

A new dimension of Sec. – 91 of CrPC: In light of Sec. - 202 of CrPC

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In 1969, the Law Commission of India in its 41st Report on the subject -“The Code of Criminal Procedure, 1898 - Vol-1”, in its 16th chapter - ‘Complaints to Magistrate’, observed that everyday experience of the courts shows that many complaints are ill founded and it is necessary therefore that they should at the very beginning be carefully considered and those which are not on their face convincing should be subjected to further scrutiny so that only in substantial cases should court summon the accused person. With this view and objective Chapter XV of the Code of Criminal Procedure (hereinafter referred to as CrPC/Code)” came into being i.e. calling the accused in the Court of law which entails wider consequences for him including abridging freedom of the accused should only be ordered with backing of clearly laid down law and used as sparsely as possible.

It is also a well settled position of criminal law that if two views are possible of facts or law then the one favoring to the accused should be preferred.¹ Complaint to magistrate under section 200 of CrPC is different from the other ways available in the code to take cognizance of the matter. Here the magistrate is supposed to take cognizance on the basis of private complaint and statement of the complainant & witnesses, if any, produced by him. Since larger objective of chapter XV of the code is to weed out frivolous complaints and take grave offenders into account, it’s considered obligatory on the part of the magistrate to first ensure if prima facie, case made out by the complainant exists or not. The test to judge if prima facie complaint to take cognizance is existing or not is not even which applies at the stage of framing of charge. In *Kewal Krishnan S/o Lachman das v Suraj Bhan and Anr.*², the Hon’ble Supreme Court held :

“All that he (Magistrate) has to see is whether or not there is ‘sufficient ground for proceeding’ against the accused. At this stage magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the magistrate in scrutinizing the evidence is not the same as the one which is to be kept in view at the stage of framing charges.”

Test to judge if particular charge should go for trial is - if alleged charge remains unopposed by the side of the accused, would that result in conviction of the accused? If Yes, then the alleged charge remains. However, in a complaint to Magistrate, only ‘ground for proceeding’ needs to be shown and there is no requirement that the complaint shows anything which results in conviction of the accused. Low bar has been set to fulfill twin purposes-

First, so that complainant does not get rejection at preliminary stage only for not proving case which results in conviction.

Second, in the absence of accused, as intended by this chapter, nothing substantial which has bearing on final outcome of the case be done.

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¹ *Bhagwan Singh & Others v. State of M.P.* (2002) 4 SCC 85

² AIR 1980 SC 1780

Scheme of chapter XV of CrPC is such that if any complaint has been made to a magistrate under section 200, he has following alternatives -

- (i) after pursuing the complaint and if satisfied sufficient grounds are there he can straightaway issue process to the accused u/s 204 of CrPC, but before that compliance with requirement u/s 200 is must,
- (ii) the magistrate can postpone the issue of process and direct an inquiry himself u/s 202 of CrPC,
- (iii) the Magistrate can postpone the issue of process and direct an investigation by the police or by any other person u/s 202 of CrPC,
- (iv) if no prima facie case is made out by mere perusal of the complaint magistrate can reject it u/s 203 of CrPC.

We are here concerned with second alternative available to magistrate u/s 202 of CrPC i.e. when decision for postponement of issuance of process is made and the matter is put for inquiry by the magistrate. Question to ponder here is - what is the exact extent of 'inquiry' conducted under section 202 of CrPC?

Once the matter has been put for inquiry u/s 202 of CrPC before proceeding for issuance of process it is duty of the magistrate to ensure some extra material to satisfy that prima facie case exists. It has been held that "if no fresh material comes on record after holding enquiry under section 202, the magistrate cannot issue process."³

Many a times situations arise where the Complainant has already submitted available material with him or the subject matter of complaint is such that it needs to be further corroborated by the documents which are in custody of the accused and only then further process can be issued against the accused. In such situations, the complainant seeks to get presence of the accused before the court by filing application under Section 91 of CrPC.

It is to be noted that in plethora of judgments of the Supreme Court, a lid over the scope of inquiry under section 202 of CrPC has been placed but it has not been seen in the context of application under section 91 of CrPC.

Sec. 91 of CrPC provides that a police officer or a court may, under certain circumstances, issue an order or a summons for the production of any document or thing if such production is necessary or desirable for the purpose of any investigation, INQUIRY, trial or other proceedings under the code.

Section 2 (g) of CrPC provides that "inquiry" means every inquiry, other than a trial, conducted under this code by a Magistrate or Court.

