stage under the provisions of Act of 1994 read with the relevant provision under the

Indian Penal Code and therefore, invoking his jurisdiction under section 202 of the Cr.P.C. he has made a clear direction with bold letters that considering the nature of the offence and graveness of the allegations ***joint commissioner of police crime, Kolkata is directed to cause an enquiry into the case by himself*** and to submit a report. However, it appears that the report was submitted not by the person who was directed to make the enquiry but by one A.K. Das who was subordinate to Joint Commissioner of Police and it was merely forwarded through Special Additional C.P. and Joint C.P. (Crime) Kolkata. This enquiry was done by an officer in the rank of Assistant Commissioner of Police, violating the court's order. He was not competent to make the enquiry nor competent to submit a report to that effect as the said order clearly demonstrates that the magistrate concerned had considered the '*nature of the offence*' and '*graveness of the allegation*' and thereby had directed Joint Commissioner of Police (crime) Kolkata to make the enquiry. The Joint Commissioner of Police (crime) Kolkata did not have any authority to sub delegate such power to another authority for causing enquiry without taking leave from the concerned magistrate.

11. It is further unfortunate to note that Magistrate by his order dated 22.05.2015, by which he issued the process against the accused person, recorded that *after completion of enquiry under section 202 of Cr.P.C. the Special Additional Commissioner of Police and Joint Commissioner of Police (Crime) Kolkata has submitted his report* and after perusing the same he has accepted it. While passing the said order the court below completely ignored the fact that the said enquiry was neither done by the Special Additional Commissioner of Police or Joint Commissioner of Police (Crime) as directed

by the court but it was done by an officer below the rank of Joint Commissioner of Police (Crime) Kolkata. This clearly manifest that while the Magistrate concerned had issued the process under 204 he did not apply his mind far from judicial mind.

12. That apart the subordinate officer who made the enquiry and submitted report before the magistrate apparently did not make any independent enquiry because his entire report is based on the annexures which were pre-existed and pre dates, the filing of the complaint and on the basis of which perhaps the complainant lodged the complaint. These documents filed as annexures cannot be the basis of the report, without having making any independent enquiry. Learned Counsel for the petitioners in this context rightly submitted that the said report is a table work prepared on the basis of pre-existed collection of documents and in the absence of any independent enquiry or independent finding, Learned Magistrate ought not to have used excerpts from the annexures of an internal investigation done by the CID before filing of the complaint for issuance of process against the accused persons. When the learned Magistrate not being satisfied about the available materials and considering the gravity of the allegation asked a particular authority to make enquiry by himself and to submit a report by himself then that particular authority is duty bound to cause enquiry and to submit a report because when a particular thing is stated to be done in a particular way by a judge, it must be done in that way or not to be done at all. Accordingly it is palpably clear that the impugned order, issuing process under section 204, against the accused persons on

the basis of a report prepared by an unauthorized person, is not sustainable in the eye of law.

13. Mr. Ganguly in this context referring the judgment of **Grives Cotton Ltd. and others (Supra)** contended that by his submissions, he has established that no case has been made out against either of the petitioners as appearing from the assertions of the complaint and also from the initial deposition and for which learned Trial court had also recorded that available materials are not sufficient to issue process against petitioners under the said provisions of law, he ought to have proceed for dismissal of complaint under section 203 of Cr.P.C. instead of making direction for enquiry under section 202 of Cr.P.C.

14. In this context it may be relevant to mention that the judgment of **Grives Cotton Ltd. and others (Supra)** is clearly factually distinguishable with the present case. In the said judgment this High Court clearly recorded that the complainant failed to establish the conditions and incidents of the penal liability set out under section 405/420 and 471 of the IPC as the allegations pertain to alleged breach of contractual obligation and the court noticed that attempts are being made by the parties to invoke jurisdiction of criminal courts by filing vexous criminal complaint by camouflaging allegations which were ex facie outrageous or pure civil claims. The court specifically held such attempts are not to be entertained and should be dismissed at the threshold. This is not the case in the instant proceedings. On perusal of the complaint it is clear from the first paragraph of the complaint that on the basis of information received from the letter dated 22.04.2014 of the Chief Secretary, Government of U.P. about existence of

possible unholy nexus between the donors and the accused persons, in the matter of kidney transplantation against the illegal exchange of huge consideration in the form of money or in kind, the complainant being the appropriate authority under section 13 of the Act of 1994 caused enquiry into the matter by CID and thereby on the basis of assessment of the result of enquiry, he made certain imputations against the accused persons who are 12 in number including the present two petitioners.

15. It is true that Magistrate on the basis of available documents placed before him made a preliminary observation that he is not satisfied with the documents available to him for issuance of process against the accused persons but considering the nature of offence as alleged and gravity of allegation he exercised his power under section 202 of the Cr.P.C., which cannot be said to be unlawful. In the abovementioned facts and circumstances of the present case, Magistrate after considering the materials available before him, in his wisdom had directed a particular higher authority to cause enquiry and to submit a report. That particular authority ought to have carried out the said order of court and having not done so, the impugned order issuing process vitiates with the wrong conception of fact which led the Magistrate to believe that the enquiry was done by the Joint Commissioner of Police Crime Kolkata, whom he directed to cause an enquiry into the case by himself.

16. In such view of the matter and without going into further merits of the case the order dated 22.05.2015 passed by the court below about issuing process against the accused persons and all subsequent orders are hereby quashed. Learned Court below is directed to ask Joint Commissioner to

comply his order dated 21.01.2015 in its letter and spirit, with a further direction to submit a report by him within a period of 60 days and after receipt of such report, he will decide either to proceed under section 203 or under section 204 of Cr.P.C., without being influenced by any observation made herein.

17. CRR 1374 of 2016 and **CRR 442 of 2016** thus stands disposed of Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)