

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

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

C.R.R. 2983 of 2022

**Microsoft Global Services Centre (India) Pvt. Ltd. & Anr.
Vs.
The state of West Bengal & anr.**

For the Petitioners	:	Mr. Sandipan Ganguly Mr. Ayan Bhattacharjee Mr. Shounak Mitra Mr. Zulfikar Ali Alquaderi Mr. Aditya Sarkar
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For the opposite party No.2	:	Mr. Tapas Dutta Ms. Matrayee Chatterjee
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Heard on	:	17.12.2024
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Judgment on	:	21.02.2025
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Dr. Ajoy Kumar Mukherjee , J.:

1. Opposite party No.2 herein as complainant lodged a written complaint against eight accused persons, including the present two petitioners alleging that on 05-08-2019, the complainant/ opposite Party No.2 herein purchased a software namely “Microsoft Office Home & Business, 2019” from the accused no.1 through *Amazon online* and the

said product was received with a product Key-HH7XN-27BF3-27BF3-R3M7F-83JM3-B9976 for installation along with a forwarding letter from the accused no.3. At the time of installation of the said software in the computer, complainant faced problem and as such contacted with the accused no. 2 & 3 but the issue has not been resolved. Then, complainant/Opposite Party No.2 contacted with Microsoft Office, Bangalore as per advice of that accused no. 2 & 3 (who are not the petitioner herein) and from the office of Microsoft a separate Product Key was given on 21-08-2019. Despite that the system was not installed, hence, from the office of Microsoft another Product Key by petitioner no. 1 herein was provided and confirmation code to the complainant was given on 23-08-2019 but when it was used for installation, the problem still persisted.

2. It is further alleged that in spite of repeated request and reminder, none of the accused persons had taken any initiative for resolving the issue. Accused no.2 lastly on or about 12-02-2021 informed that they are no more in this business and they advised to contact with petitioner No. 1/Microsoft Office. Several e-mail correspondences and telephonic conversations were made with the Microsoft office over the said issue, but the issue had not been resolved. On 31-03-2021 the office of petitioner no. 1 at Bangalore informed the complainant/opposite party no. 2 that the product key is not genuine and authentic as it was sold previously to other person and for which the software couldn't be installed in computer.

3. The petitioner, therefore has been allegedly cheated by the accused persons. Firstly, Product Key HH7XN-27BF3-R3 M7F-83JM3-B9976 provided with software was not genuine, hence, from the office of Microsoft

another product key RN7V9-T3C3T-2T42B-VM3HR-VMKBT was given on 21-08-2019, but the system was not installed. Then from the office of Microsoft another product key RV2NC-6G599-RDWWP-KT23C-D7B49 along with confirmation ID was given on 23-08-2019, but again failed, lastly they admitted that the software is pirated i.e. not genuine Secondly, despite repeated request to the accused persons, they did not provide the genuine software and authentic product key, thereby, the complainant/opposite party No.2 has been cheated and all the accused persons are involved in conspiracy.

4. Being aggrieved by the said impugned proceeding Mr. Ayan Bhattacharya, learned Counsel appearing on behalf of the petitioner submits that it is apparent from the petition of complaint that the opposite party no. 2/company had purchased a product of “Microsoft” sold by one Datacorp Software LLP (Accused No.1) through Amazon India (who is not an accused). It is also the case of the complainant, that they allegedly contacted Microsoft, when the second product key/backup key did not work, and then Microsoft had informed the complainant that the complainant had purchased a pirated version of software. Accordingly it is the Microsoft which had, infact detected that the software was not a genuine one and that complainant has purchased the software from the accused no. 1 through Amazon India, which is a pirated one.

5. Mr. Bhattacharya argued, it is preposterous to note that the Microsoft would manufacture pirated product as the same is in contradiction in term and therefore initiation of the instant proceeding qua the petitioners is nothing but an abuse of process of the court. He further

submits that the petitioner no.1 herein is a consulting and enterprise support division of Microsoft Group and is engaged in providing consulting services based on Microsoft technology. The petitioner no. 1 provides assistance to customers of Microsoft product to support their solution on Microsoft problem and therefore, petitioner no.1 is no way connected with sale of “Microsoft office home and business 2019”.

