* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.M.C. 2427/2018 & CRL. M.A. 8663/2018

Reserved on : 13.03.2020
Delivered on : 25.06.2020

IN THE MATTER OF:

MADHVI SINGH ..... Petitioner
Through: Mr. Jay Savala, Sr. Advocate with Ms. Amrita Mishra, Ms. Ritu Yadav and Mr. Rajpal Singh, Advocates.

Versus

G.K HADA & ORS. ..... Respondents
Through: Mr. Sharat Kapoor, Mr. Ankit and Mr. Vaibhav, Advocates for R-1.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

MANOJ KUMAR OHRI, J.

1. The present petition is directed against the order dated 01.10.2016 passed by ACMM, South East, Saket Court in Complaint Case No. 625094/2016 vide which the petitioner along with the other accused persons was summoned for the offence punishable under Sections 471/120B/34 IPC.

2. Briefly, the facts of the case are that the husband of the petitioner Late Sh. A.N. Singh along with his brother Late Sh. G.N. Singh were the owners of the property bearing no. D-2, Maharani Bagh, New Delhi. In January, 1981, the entire ground floor along with two servant quarters at the first floor was let out to M/s Century Tubes Ltd. (CTL) for residence

of its Managing Director Sh. Gautam Hada i.e. respondent no.1 herein, initially at a monthly rent of Rs.4,000/-. From time to time, fresh agreements were executed with CTL and the last such agreement was executed on 01.01.2001 for a period of 2 years and thereafter it became month to month tenancy as no further agreement was executed. It has been pleaded that initially the cheques towards the rent were drawn by CTL but later the cheques were issued by M/s Pavik Lifestyle Ltd.

3. Later, the petitioner along with her husband's brother i.e., Late Sh. G.N. Singh instituted a civil suit bearing no. CS No. 254/14/08 against M/s Pavik Lifestyle Ltd. for possession and recovery of rent and mesne profits.

4. In the aforesaid civil suit during the cross examination of the respondent no.1 conducted on 08.05.2013, three draft lease agreements dated 01.01.2003, 17.03.2004 and 01.01.2006 were produced on behalf of the plaintiffs, which though were signed by respondent no. 1 and the witnesses but were not signed by the petitioner. Respondent no.1 was confronted with the aforesaid draft lease agreements to show that respondent no.1 had agreed to pay the enhanced amount of rent. Respondent no.1 denied his signatures on the aforesaid agreements.

5. The suit came to be dismissed on 27.05.2015. The first appeal under Section 96 of CPC bearing RFA No. 506/2015 impugning the aforesaid order of dismissal came to be allowed vide judgment dated 07.07.2016 and the suit was decreed for the relief of ejectment of the respondent therein from the entire premises and also for recovery of mesne profits/damages for use and occupation @ Rs.1.50 lacs per month w.e.f. 01.12.2007 till the date of recovery of possession. It has been informed that thereafter an execution petition was filed which is pending before the concerned court.

6. During the pendency of the aforesaid RFA, respondent no.1 filed the aforementioned complaint on 04.06.2015 under Section 200 read with Section 190 Cr.P.C. against the petitioner and other accused persons alleging that his signatures were forged on the aforesaid draft lease agreements. It was prayed that the said lease agreements be also sent to the handwriting expert. An opinion from a private handwriting expert was placed on record in support of the complaint and the said expert was also cited as a witness.

7. The complainant was examined in pre-summoning evidence and vide impugned order, learned ACMM summoned the present petitioner.

8. Learned Senior Counsel for the petitioner contended that in the complaint, the petitioner, a lady aged about 78 years who is presently residing in Varanasi, has been shown as a resident of Kolkata besides mentioning the Delhi address and the summoning order has been passed without conducting the mandatory enquiry under Section 202 Cr.P.C. In support of his submission, learned Senior Counsel has placed reliance on the decision of the Supreme Court in Abhijit Pawar *v.* Hemant Madhukar Nimbalkar & Anr. reported as **2017 (3) SCC 528**. He submitted that even the summons issued against the petitioner remained unexecuted at her Delhi address resulting in issuance of bailable warrants at her Kolkata address.

9. It was also contended that the summoning order was issued without examining the expert witness cited by the complainant or without sending the concerned documents to FSL. Additionally, it was also urged that there was an enormous delay in filing the complaint; the offence is of civil nature; the continuation of proceedings would be gross abuse etc. It was also submitted that the complaint was filed only as a counter blast to the eviction proceedings initiated by the petitioner

against the respondent no. 1. It was further submitted that no reliance was placed on the aforesaid draft lease agreements either at the time of dismissal of the suit or subsequent decree in his favour by this Court in the aforementioned RFA.

10. However, during the course of arguments, learned Senior Counsel for the petitioner, on instructions, restricted his submission only to violation of Section 202 Cr.P.C. and sought to reserve his right to raise the other contentions at an appropriate stage.

