(2014) 14 Supreme Court Cases 638

(BEFORE CHANDRAMAULI KR. PRASAD AND PINAKI CHANDRA GHOSE, JJ.)

VIJAY DHANUKA AND OTHERS . . Appellants;

Versus

NAJIMA MAMTAJ AND OTHERS . . Respondents.

Criminal Appeals Nos. 678-81 of 2014†, decided on March 27, 2014

A. **Criminal Procedure Code, 1973 — S. 202 — Requirement to conduct inquiry or direct investigation before issuing process where accused residing beyond territorial jurisdiction of Magistrate concerned, held, mandatory — Purpose is to protect innocent persons residing at far off places from being harassed**

B. **Criminal Procedure Code, 1973 — Ss. 202 and 2(g) — "Inquiry" — Examination of complainant and witnesses and only thereafter direction issued for issuance of process — Held, constitutes inquiry for purposes of S. 202**

C. **Interpretation of Statutes — Subsidiary Rules — Mandatory or directory — "Shall" — Held, cannot always be construed as mandatory — Context and legislative intention to be considered**

A complaint petition was filed by Respondent 1 before the Additional CJM against the accused persons alleging commission of offence under Sections 323, 380 and 506 read with Section 34 IPC. The Magistrate took cognizance of the offence and transferred the case to another Magistrate for inquiry and disposal. The transferee Magistrate examined under Section 200 CrPC on solemn affirmation the complainant as also her two witnesses and thereafter the Magistrate directed issuance of summons against the accused persons.

The petitioners filed applications under Section 482 CrPC before the High Court challenging the order issuing process on the ground that the accused persons being residents of an area outside the territorial jurisdiction of the Magistrate who had issued summons, an inquiry within the meaning of Section 202 CrPC was necessary and that only after such inquiry Magistrate was required to come to the conclusion as to whether sufficient grounds exist for proceeding against the accused persons. The applications were dismissed by the High Court.

Before the Supreme Court the following two questions arose for consideration:

(*1*) In a case in which the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, whether it would be mandatory to hold inquiry or the investigation as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding?

(*2*) Whether the Magistrate before issuing summons has held the inquiry as mandated under Section 202 CrPC?

† Arising out of SLPs (Crl.) Nos. 5090-93 of 2013. From the Judgment and Order dated 19-2-2013 of the High Court of Calcutta in CRRs Nos. 508-11 of 2013

Dismissing the appeals, the Supreme Court

Held :

(1) Though the word "shall" ordinarily means 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. However, the expression "shall" in Section 202(1) CrPC prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. (Para 12)

In Section 202(1) CrPC, 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. Thus, looking to the intention of the legislature it is clear that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, considering the use of the expression "shall" and the background and the purpose for which the amendment has been brought, it is clear 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. (Para 12)

Udai Shankar Awasthi v. *State of U.P.*, (2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708, *followed*

(2) It is evident from the definition of "inquiry" under Section 2(*g*) CrPC that every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202. In the inquiry envisaged under Section 202, the witnesses are examined whereas under Section 200, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202. (Para 14)

In the present case, the Magistrate had examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process. Thus, the Magistrate had held the inquiry before issuing summons. (Para 15)

Vijay Dhanuka, In re, Criminal Revision No. 508 of 2013, order dated 19-2-2013 (Cal), *affirmed*

D. **Criminal Procedure Code, 1973 — Ss. 192 and 12 — Transfer of case by Additional CJM — Validity — Additional CJM having same powers as CJM vide S. 12(2) — Hence, transfer of case for enquiry by Additional CJM after taking cognizance to another Magistrate for inquiry and disposal, held, is valid**

Held :

Section 192 CrPC empowers any Chief Judicial Magistrate to transfer the case for inquiry after taking cognizance to a competent Magistrate subordinate to him. In the present case, on receipt of the complaint, the learned Additional Chief Judicial Magistrate in exercise of the power under Section 192 CrPC, after

taking cognizance of the offence, had made over the case for inquiry and disposal to the transferee Magistrate. Section 12(2) CrPC confers on Additional Chief Judicial Magistrate the same powers as that of a Chief Judicial Magistrate. Hence, transfer of the case by the Additional Chief Judicial Magistrate after taking cognizance of the case to transferee Magistrate for inquiry and disposal is perfectly in tune with the provisions of the Code. (Para 7)