As seen from reading of the above provisions, 'inquiry' being conducted by the magistrate carries possibility of getting application under section 91 of CrPC seeking documents from the custody of the accused. Since language of section 91 does not put any specific bar for anyone, it results into two questions-

³ 1990 BLJR 340 (345), (1990) 1 Cri LC 634, 1989 Mad LW (Cri) 462 (464)

- 1) What will be the fate of that application seeking documents from the custody of the accused which has a bearing upon the complainant's case in light of the Article 20 (3) of the Constitution of India? A lot has been commented upon this but in the presence of conflict between a 1962 eleven judge bench judgment 'The State of Bombay v. Kathi Kalu Oghad'⁴ and a 1965 Constitution bench judgement 'Shyamal v State of Gujarat'⁵, no particular ruling prevails and discretion of Magistrate comes into play.
- 2) Since ambiguity is still present irrespective of Section 91 of CrPC, does 'inquiry' as mentioned under Section 202 of CrPC envisage presence of the accused in inquiry without issuance of process against him u/s 204 to furnish relevant documents?

Initially it was a matter of ambiguity in chapter XV proceedings that if accused is allowed to come to court and tenders some relevant documents in his favor before issuance of process against him u/s 204 of CrPC, shouldn't the magistrate after weighing such documents decide fate of complaint instead of making accused suffer further by issuing process against him and then accepting the same. The ambiguity was put to rest by the Hon'ble Supreme Court in 'Adalat Prasad v. Rooplal Jindal & Ors. 2004'⁶ case where larger bench was set to reconsider Supreme Court's previous Mathew's Judgement. In the instant case process u/s 204 of CrPC was issued against the accused but later after hearing side of the accused complaint was rejected under section 203 of the CrPC, which was basically taking the matter back to pre-issuance of process stage. Since complaint can be rejected if found that no prima facie case is made out u/s 203 of CrPC or process can be issued if prima facie case is made out u/s 204 of CrPC, in both of these possibilities no presence of accused is envisaged and this is the reason that the only requirement is to prove the case prima facie. The Supreme Court invalidating the act of hearing the accused at preliminary stage held-

"But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint, he can issue process by way of summons under section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Section 200 and 202, and the only stage of dismissal of the complaint arises under section 203 of the Code at which stage the accused has no role to play".

Further because of the ambiguity in the extent of inquiry u/s 202 CrPC, it has been held several times that to get satisfaction before issuance of process, Magistrate can go length to summon anyone. However in 'Chandra Deo Singh v. Prakash Chand Bose alias Chabi Bose'⁷, deciding upon the contours of the 'inquiry' under section 202 of CrPC, the Supreme Court observed -

"Under the present section 202 of CrPC magistrate making the enquiry has to decide whether or not to proceed ONLY with reference to intrinsic quality of the statements before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and statements made before him by persons at the instance of the complainant".

⁴ 1961 Cri LJ 856

⁵ [1965] 2 SCR 457

⁶ Appeal (crl.) 91 of 2002

⁷ AIR 1963 SC 1430 (1433) ; 1963 (2) Cri LJ 397

It's to be mentioned that above judgement is in consonance with the objective of the chapter XV of CrPC, which intends the complainant to make out prima facie case and keep accused out till issuance of process under section 204 of CrPC.

In none of the proceedings has the Court contemplated presence of the accused to fill lacuna of the complainant. Now it is a well settled position of law that if a complaint has been put for further inquiry under section 202 of CrPC by the Magistrate then without some additional evidences on record, process cannot be issued and if issued, putting complaint for further satisfaction, for not being enough in content to proceed against the accused, becomes irrelevant. Now in such situation, when the Complainant, using the power available under section 91 of CrPC, files an application before the magistrate for summoning some relevant documents that are in possession of the accused having bearing over the case, thereby allowing the accused to present his side of the matter and also giving him scope to contest the whole application in the court, it violates the well- established precedents of the Hon'ble Supreme Court and the larger purpose of Section 200 CrPC complaint before magistrate.

Section 91 of CrPC, 1973, which was section 94 in old CrPC, 1898 has a history which is ambiguous. To put it briefly, in 'The State of Bombay v Kathi Kalu Oghad'⁸, CJI for the majority observed -

"The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of S. 139 of the Evidence Act"

In the same case, Das Gupta J's speaking for the minority criticized the above proposition in following words:

"Suppose, for example, an accused person has in his possession, a letter written to him by an alleged co-conspirator in reference to their common intention in connection with the conspiracy for committing a particular offence. Under s. 10 of the Evidence Act this document is the relevant fact as against the accused himself for the purpose of proving the existence of the conspiracy and also for the purpose of showing that any such person was a party to it. By producing this, the accused will not be imparting, any personal knowledge of facts; yet it would certainly be giving evidence of a relevant fact. Again, the possession by an accused of the plan of a house where burglary has taken place would be a relevant fact under s.8 of the Evidence Act as showing preparation for committing theft. By producing this plan is he not giving evidence against himself?"