11. Learned counsel for respondent no. 1, on the other hand, opposed the present petition. It was submitted that in the complaint, both the addresses have been mentioned and as such no enquiry under Section 202 Cr.P.C. was necessary. In support of his submission, he placed reliance on the decisions in Vijay Dhanuka & Ors. *v.* Najima Mamtaj & Ors. reported as **(2014) 14 SCC 638** and Birla Corporation Limited & Ors. *v.* Adventz Investments & Holdings Limited & Ors. reported as **AIR 2019 SC 2390**.

12. I have heard the learned counsels for the parties and gone through the case records.

13. By Amendment Act 25 of 2005, Sub-Section (1) of Section 202 Cr.P.C. came to be amended w.e.f. 23.06.2006 and the following words were inserted:-

> *"and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction"*

14. The object of the amendment was to place a check on false complaints filed against persons who are living at far-off places. It was made obligatory upon the Magistrate to enquire into the case himself or direct an investigation to be made by a police officer or by such other

person as he thinks fit to find out whether or not there was sufficient ground to proceed against the accused. The use of the word "shall" mean that an enquiry or investigation envisaged under Sub-Section (1) of Section 202 Cr.P.C. is mandatory.

15. In Abhijit Pawar (Supra), the purpose and object of the aforesaid amendment in Section 202 Cr.P.C. came for consideration and while relying on its earlier decision in Vijay Dhanuka (Supra), the Supreme Court held as under :-

> *"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 Cr.P.C. 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.*
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> *24. The essence and purpose of this amendment has been captured by this Court in Vijay Dhanuka v. Najima Mamtaj, in the following words: (SCC p. 644, paras 11-12)*
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> > *"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."*
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> *25. For this reason, the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed…."*

16. The Supreme Court in Mehmood Ul Rehman *v.* Khazir Mohammad Tunda & Ors. reported as **(2015) 12 SCC 420**, held that cognizance of an offence on a complaint is taken for the purpose of issuing process to an accused. In this process, judicial notice of certain facts which constitute an offence is taken and as such, there has to be an application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It was emphasized that:

> *"22…. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation*

under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction…."

17. In Birla Corporation Ltd. (Supra), the Supreme Court while relying on the decisions in Vijya Dhanuka (Supra); Abhijit Pawar (Supra) and National Bank of Oman v. Barakara Abdul Aziz and Anr. reported as **(2013) 2 SCC 488** reiterated that holding of enquiry under Section 202 Cr.P.C. is mandatory.

18. In Pepsi Foods Ltd. *v.* Special Judicial Magistrate & Ors. reported as (**1998) 5 SCC 749**, it was held that summoning of an accused in a criminal case is a serious matter and the criminal law cannot be set into motion as a matter of course. It was further held that:

"28. ...It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. 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. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

19. As enunciated in the decisions referred above, the sole object of bringing the amendment in Sub-Section (1) of Section 202 Cr.P.C was to save the accused living at far-off places from unnecessary harassment in false and fictitious complaints. In these circumstances, the issue that has arisen in the present case needs to be addressed keeping in view the object and purpose of the amendment.

20. It is worthwhile to note that while passing the impugned order, learned ACMM declined the complainant's prayer to summon the legal heirs of Late Sh. G.N. Singh, for which ld. ACMM relied upon the judgment dated 27.05.2015 passed by ld. ADJ in the aforementioned civil suit. The judgment was brought on record by the complainant during his examination at the time of pre-summoning evidence. The said judgment recorded the objections raised by the complainant (defendant in the civil suit) that the suit for possession filed against him was bad for misjoinder of the parties as the tenanted portion in the premises was let out by Late Sh. G. N. Singh as an absolute owner and the present petitioner (impleaded as Plaintiff no. 1 in the civil suit) had no concern with the premises. The complaint had also pleaded that the petitioner, prior to filing of suit, had filed several eviction petitions under Delhi Rent Control Act against tenants in respect of first floor and above of the very same house.

21. The complainant, is occupying as a tenant the entire ground floor of the very premises, which are mentioned as the Delhi address of the petitioner in the memo of the complaint, the other being an address in Kolkatta. In spite of that, there is not even a whisper let alone an averment to the effect that the petitioner has been residing at the given address in Delhi. In these circumstances, in absence of any averment in the complaint or the material on record to the aforesaid effect coupled

with the fact that an alternate address of the petitioner is given which is outside the jurisdiction of the court, then an enquiry ought to have been conducted. When the law casts a duty on the court to conduct an enquiry once an accused is stated to be a resident of a place which is outside the territorial jurisdiction of the court, in the opinion of this Court, in the facts and circumstances of this case, it was obligatory on the part of learned ACMM to conduct an enquiry envisaged under Section 202 Cr.P.C. Accordingly, the impugned order dated 01.10.2016 is set aside and the matter is remanded back to the concerned court for fresh consideration in accordance with law. The matter shall be initially listed before the concerned court on 01.07.2020 for directions.

22. The petition is disposed of in the above terms. Miscellaneous application is disposed of as infructuous.

23. A copy of this order be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

JUNE 25, 2020
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