R-M/53042/SR

Advocates who appeared in this case :
Jaideep Gupta, Senior Advocate (Rakesh Sinha, S. Sengupta and Brajesh Kumar, Advocates) for the Appellants;
Ms Nidhi, Advocate, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708, *Udai Shankar Awasthi* v. *State of U.P.* 644*f-g*
2. Criminal Revision No. 508 of 2013, order dated 19-2-2013 (Cal), *Vijay Dhanuka, In re* 641*d-e*, 645*f*

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J.— The petitioners have been summoned in a complaint case for commission of offence under Sections 323, 380 and 506 read with Section 34 of the Penal Code, 1860 (hereinafter referred to as "IPC"). Respondent 1 filed a complaint in the Court of the Additional Chief Judicial Magistrate at Jangipur, Murshidabad on 1-10-2011, who after taking cognizance of the same, transferred the complaint to the Court of the Judicial Magistrate, Jangipur, Murshidabad for inquiry and disposal.

2. According to the allegation in the complaint petition, Accused 1, Rajdip Dey is sub-broker of Karvy Stock Broking Ltd.; whereas the other accused persons are its officials posted at Kolkata and Hyderabad. The complainant alleged to be its investor and claimed to have purchased shares from Karvi Stock Broking Ltd. through the sub-broker, Accused 1. According to the complaint, a dispute arose over trading of shares between the complainant and the accused persons and to settle the on-going dispute, the accused persons offered a proposal to the complainant who consented to it and accordingly, on 11-9-2011, the accused persons visited at her residence at Raghunathganj Darbeshpara to have a discussion with the complainant and her husband. According to the allegation, the discussion did not yield any result and the accused persons started shouting at them. Some of the accused persons, according to the allegation, took out a pistol from their bag and put the same over the heads of the complainant and her husband. It is alleged that they assaulted the complainant and her husband with fists and slaps and also abused them and coerced the complainant to sign some papers and snatched away the suitcase containing some papers.

3. The aforesaid complaint was filed on 1-10-2011 in the Court of the Additional Chief Judicial Magistrate, Jangipur, Murshidabad. The learned Magistrate took cognizance of the offence and transferred the case to the court of another Magistrate for inquiry and disposal. On receipt of the record,

the transferee Magistrate adjourned the case to 31-10-2011. On the said date, the complainant and her witnesses were present. The complainant was examined on solemn affirmation and the two witnesses, namely, Enamul Haque and Masud Ali were also examined. The order dated 31-10-2011 shows that they were examined under Section 200 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code"). The transferee Magistrate, thereafter, adjourned the case for orders and on the adjourned date i.e. 15-11-2011, he directed for issuance of summons against the accused persons for offence under Sections 323, 380 and 506 read with Section 34 IPC. It is relevant here to state that in the complaint, the residence of the accused has been shown at a place beyond the territorial jurisdiction of the Magistrate.

4. The petitioners challenged the order issuing process in four separate applications filed under Section 482 of the Code before the High Court, inter alia, contending that the accused persons being residents of an area outside the territorial jurisdiction of the learned Magistrate who had issued summons, an inquiry within the meaning of Section 202 of the Code was necessary. It was also contended that only after inquiry under Section 202 of the Code, the learned Magistrate was required to come to the conclusion as to whether sufficient grounds exist for proceeding against the accused persons. The said submission did not find favour with the High Court and by a common order dated 19-2-2013[1], it rejected all the applications. It is against this common order that the petitioners have filed these special leave petitions.

5. Leave granted. Mr Jaideep Gupta, learned Senior Counsel appearing on behalf of the appellants submits that the accused persons admittedly were residing at a place beyond the area in which the learned Magistrate exercised his jurisdiction, hence, an inquiry under Section 202 of the Code was sine qua non. He submits that in the present case, the learned Magistrate has not held inquiry as envisaged under Section 202 of the Code.

6. Ms Nidhi, learned counsel representing Respondent 1, however, submits that, in fact, the learned Magistrate before issuing the process has held an inquiry contemplated under the law and the order issuing process cannot be faulted on the ground that no inquiry was held. In view of the rival submissions, we deem it expedient to examine the scheme of the Code.

