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**(2011) 03 AHC CK 0228**

**In the Allahabad High Court**

**Case No :** Criminal Miscellaneous Case No. 919 of 2011

Ganga Chauhan @ Guga Chauhan and another

APPELLANT

Vs

State of U.P.and another

RESPONDENT

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**Date of Decision :** 03-03-2011

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 202, 482

**Citation :** (2011) 03 AHC CK 0228

**Hon'ble Judges :** V.K.Dixit, J

**Final Decision :** Allowed

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## **Judgement**

Virendra Kumar Dixit, J.

Heard learned counsel for the petitioners, learned A.G.A. for the State and perused the relevant papers on record.

Since the issue involved is based on legal premise which can be decided at this juncture hence the notice to the opposite party no.2 is dispensed with.

This application under Section 482 Cr.P.C. has been filed for quashing the impugned summoning order dated 02.02.2011 passed by the learned A.C.J.M., Court No. 30, Lucknow in Complaint Case No. 144 of 2010, under Sections 379,452,504 and 506 I.P.C., Police Station Hasanganj, District Lucknow.

Learned counsel for the petitioners submits that learned Magistrate did not record the statements of the witnesses under Section 202 Cr.P.C. and in lieu thereof he accepted the affidavits of witnesses Sunil Kumar and Onkar Nath Shukla under Section 202(2) Cr.P.C. which is not permissible under law. It is further submitted that it is nowhere provided under the Code of Criminal Procedure 1973 that the witnesses may file their affidavits in place of their statements under Section 202(2) Cr.P.C. It is further submitted that the Magistrate has committed gross illegality and procedural mistake and the impugned summoning order is liable to be quashed.

Learned A.G.A. has not raised any objection against the legal position submitted by learned counsel for the petitioner.

In order to appreciate the arguments of the learned counsel for the parties, the provisions of Section 202 Criminal Procedure Code 1973(hereinafter referred as Cr.P.C.) is reproduced as under:

202 (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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 complaint and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under subSection (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 subsection (1) is made by a person not being 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.

As stated in sub Section (1) of Section 202 Cr.P.C., itself, the object of the enquiry is to ascertain the truth or falsehood of the complainant, but the magistrate making the enquiry has to do this only with reference to the inherent quality of statements on oath made by the complainant and the statements made before him by witnesses examined at the instance of the complainant. To say in other words, during the course of the enquiry under the section, the Magistrate has to satisfy himself simply on the evidence adduced by the complainant whether prima facie case has been made out so as to put the proposed accused on a regular trial.

The language used in subSection (2) of Section 202 Cr.P.C. carries a mandate for the Magistrate which has to be obeyed by him before the issues process.

A perusal of the Section 202 sub Section (2) Cr.P.C. makes it clear that the

Magistrate has to take evidence of witnesses on oath. In sub Section (2) in an enquiry under sub Section (1), the words "the Magistrate may, if he thinks fit, take evidence of witnesses on oath" contemplates that the Magistrate shall take the evidence of the witnesses on oath before the court. The basic purpose of the criminal law is that the person who is to be prosecuted should be summoned only if the Magistrate in an enquiry, finds substance in the allegation of the complainant which is duly supported by the witnesses who have given the statement on oath before the Magistrate. The provision of Section 202 Cr.P.C. is to enable the Magistrate to form an opinion whether the process should be issued or not. The issue of process is a matter for judicial determination. As required under Section 200 Cr.P.C. which makes it obligatory for 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 in writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. The enquiry under Section 202 Cr.P.C. is one sided as the proposed accused is not in the picture. The complainant has given his statement on oath and the witnesses have also given their statement on oath the enquiry can be said to be based on a reasonable and justified conclusion of the Magistrate when he passes an order either under Section 203 Cr.P.C. dismissing the complaint or under Section 204 Cr.P.C. issuing process against the accused after going through the statements of the complainant as well as of the witnesses. Thus it is incumbent upon the learned Magistrate taking cognizance of an offence to examine the complainant and witnesses present on oath except in the case of where the complaint is made by a public servant in discharge of his official duties.

In the case of Hari Singh and another vs. State of U.P. and others reported in 1992 CRI.L.J. 1802 it was held by this Court that in an enquiry into an offences by the Court of a magistrate under Section 202 Cr.P.C. the personal examination of witnesses is imperative. The words "take evidence of witnesses on oath" in Section 202(2) will have to be read along with Section 274 or 275, Cr.P.C. as the case may be. Memorandum containing substance of evidence or taking down of evidence of witnesses would be possible only when they are personally examined by the Court. Therefore, filing of affidavit at the stage of Section 202, Cr.P.C. is not permissible under the law.

If the mandatory provision of Section 202 of Cr.P.C. requires that the Magistrate shall examine the witnesses on Oath, the filing of affidavit by the eye witnesses can not be a substitute. Therefore, the Magistrate is under obligation and duty bound to examine upon oath the complainant and his witnesses before issuance of process under Section 204 Cr.P.C. and non compliance of which would vitiate further proceedings. Under Section 200 Cr.P.C. the Magistrate has no option except to examine the complainant and the witnesses, if any, on oath. Thus in an inquiry into an offence by the court of a Magistrate under Section 202 Cr.P.C., the personal examination of the witnesses is compulsory and legally binding, filing of affidavit at the stage of Section of 202, Cr.P.C. is not permissible under the law.

The impugned order of the Magistrate suffers from not following the mandatory provisions of subSection (2) of Section 202 of Cr.P.C.

As discussed in view of the specific provision under sub Section 202 (2) of Cr.P.C. the Magistrate has committed illegality and procedural mistake and the impugned summoning order is not in consonance with the provisions of law and is liable to be quashed.

Accordingly, the application under Section 482 Cr.P.C. is allowed. The impugned order dated 02.02.2011 passed by the learned Magistrate in complaint Case No. 144 of 2010, under Sections 379,452,504,506 I.P.C., Police Station Hasanganj District Lucknow is hereby quashed and the matter is remanded back to the concerned learned Judicial Magistrate to proceed with the case in accordance with the provisions of law.