6. Similarly, petitioner no.2 is an office bearer of petitioner no.1 who has been implicated in the instant case without any specific allegation. Neither in the complaint nor in the statements recorded under section 200 Cr.P.C., there is any specific allegation against the petitioner no.2 and he has been made an accused only on the ground that he is associated with the petitioner no.1 herein. Accordingly Mr. Bhattacharya argued that it is trite law that the concept of vicarious liability is not recognized in IPC. Since no specific role has been attributed to petitioners, on that ground alone the proceeding is liable to be quashed.

7. Mr. Bhattacharya further clarified that the product was sold by accused no.1 through the online platform ‘*Amazone.in*’. The petitioners are no way connected with accused no.1 or its partners at any point of time. As the product itself was not a product of “Microsoft”, therefore, under no circumstance the petitioners herein can be held liable for the purchase of a pirated version of a software not manufactured by “Microsoft” and purchased by unconnected third party. This is also because it is nobody’s case that Microsoft is into the business of pirated products. Therefore, the impleadment of “Microsoft” as an accused is a clear abuse of process which has been undertaken by the complainant in order to mount pressure.

Petitioner no.1 was no way connected with sales or marketing or after sales support services for “Microsoft Office Home and Business, 2019”. Petitioner no.1 only caters services to high end customers in designing and planning and the petitioner no.2 is working for gain at petitioner no.1’s office, who has been arrayed as accused no.7.

8. Mr. Bhattacharya has also made an alternative argument on behalf of the petitioners contending that the order dated January, 24, 2022 was passed under section 204 Cr.P.C., without complying the mandatory provision laid down in section 202 Cr.P.C.

9. Mr. Bhattacharya in support of his contention relied upon the following judgments.

- (i) ***Medmeme, LLC and others Vs. Ihorse BPO Solutions, Pvt. Ltd.*** reported (2018) 13 SCC 374.
- (ii) ***S.K. Alagh Vs. State of U.P. and others*** reported in (2008) 5 SCC 662.
- (iii) ***Sunil Bharti Mittal Vs. CBI*** reported in (2015) 4 SCC 609.
- (iv) ***Delhi Race Club (1940) Limited and others Vs. State of U.P. and another*** reported in 2024 SCC Online SC 2248.

In support of his alternative argument Mr. Bhattacharya also relied upon the judgments reported in

- (i) ***Birla Corporation Limited Vs. Adventz Investments and holdings Ltd. and others*** reported in (2019) 16 SCC 610.

(ii) *Delhi Race Club (1940) Limited and others Vs. State of U.P. and another* reported in (2024) SCC Online SC 2248.

10. Mr. Tapas Dutta learned Counsel appearing on behalf of the opposite party no.2 argued that multiple orders cannot be challenged in a criminal Revisional Application under section 482. He further contended that the inherent powers under section 482 of the Code can be exercised, only when no other alternative remedy is available to the litigant and/or no specific remedy is provided by the statute. In this context he further contended that out of eight accused persons, only two accused persons preferred the instant application under section 482, but the said two accused persons have their remedy by making a prayer for discharge under section 245 of the Cr.P.C., hence proceeding under section 482 Cr.P.C is not maintainable.

11. He further contended that it is settled law that the civil dispute and criminal case can run simultaneously, as the cause of action in both the cases are different, though both may arose from the same transaction.

12. He further contended that the petitioner has made allegation that section 202 of the Code has not been complied with but in the present case the trial court after making enquiry by way of examination of witnesses had issued process and therefore it cannot be said that section 202 has not been complied. In fact for making inquiry under section 202, no prescribed mode has been stated in the said provision.

13. He further contended that the company has been correctly arrayed as accused. However, if any of the director can show that he is innocent

and no way connected with the incident, they have right to pray for discharge but at this stage when the role played by them is unknown, the proceeding against the petitioners cannot be quashed. Accordingly he prayed for dismissal of the present application.

14. Ld. Counsel for the opposite party relied upon following judgments.

- (i) ***Ramveer Upadhyay Vs. State of U.P. & Ors.*** reported in (2022) INSC 455.
- (ii) ***Gian Singh Vs. State of Punjab & Ors.*** reported in (2012) 10 SCC 303.
- (iii) ***Rakhi Mishra Vs. State of Bihar & Ors.*** reported in (2017) 16 SCC 772.
- (iv) ***Supriya Jain Vs. State of Haryana & anr.*** reported in (2023) 7 SCC 771.
- (v) ***Vipin Sahni & Ors. Vs. CBI*** reported in 2024 INSC 284
- (vi) ***CRR 2295/2019 (Sheetal Amit Patil & anr. Vs. State of West Bengal)*** Decided 11.06.2021 by the Co-ordinate Bench
- (vii) ***CRR 3849/2022 (A.T. Deb Vs. West Bengal Essential Commodities Supplies Corporation Ltd. & ors.)*** decided on 13.09.2024 by the Co-ordinate Bench.