7. In the present case, we are concerned with an order passed in a complaint case. Section 190 of the Code provides for cognizance of offences by Magistrates and the same reads as follows:

> "**190.** ***Cognizance of offences by Magistrates***.—(1) Subject to the provisions of this Chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—
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> (*a*) upon receiving a complaint of facts which constitute such offence;

1 *Vijay Dhanuka, In re*, Criminal Revision No. 508 of 2013, order dated 19-2-2013 (Cal)

(*b*) upon a police report of such facts;

(*c*) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

Section 190 of the Code finds place in Chapter XIV and from its plain reading, it is evident that the competent Magistrate, inter alia, may take cognizance of any offence, subject to the provisions of Chapter XIV, upon receiving a complaint of facts which constitute an offence. Section 192 of the Code empowers any Chief Judicial Magistrate to transfer the case for inquiry after taking cognizance to a competent Magistrate subordinate to him. In the present case, on receipt of the complaint, the learned Additional Chief Judicial Magistrate in exercise of the power under Section 192 of the Code, after taking cognizance of the offence, had made over the case for inquiry and disposal to the transferee Magistrate. Section 12(2) of the Code confers on the Additional Chief Judicial Magistrate the same powers as that of a Chief Judicial Magistrate. Hence, transfer of the case by the Additional Chief Judicial Magistrate after taking cognizance of the case to transferee Magistrate for inquiry and disposal is perfectly in tune with the provisions of the Code. The transferee Magistrate, thereafter, examined the complainant and her witnesses and only thereafter issued the process.

8. Section 200 of the Code, inter alia, provides for examination of the complainant on oath and the witnesses present, if any. Same reads as follows:

"**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."

9. Under Section 200 of the Code, on presentation of the complaint by an individual, other than public servant in certain contingency, the Magistrate is required to examine the complainant on solemn affirmation and the witnesses present, if any. Thereafter, on perusal of the allegations made in the complaint, the statement of the complainant on solemn affirmation and the witnesses examined, if any, various options are available to him. If he is

satisfied that the allegations made in the complaint and statements of the complainant on oath and the witnesses constitute an offence, he may direct for issuance of process as contemplated under Section 204 of the Code. In case, the Magistrate is of the opinion that there is no sufficient ground for proceeding, the option available to him is to dismiss the complaint under Section 203 of the Code. If on examination of the allegations made in the complaint and the statement of the complainant on solemn affirmation and the witnesses examined, the Magistrate is of the opinion that there is no sufficient ground for proceeding, the option available to him is to postpone the issue of process and either inquire the case himself or direct the investigation to be made by a police officer or by any other person as he thinks fit. This option is also available after the examination of the complainant only.

10. However, in a case in which the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction whether it would be mandatory to hold inquiry or the investigation as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, is the question which needs our determination. In this connection, it is apt to refer to Section 202 of the Code which provides for postponement of issue of process. The same reads 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:
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> Provided that no such direction for investigation shall be made—
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> (*a*) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or
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> (*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.
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> (2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:
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> 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.
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> (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." (emphasis supplied)

11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

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.

13. In view of the decision of this Court in *Udai Shankar Awasthi* v. *State of U.P.*[2], this point need not detain us any further as in the said case, this Court has clearly held that the provision aforesaid is mandatory. It is apt to reproduce the following passage from the said judgment: (SCC p. 449, para 40)

> "*40.* The Magistrate had issued summons without meeting the mandatory requirement of Section 202 CrPC, though the appellants were

2 (2013) 2 SCC 435 : (2013) 1 SCC (Civ) 1121 : (2013) 2 SCC (Cri) 708

outside his territorial jurisdiction. *The provisions of Section 202 CrPC were amended vide the Amendment Act, 2005, making it *mandatory to postpone the issue of process* where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned.* The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."

(emphasis supplied)

14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has been defined under Section 2(*g*) of the Code, the same reads as follows:

> "**2. (*g*) 'inquiry'** means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or the court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code.

15. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process.

16. In view of what we have observed above, we do not find any error in the order impugned[1]. In the result, we do not find any merit in the appeals and the same are dismissed accordingly.

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* **Ed.**: The matter between the two asterisks has been emphasised in original as well.

1 *Vijay Dhanuka, In re*, Criminal Revision No. 508 of 2013, order dated 19-2-2013 (Cal)