

Calcutta High Court

HON'BLE JUDGE(S): AJOY KUMAR MUKHERJEE, J

IN THE MATTER OF: ARNAB ROY ALIAS BAPTU

V.

ARPITA KHAN @ MONIA AND ANR.

CRR - 623 of 2022, decided on 06/12/2022

Criminal P.C. (2 of 1974) , S.202, S.204, S.190— Penal Code (45 of 1860) , S.120B, S.500, S.504, S.506— Criminal defamation - Cognizance of offence - Issuance of summons - Challenge as to - In view of fact that instant case is that of criminal defamation, heavy burden was on Magistrate to scrutinise complaint from all aspects - Admittedly accused resided beyond area in which Magistrate concerned exercised jurisdiction - Magistrate should have made an inquiry under S.202, that complaint is not frivolous and that there is enough evidence which forms sufficient grounds for processing against accused - Order taking cognizance of offence and issuance of process against petitioner, set aside - Case remitted to Magistrate for passing fresh orders after complying with procedure laid down in S.202. AIR 2019 SC 2390-FollowedAIR 2017 SC 299-Followed2014 AIR SCW 2095-Followed

(Para 7, 10, 11, 12, 13)

Case Referred:

Chronological Paras

AIR 2020 SC 992 : AIR Online 2020 SC 175

Para No.(5)

AIR 2019 SC 2390 : AIR Online 2019 SC 281 : 2019 Cri LJ 3196 (Foll.)

Para No.(7)

AIR 2017 SC 299 (Foll.)

Para No.(8)

AIR 2016 SC 740 : 2016 Cri LJ 1346

Para No.(5)

AIR 2014 SC (Supp) 756 : 2014 AIR SCW 2095 : 2014 Cri LJ 2295 (Foll.)

Para No.(9)

AIR 2010 SC 3196 : 2010 AIR SCW 2770 : 2010 Cri LJ 2828

Para No.(5)

Name of Advocates

Manas Kumar Barman for Petitioner; Sumanta Ganguly for Respondent.

1. **ORDER** :-Being aggrieved by the order dated 7.2.2022 passed by the learned Additional City Sessions Judge, Bench-II, Bichar Bhawan, Calcutta in connection with Criminal revision no. 105 of 2021, the present revisional application under Section 401 read with Section 482 of the Code of Criminal Procedure has been preferred.

2. By the impugned order, the learned court below has affirmed the impugned order dated 23.4.2021 passed by the learned Additional Chief Metropolitan Magistrate, Calcutta in connection with complaint case no. CN-547 of 2021 whereupon cognizance was taken and summon was issued under Section 120B/500/504/506 of the Indian Penal Code against both the petitioners herein under Section 204 of the Code of Criminal

Procedure.

3. The petitioner's case is that the complainant/opposite party no. 1 being the full blood elder sister of the petitioner no. 1 filed a private complaint before the Magistrate alleging inter alia that the petitioner no. 1 herein is notorious and mischievous person and he along with his wife, i.e. petitioner no. 2 alleged to have misbehaved with the parents of the complainant, out of whom one died on 8.6.2020 and both the petitioners herein did not have cordial relationship with the complainant/opposite party no. 1 and her family. It is alleged that petitioner no. 1 herein in collusion with petitioner no. 2 sent some derogatory, provocative and threatening messages via Whatsapp to his father's mobile phone from his mobile phone which caused defamation of complainant/opposite party no. 1 herein.

4. Petitioner contended that learned trial court after examining the complainant under Section 200 of the Code of Criminal Procedure, was pleased to observe that a prima facie case exists in favour of the complainant and there are sufficient grounds for proceeding under Section 500/504/506/120B of the Indian Penal Code against the petitioners herein and accordingly, he issued process under Section 204 of the Code vide order dated 23.4.2021. Being aggrieved by the said order, the petitioner preferred criminal revision before the City Sessions court, Calcutta and learned Judge, Bench -II, City Sessions court was pleased to affirm the order of learned Magistrate about taking cognizance of the offence and also about the issuance of process under Section 204 of the Code of Criminal Procedure and thereby dismissed the revisional application vide impugned order dated 7.2.2022.

5. The petitioner herein had attacked the impugned order mainly on the ground that the instant case is plantation and counter blast of as many as five previous cases against opposite party No. 1 herein and courts below passed the impugned order on the basis of conjectures and surmise. He did not keep in mind the provision of Section 65B (4) of the Indian Evidence Act, 1872, that a certificate under the relevant section must be produced at the time of giving any evidence of electronic record which is obligatory and mandatory and not voluntary. The said certificate has not been produced in the present case. The courts below have ignored the clear statutory bar under Section 59 of the Indian Evidence Act which stipulates, all facts except the contents of documents or electronic records may be proved by oral evidence. The order impugned is very cryptic and does not reflect application of mind by the Magistrate. Furthermore the order passed by the courts below is perverse because the person who alleged to have been defamed has not appeared before the court nor deposed before the court at the time of initial

deposition which is violative of section 199 of the code. Accordingly, the petitioner contends that the issuance of process under Section 204 of the Code of Criminal Procedure as well as taking cognizance under Section 190 of the Code of Criminal Procedure are bad in law and liable to be set aside. In this context, he relied upon the judgment of the Apex court reported in (2016) 3 SCC 1 : **(AIR 2016 SC 740)**, (2010) 5 SCC 600 :

(AIR 2010 SC 3196) and (2020) 3 SCC 1 : **(AIR 2020 SC 992)**.

