

re: *Satender Kumar Antil Vs. Central Bureau of Investigation & Anr, Petition(s) for Special Leave to Appeal (Crl.) No(s).5191/2021* as well as in the light of the judgment dated 02.09.2021 in re; *Aman Preet Singh vs. C.B.I. through Director, Criminal Appeal No.929 of 2021* (arising out of SLP (Crl.) No.5234/2021), wherein the Apex Court has considered the decision of Delhi High Court in re; **Court on its own Motion vs. Central Bureau of Investigation (2004) 72 DRJ 629**, wherein the guideline was formulated that if any accused person has not been arrested during investigation and has cooperated with the investigation, there is no need to arrest him after filing charge sheet, particularly, if the nature of offences is not so serious. In the aforesaid judgment, the Apex Court has considered its own judgment in re; *Siddharth vs. The State of Uttar Pradesh & Anr., Criminal Appeal No.838 of 2021* (arising out of SLP (Crl.) No.5442/2021), whereby the Apex Court considering the observation of the well celebrated judgment in re; *Joginder Kumar vs. State of U.P. & Ors, (1994) 4 SCC 260*, has observed that the arrest is not mandatory in all cases and if the accused person is cooperating with investigation, there is no need to arrest.

11. Till the disposal of such application of the petitioners, the non-bailable warrant shall not be executed against them but if the petitioners do not file application within four weeks, as aforesaid, the benefit of this order may not be given to them and the learned court below would be at liberty to take appropriate coercive steps, as per law.

12. Before parting with the matter, I must observe that the learned court below must take care of relevant facts before issuing the bailable warrants, non-bailable warrants and proclamation under Section 82 Cr.P.C.

13. The Hon'ble Apex Court in re: *Inder Mohan Goswami* (supra) has clearly observed that issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants. Further, in the order where the bailable/ non-bailable warrant or proclamation under Section 82 Cr.P.C. is issued, the court must indicate that despite the service of summons or bailable warrant or non-bailable warrant the accused has not appeared. In the absence of such indication the coercive orders, as said above, would be treated as if they failed the test of statutory prescriptions prescribed under Sections 64 & 65 of the Cr.P.C.

14. Accordingly, the instant petition is *disposed of finally* in terms of the aforesaid order making it clear that I have not decided the validity of the charge-sheet. Therefore, the petitioners would be at liberty to avail appropriate remedy before appropriate court of law at various stages.

(2022)011LR A257

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 23.12.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482/378/407 No. 5691 of 2021

**Hemant Tiwari & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Applicants:
Rajesh Kumar, Rohit Kumar Tripathi

Counsel for the Opposite Parties:
G.A.

3. Uday Shankar Awasthi Vs St. of U.P. , (2013)
2 SCC 435

(Delivered by Hon'ble Rajesh Singh
Chauhan, J.)

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - section 202 - Postponement of issue of process - Section 2(g) - Inquiry - no specific mode or manner of inquiry provided u/s 202 Cr.P.C. of the Code - Apex Court in the inquiry mandated u/s 202 Cr.P.C. - would mean examination of the complainant and examination of the witnesses. (Para - 11)

1. Heard Sri Rohit Kumar Tripathi and Sri Rajesh Kumar, learned counsel for the petitioners and learned AGA.

2. In view of the proposed order notice to opposite party no. 2 is dispensed with.

(B) Criminal Law - The Code of Criminal Procedure, 1973 - Section 202 - in case the summons are issued against the accused persons who are residing outside the territorial limits a prior inquiry by the concerned Magistrate or investigation by the police should be made before issuing summons.(Para -4 ,8)

3. By means of this petition the petitioners have prayed for quashing the summoning order dated 31.5.2019 (Annexure no. 1) and N.B.W. order dated 1.11.2021 passed by the C.J.M., Lucknow summoning the petitioners in Complaint Case No. 5637/2018 u/s 500,501 IPC, P.S. Gautampalli, District Lucknow as well as entire criminal proceedings of the aforesaid criminal case.

Complaint filed by opposite party no. 2 - summoned all petitioners - residing outside the territory of the court from where the summoning order has been issued - contention - no inquiry was conducted by the Magistrate against the persons who were residing outside the territorial limits. (Para - 4,7)

4. The contention of learned counsel for the petitioner is that the petitioner nos. 2 and 3 are the resident of New Delhi and Bangalore respectively. On the complaint filed by opposite party no. 2 the learned C.J.M., Lucknow has summoned all the petitioners vide impugned order dated 31.5.2019. As per learned counsel for the petitioner while summoning the petitioners no. 2 and 3 who are residing outside the territory of the court from where the summoning order has been issued, the learned court-below has committed manifest error of law inasmuch as section 202 Cr.P.C. clearly mandates that in case any accused person is residing at a place beyond the area in which he exercises his jurisdiction, shall postpone the issue of process against the accused and either enquire into the case himself or direct the

HELD:-Summoning order (impugned) has been issued after examination of the complainant u/s 200 and examination of witnesses u/s 202 Cr.P.C. Therefore, there is no infirmity or illegality in the impugned order. Sections for which the petitioners have been summoned i.e. 500 and 501 IPC are triable by the sessions, therefore, the prior direction for investigation could have not been issued by the Magistrate in view of the first proviso of section 202(1) Cr.P.C. .(Para - 13)

Petition dismissed . (E-7)

List of Cases cited:-

1. N.B.O. Vs Barakara Abdul Aziz & anr. , (2013) 2 SCC 488

2. Vijay Dhanuka ors. Vs Najima Mamta & ors. , (2014) 14 SCC 638

investigation to be made by the police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceedings. For the convenience section 202 Cr.P.C. is being reproduced herein-below:

"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: Provided that no such direction for investigation shall be made,--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(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.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

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.