Decision

15. Mr. Bhattacharya on behalf of the petitioners made alternative argument pointing out the address of the petitioners appearing in the complaint which discloses that the address of the present two petitioners given in the complaint does not fall within the jurisdiction of the court below. Accordingly he argued alternatively that while issuing process under

section 204, the trial court has not complied the mandatory provision, laid down in section 202 of the Code of criminal Procedure.

16. Under section 202 of Cr .P.C. 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. Infact this amended provision of section 202 Cr.P.C. came into being on an from 22nd June, 2006, wherein the words *“and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction”* has been added.

17. The essence of the purpose of said amendment has been discussed by the Apex Court in ***Vijay Dhanuka and ors., Vs. Najima Mamtaz, & others*** reported in **(2014) 14 SCC 638:-**

“The words “and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction” were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. 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. The note for the amendment reads 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 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.”(emphasis added)

18. In view of aforesaid settled position of law, it is clear that the amended provision cast an obligation on the Magistrate to make an inquiry as to whether the allegations levelled in the complaint along with the initial deposition prima facie constitutes the offence for which the complaint is filed. Coming back to the present context, it appears that Id. Magistrate issued the process under section 204 of the Cr.P.C. by a cryptic order on 24th January 2022. It would not be out of context to reproduce the said order dated 24.01.2022.

“Order dated -24-01-2022

Today is date fixed for SA.

The complainant is present with his Ld. Advocate.

Mr. Biswajit Goswami as P.W.-1 and Mrs. Payal pal as P.W. -2 are examined on S.A. under section 200 of Cr.P.C.

It appears that the allegations under section 420/120B/34 of the IPC, 1860 has been established and prima facie case has been made out against the accused persons.

Issue summons at once under section 204 of Cr.P.C. upon the accused persons.

To 28/3/22 for S/R”

19. There is no quarrel with the well settled proposition of law that since no specific mode or manner of enquiry is provided under section 202 of the Code therefore when the witnesses are examined under section 200 of the Code, the examination by the Magistrate for the purpose of deciding, whether or not there is sufficient ground for proceeding against the accused, can also be an inquiry envisaged under section 202 of the Code. It is also not in dispute that in the present context two witnesses namely Mr. Biswajit Goswami and Mrs. Payal Pal have tendered their initial deposition before the court below before issuance of process.

20. In spite of all these, it can not be said that the examination under 200 Cr.P.C, is an empty formality on the part of the magistrate before issuing process. In this context section 200 of the Cr.P.C. which deals with

“examination of complainant” clearly demonstrates that the Magistrate taking cognizance shall examine upon oath the complainant and witnesses present, if any and shall reduce the same into writing. Now if the said provision is read with Rule 89(3) of the Calcutta High Court Criminal (subordinate Court) Rules 1985, it is clear that the examination of the complainant and his witnesses shall not be taken to be a mere formality but they shall be examined intelligently and in such manner as to enable the magistrate to determine, whether there is prima facie sufficient ground for proceeding.

21. Accordingly while examining complainant or his witnesses, learned Magistrate’s role is not that of a silent spectator before summoning the accused. Section 200 of the Cr.P.C. read with Rule 89 of the Calcutta High Court Rules abundantly made it clear that the magistrate may even himself put questions to the complainant and his witnesses to elicit answers to find out truthfulness of the allegations to determine, if any offence is prima facie committed by the accused person or not. It is not that the complainant or his witness is only to place their initial statements by filling affidavit in chief in support of allegations made in the complaint and thereafter the Magistrate is duty bound to have the criminal law set into motion. It is settled principle of law that the order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto.

22. I have gone through the initial statements made by said Biswajit Goswami and Payel Pal and I do not find from their statements to come to a conclusion that the mandatory inquiry has been conducted by the

magistrate in respect of the present two petitioners, in compliance with section 202 of the Code of the Criminal Procedure.