6. Learned advocate for the opposite party submits that at the time of taking cognizance and for issuance of summon, the court is only required to see whether the allegations made in the complaint and in the initial deposition, prima facie constitutes the offence or not. The quantity of witness is not the relevant consideration but the quality of the evidence adduced during initial deposition is relevant and from the initial deposition given by the complainant, it is very much clear that it constitutes the offences under Section 500/504/506/120B of the Indian Penal Code. At this stage, learned Magistrate is not supposed to investigate as to whether the trial will ultimately ended in conviction or not. He is only required to consider the contents of the complaint and available documents for the purpose of taking cognizance as well as for the purpose of issuance of summon. He further submits that the petitioners have not only defamed the father of complainant but also the complainant/ opposite party No. 1 by sending Whats APP messages. He further submits that certificate under section 65-B is required to be produced by the opposite parties at the time of trial and not at this initial stage of proceeding. Accordingly, in the present case, the Magistrate has committed no wrong in issuance of process against the petitioners under the relevant provision of the statute.

7. Having considered the facts and circumstances of the case and also considering the nature of allegation levelled against the petitioner, it appears that since this is a case of criminal defamation, the heavy burden is on the Magistrate to scrutinize the complaint from all aspects. Here from the written complaint, it appears that the accused concerned resides outside the jurisdiction of the court concerned and as such Magistrate should have kept in mind the provision laid down in Section 202 of Code of Criminal Procedure which stipulates about the cases where accused resides beyond the area in which the Magistrate exercises his jurisdiction and he must be satisfied about the ingredients of Section 499 of the Indian Penal Code. As held in Birla Corporation Ltd. Vs. Adventz Investments and holdings Ltd. and others reported in (2019) 16 SCC 610 : **(AIR 2019 SC 2390)** and also in a series of judgments of the Supreme Court that the object of an inquiry under section 202 Cr.P.C. is for the Magistrate to scrutinize the

material produced by the complainant to satisfy himself that the complaint is not frivolous and that there is evidence/material which forms sufficient ground for the Magistrate to proceed to issue process under section 204 Cr.P.C. It is the duty of the Magistrate to elicit every fact that would establish the bona fides of the complaint and the complainant.

8. In *Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and another*, reported in (2017) 3 SCC 528 : **(AIR 2017 SC 299)** Apex Court was pleased to observe as follows:-

"23. Admitted position in law is that in those cases 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. Section 202 CrPC was amended in the year 2005 by the Code of Criminal Procedure (Amendment) Act, 2005, with effect from 22-6-2006 by adding the words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction". There is a vital purpose or objective behind this amendment, namely, to ward off false complaints against such persons residing at a far- off places in order to save them from unnecessary harassment. Thus, the amended provision casts an obligation on the Magistrate to conduct enquiry or direct investigation before issuing the process, so that false complaints are filtered and rejected. The aforesaid purpose is specifically mentioned in the note appended to the Bill proposing the said amendment."

9. Supreme Court had the occasion to analyze the term "shall" used in section 202 in *Vijay Dhanuka and others Vs. Najima Mamtaj and others*, reported in (2014) 14 SCC 638 : **(2014 AIR SCW2095)**, where Their Lordships were pleased to observe:-

"12. 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."

10. In such circumstances when admittedly accused persons/petitioner herein reside beyond the area in which magistrate concerned exercises jurisdiction, the Magistrate should have made an inquiry that the complainant is not frivolous and that there is evidence/materials which forms sufficient grounds for processing against the accused.

11. In view of above, CRR 623 of 2022 is disposed of by setting aside the order dated 7.2.2022 passed in Criminal revision no. 105 of 2021 by the learned Additional City Sessions Judge, Bench-II, Bichar Bhawan, Calcutta and also the order regarding issuance of process under Section 204 of the Code of Criminal Procedure passed in the later part of the order dated 23.4.2021.

12. The case is remitted to the Magistrate for passing fresh orders uninfluenced by any observation passed by this court. The concerned Magistrate will pass fresh orders after complying with the procedure laid down in section 202 Cr.P.C. within two months from the date of receipt of this order.

13. CRR 623 of 2022 is accordingly disposed of.

14. Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

Petition Allowed