(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."

5. Learned counsel for the petitioner has submitted that the aforesaid mandatory condition has been inserted in section 202 Cr.P.C. by Act no. 25 of 2002, w.e.f 23.6.2006. Therefore, before issuing summons, particularly to petitioner nos. 2 and 3 the Magistrate should have enquired into the case himself or should have directed for investigation to be made by the police officer. Since such mandatory exercise has been avoided by the Magistrate while issuing the summoning orders against the petitioner nos. 2 and 3, the impugned order dated 31.5.2019 vitiates and the same is liable to be quashed at the threshold.

6. In support of his aforesaid contention the learned counsel for the petitioner has drawn attention of this Court towards ***National Bank of Oman vs. Barakara Abdul Aziz and another (2013) 2 Supreme Court Cases 488 and Vijay Dhanuka and others vs. Najima Mamtaj and others (2014) 14 Supreme Court Cases 638.***

7. Learned counsel for the petitioner has submitted that in the case of National Bank of Oman (supra) the Apex Court instead of quashing the complaint remitted the matter back to the Magistrate concerned to pass fresh order under the mandatory condition of section 202 Cr.P.C. inasmuch as no inquiry was conducted by the

Magistrate against the persons who were residing outside the territorial limits.

8. Learned counsel for the petitioner has submitted that in re: Vijay Dhanuka (supra) Apex Court has considered one earlier judgment of Apex Court i.e. *Uday Shankar Awasthi vs. State of U.P. (2013) 2 SCC 435* whereby the Apex Court has interpreted section 202 Cr.P.C. and it has been clearly directed by the Apex Court that in case the summons are issued against the accused persons who are residing outside the territorial limits a prior inquiry by the concerned Magistrate or investigation by the police should be made before issuing summons. Since in the present case no such mandatory exercise has been followed, therefore, the impugned order dated 31.5.2019 vitiates and is liable to be set aside.

9. Per contra, Sri Anirudh Kumar Singh, learned AGA has submitted that since the learned Magistrate has issued summons against the petitioners including the petitioners no. 2 and 3 who resides outside the territorial limits after making compliance of section 200 and 202 Cr.P.C., therefore, there is no infirmity in the impugned order. He has further submitted that the first proviso of section 202 Cr.P.C. clearly mandates that where it appears to the Magistrate that the complaint is triable exclusively by the Court of sessions, no such direction for investigation shall be made by the Magistrate. As per Sri Singh in the present case the present petitioners have been summoned for section 500 and 501 IPC and section 500 IPC is triable by sessions court and section 501(a) IPC is also triable by the sessions, therefore, no such direction for investigation could have been issued by the Magistrate. Hence, in view of the above there is no infirmity or illegality in the order dated 31.5.2019.

10. Having heard learned counsel for the parties and having perused the material available on record, I find that the Apex Court in re: *Vijay Dhanuka (supra)* has set at rest the controversy in question vide para 13 to 16 thereof. For the convenience paras no. 13 to 16 are being reproduced herein below :

"13. In view of the decision of this Court in the case of Uday Shankar Awasthi v. State of Uttar Pradesh, (2013) 2 SCC 435, 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:

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

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

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or 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 202 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. In the result, we do not find any merit in the appeals and the same are dismissed accordingly."

11. In para 13 the Apex Court has considered the earlier dictum of Apex Court in re: **Uday Shankar Awasthi** (*supra*) wherein the amended section 202 Cr.P.C. has been interpreted, therefore, the Apex Court has taken cognizance of the amended portion of section 202 Cr.P.C. Vide para 14 the Apex Court has interpreted the term 'Inquiry' as defined u/s 2(g) of the Code, noticing the fact that no specific mode or manner of inquiry is provided u/s 202 Cr.P.C. of the Code,

therefore, as per the Apex Court in the inquiry mandated u/s 202 Cr.P.C. would mean the examination of the complainant and examination of the witnesses. After the aforesaid examination, obviously the same would have been made on the solemn affirmation, that exercise would be sufficient to understand that, that is the inquiry as mandated u/s 202 Cr.P.C.

12. The Apex Court in para 15 and 16 of the aforesaid judgment has clearly observed that the Magistrate has examined the complaint on solemn affirmation of the two witnesses and only thereafter he had directed for issuance of process, therefore, there is no error in such order.

13. In the present case the impugned order dated 31.5.2019 clearly reveals that such order has been issued after examination of the complainant u/s 200 and examination of witnesses namely Nitin Srivastava, Sushil Awasthi, Rajat Kishor Mishra and Haseeb Siddiqui u/s 202 Cr.P.C. Therefore, there is no infirmity or illegality in the impugned order dated 31.5.2019. Besides, the sections for which the petitioners have been summoned i.e. 500 and 501 IPC are triable by the sessions, therefore, the prior direction for investigation could have not been issued by the Magistrate in view of the first proviso of section 202(1) Cr.P.C.

14. Accordingly, I **dismiss** the present petition being devoid of merits. However, it is provided that if the petitioner appears before the learned court below i.e. C.J.M., Lucknow in compliance of order dated 31.5.2019 by filing appropriate application, the same shall be heard and decided expeditiously as per law.