23. Upon hearing learned Counsel appearing on behalf of the petitioners and ld. Counsel appearing on behalf of the opposite party, it appears that there are several disputed facts involved in the present proceeding in respect of present two petitioners, for instance:-

- (a) The opposite party no.2 herein/complainant had not made any contract or agreement with the petitioners and the opposite party no.2 had purchased the product of '*Microsoft*' sold by one Data Cord Software LLP (accused no.1) through *Amazon India*, who are not petitioner herein.
- (b) It is not in dispute from the complaint that the '*Microsoft*' had detected that the software which the opposite party no.2 had allegedly purchased from accused no.1 through *Amazon* is not a genuine one but a pirated version.
- (c) It is not the case of the complainant that '*Microsoft*' started manufacturing pirated product. There is nothing in record to show that the petitioners are anyway connected with accused no.1 or its partners at any point of time.
- (d) If the said product is a pirated version, as detected, it should have been made clear by the complainant why '*Microsoft*' would manufacture pirated version and what is the role of present petitioners in manufacturing and/or marketing pirated version of its own product.

(e) The petitioners' version not been denied, during the course of hearing that petitioner no.1 herein is a consulting and enterprise support division of '*Microsoft*' group and is engaged in providing consulting services based on '*Microsoft*' technology, whose primary job is to provide assistance to specific customers of '*Microsoft*' product to support their solution on '*Microsoft*' problem and the petitioner no.2 herein is working for gain at petitioner no.1 at his office and as such how they are connected with the alleged offence.

24. Accordingly the mandatory inquiry by any mode, ought to have been conducted by the Magistrate under section 202 of Cr.P.C., when the petition of complaint and the recorded deposition does not mention any specific role of the petitioners herein in committing the offence and when the concept of vicarious liability may not have any application in the present context. Moreover, though the process has also been issued under section 120B and under section 34 IPC against the petitioners, but for that also no inquiry has been made as to whether there was any meeting of mind for doing any illegal act by the petitioners adopting any illegal means, specially when the complaint case discloses that '*Microsoft*' itself had detected that the product is not genuine and for which '*Microsoft*' and its entity had a chance of sustaining loss on account of such transaction of pirated product.

25. The words used in section 204 '*sufficient ground for proceeding*' are of immense importance which clearly suggests that an opinion is to be formed only after due application of mind that there is sufficient basis for

proceeding against the accused and formation of such an opinion is to be stated in the order itself. If the order does not disclose answering the aforesaid queries, where it is mandated to be inquired under section 202 of Cr.P.C in respect of the present petitioners role in committing offence, the order is liable to be set aside, as not a single word is written by way of reason, in the order, while coming to the conclusion that there is prima facie case against the present petitioners. In the above background, though I am not unmindful to the settled position of law that such order passed under section 204 need not contain detailed reason, but as I have stated above that on perusal of the summoning order, I do not find that order at all reflects any inquiry, at least in the context of aforesaid situations and in so far as these two accused persons/petitioners are concerned, no inquiry has been conducted by the Magistrate, enumerated in section 202 of Cr.P.C.

26. It is made clear that I may not be misunderstood that I am suggesting that these two petitioners/accused persons cannot be proceeded with at all but what is emphasized is that there is no presumption against these two accused persons for committing the alleged offence from the complaint and the initial deposition and since these two petitioners reside outside the jurisdiction of the Magistrate concerned, the magistrate was required to apply his mind on the above mentioned aspects, while passing summoning order under section 204 Cr.P.C.

27. Mr. Dutta learned Counsel appearing on behalf of the opposite party no.2 though refuted the other arguments made on behalf of the petitioners, on facts of the case but he also submitted that in case, the court is

satisfied that mandatory requirement of section 202 Cr.P.C has not been fulfilled by the learned Magistrate before issuing the process, this Court can direct the Magistrate to do so.

28. In view of aforesaid discussion, without going to the factual aspect of the case, I remit the matter to the magistrate for passing fresh order, uninfluenced by the observations made herein. The court below will pass fresh order after complying with the procedure laid down in section 202 CrP.C. in respect of the present two petitioners within two months from the date of the receipt of the order. Consequently the summoning order in respect of the present two petitioners passed under section 204 Cr.P.C. dated 24.01.2022 stands quashed.

29. CRR 2983 of 2022 along with the connected applications 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.)