**(2010) 2 ACR 1294**

**Allahabad High Court**

**Case No:** Criminal M.A. No. 22022 of 2009

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| Ali Mohammed Hussain | | APPELLANT |
| | Vs | |
| State of U.P. and Another | | RESPONDENT |

**Date of Decision:** Sept. 7, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 200, 200, 202, 202(1), 202(2)
- Penal Code, 1860 (IPC) - Section 120B, 364, 420

**Citation:** (2010) 2 ACR 1294

**Hon'ble Judges:** Arvind Kumar Tripathi, J

**Bench:** Single Bench

**Advocate:** Jai Singh Yadav, for the Appellant; A.G.A., for the Respondent

**Judgement**

Arvind Kumar Tripathi, J.
This criminal misc. application u/s 482, Code of Criminal Procedure has been filed with the prayer to allow this petition and to quash the proceeding in Complaint Case No. 3890 of 2000, under Sections 420 and 120B, I.P.C., P.S. Brahmpuri, district Meerut.

2. Heard learned Counsel for the applicant and learned A.G.A. and perused the record.

3. Learned Counsel for the applicant submitted that the list of witnesses was given but the witnesses were required to be examined u/s 202, Code of Criminal Procedure. It was mandatory u/s 202(b), Code of Criminal Procedure. He also contended that, it is a business transaction and no offence is made out under Sections 420 and 120B, I.P.C. There was no evidence regarding forgery and conspiracy hence the summoning order as well as the entire proceeding is liable to be quashed. He has relied upon the judgment of the single Bench of this Court in case of R. K. Kothari and Ors. v. Messrs Joshi Pharma and Anr. 1989 AWC 604. In the aforesaid case, it was held that if the allegation simply disclose a civil liability and do not constitute any offence and there it would be no criminal

liability. It would not be criminal breach of trust unless there is some mens rea of criminal intention.

Second case he relied is case of Mohammad Umar and Ors. v. State of U.P. and Anr. 2006 (3) ALJ 281: 2006 (3) ACR 2529. In the aforesaid case, it was held the Magistrate did not follow the procedure laid own u/s 2002, Code of Criminal Procedure and did not record any statement u/s 202, Code of Criminal Procedure. Only the statement was recorded of the complaint u/s 200, Code of Criminal Procedure. Hence, non-observation of Section 202, Code of Criminal Procedure by the Magistrate renders summoning order illegal. The aforesaid case was u/s 364, I.P.C. triable by the Session Court. In that case the prosecution was required to examine all the witnesses u/s 202(2), Code of Criminal Procedure proviso. Hence, it is not applicable in the present case.

4. He also placed reliance on the case of Mohammad Ataullah Vs. Ram Saran Mahto, In the aforesaid case, it was held that the Magistrate directed for investigating in complaint case u/s 202, Code of Criminal Procedure. The investigation report did not disclose any additional material, hence it was held that taking of the cognizance and issuing process was not proper. The aforesaid case is also not applicable. In the present case, there was no direction u/s 202, Code of Criminal Procedure for inquiry or investigation by the police.

5. Under the provision of Section 202(1)(b), when the complaint was filed, as per provision unless the complainant and the witness present, if any, have been examined u/s 200, Code of Criminal Procedure, the Court will not proceed against the accused. In the present case the applicant appeared before the Court, but witnesses were not produced hence they were not examined by the Magistrate. Merely the witness were mentioned in the complaint, they will not be examined. Hence, if witnesses were not present, there was no question to examine unless the Magistrate finds it necessary. Normally the statement of witnesses are recorded u/s 202, Code of Criminal Procedure before issuing summons, but this is satisfaction of the Magistrate. If there was material and Magistrate after satisfaction issued summons there is no illegality in proceeding. At this stage the evidence will not be examined like trial. Only this much has to be considered whether prima facie offence is disclosed or not. Hence, there is no violation of provision of Section 202, Code of Criminal Procedure. The offence was not exclusively triable by Session Judge. Hence, unless it is found by the Magistrate that the offence was exclusively triable by Magistrate, it is not required to examine all the witnesses.

6. In view of the fact it appears, that the goods were supplied by the applicant and as per agreement payment was to be made within 30 days, but even a single paisa was not paid. Hence, it appears that since very inception there was intention of cheating hence prima facie it cannot be said that the there was no intention of cheating at all or it is not a criminal breach of trust. However, the aforesaid matter requires to be decided, on the basis of evidence produced before the trial court. At this stage, I am not inclined to interfere with the proceeding.

7. The alternative prayer is for consideration of the bail application, preferably, on same day because the applicant is residing in Kerala and is aged about 80 years.

In view of the fact and circumstances of the case, it is provided that if applicant appears and surrenders before the court below and move bail application within thirty days from today, then the same shall be considered, as expeditiously as possible, in accordance with law, in view of the law laid down by Full Bench of this Court in the case of Amrawati and Anr. v. State of U.P. 2004 (57) ALR 390 and affirmed by Hon''ble Supreme Court in Lal Kamlendra Pratap Singh v. State of U.P. and Ors. 2009 (2) Crime 4 : 2009 (2) ACR 2063 (SC), after affording the opportunity. If the bail application cannot be decided, due to any reason, he may be released on interim bail as observed in the aforesaid judgment.

8. With the aforesaid observation this application is finally disposed of.