Although Section 91 of CrPC is not mentioned in the above observation, it can be assumed from the phrase "accused may have documentary evidence in his possession which may throw some light on controversy" that reference was made to Section 91 of CrPC. Being eleven judge bench judgement, it left the scope open for the complainant to seek documents from the custody of the accused and only those are not going to be taken which are 'incriminating and based upon personal knowledge of the accused' which is actually a subjective question to be decided either by the magistrate or by the police officer. Relying on this observation, applications to seek documents from the custody of the accused are still being filed and subjectivity involved to decide if that document is based upon personal knowledge of the accused so barred under Article 20(3) of the Constitution of India or if documents have some kind of bearing over subject matter of the complaint which can throw some light in trial, allows accused to

⁸ 1961 Cri LJ 856

become active participant at the stage of 'inquiry' stated under section 202 of CrPC which also allows him to argue content of the complaints, whereas as shown in the above-mentioned judgements, presence of accused was never intended. It's also harassment for the accused to be 'compelled' to be part of the pre-issuance of process proceedings on the basis of notice issued by the magistrate on an application under section 91 of CrPC.

This ambiguity was dealt by a Constitution bench of the Supreme Court in 'Shyamlal Mohanlal v State of Gujarat'⁹ which observed –

"If, after a thing or a document is produced, its admissibility is going to be examined and the document or thing in question is not going to be admitted in evidence if it incriminates the accused person, the order to produce the thing or document would seem to serve no purpose. It cannot be overlooked that it is because the document or thing is likely to be relevant and material in supporting the prosecution case that on most occasions the power u/s. 94(1) (Old Code) would be resorted to, so that on the alternative view which seeks to exclude incriminating documents or things, the working of s. 94(l) would yield no useful result".

Further in the very same case the Supreme Court majority held the High Court correct which had stated that Section 94 of CrPC (Old Code) doesn't include accused.

Thus, it can be seen that while clear judgement on the point has come out, still because of the observation made in 'State of Bombay v Kathi Kalu Oghad'¹⁰, applications to seek documents from the custody of the accused are still being entertained which, as rightly observed in the Shyamlal¹¹ case, gives scope to the accused to become part of inquiry being conducted under section 202 of CrPC and further contest on nature of the documents in his custody and content of complaint of the complainant, which was never the intention of the legislature.

In 'Smt. Nagawwa v Veeranna Shivalingappa Konjalgi and Othr'¹², the Supreme Court observed-

"..the scope of the enquiry under section 202 of the CrPC is extremely limited - limited only to ascertainment of the truth or falsehood of the allegations made in the complaint - (i) on the materials placed by the complainant before the court, (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding question from purely point of view of the complainant WITHOUT AT ALL adverting to the defense that accused may have"

It can be clearly seen that nowhere presence of the accused was ever envisaged.

In Ramdev Case¹³ question arose when the magistrate instead of ordering investigation under section 157 of CrPC ordered it to be done under Section 202 of CrPC, which according to the appellant was not sufficient to get documents which have been alleged to be forged from the custody of the accused. The Supreme Court quoting 'Pepsi Food Ltd. v Judicial Magistrate'¹⁴ held the magistrate's decision as correct since calling the accused is a bigger affair and statement of the complainant and his

⁹ [1965] 2 SCR 457

¹⁰ 1961 Cri LJ 856

¹¹ [1965] 2 SCR 457

¹² 1976 AIR 1947, 1976 SCR 123

¹³ Ramdev Food Products Pvt. Ltd. v State of Gujarat Criminal Appeal No. 600 of 2007 decided by the Supreme Court in 2015

¹⁴ 1998 5 SCC 749

witnesses, as held in several other judgements, must be sufficient to proceed further to make out a prima facie case. However, the basis of the Supreme Court in keeping out the application to seek documents from the custody of the accused at stage of postponement of the issuance of process in investigation were two-

First was the limited nature of inquiry or investigation under section 202 of CrPC and
Second was the habit of people changing civil matters in criminal,

but the Supreme Court refrained from commenting upon the larger issue.

Till the time the SC clarifies the ambiguity surrounding the interpretation of section 91 because of the conflicting judgements in Oghad¹⁵ and Shyamla¹⁶, the application under section 91 calling an accused to bring any document should not be entertained while the inquiry under section 202 of the CrPC is on because the Supreme Court judgements with regard to Section 202 makes it categorically clear that there should be no role of accused in the inquiry proceedings in the pre issuance of summons stage. Such an interpretation will be a balancing act too as the bar for such an application will just be in the pre-issuance of summons stage during which time the Magistrate will need to form his opinion only on the basis of the complaint and statements of complainant & his witnesses, if any. Post issuance of summon under section 204 CrPC, such an application can be entertained till the time a larger bench of the SC gives a clearer ruling regarding the ambit of section 91 CrPC with respect to the accused.

¹⁵ 1961 Cri LJ 856

¹⁶ [1965] 2 SCR 457