
(2020) 05 BOM CK 0026

In the Bombay High Court

Case No : Criminal Writ Petition No. 491 Of 2016

Reshma Motiram Jadhav

APPELLANT

Vs

Motiram Somnath Jadhav And Ors

RESPONDENT

Date of Decision : 12-05-2020

Acts Referred:

Indian Penal Code, 1860 — Section 109, 494
Code Of Criminal Procedure, 1973 — Section 202, 203, 320, 320(2)
Constitution Of India, 1950 — Article 226, 227

Citation : (2020) 05 BOM CK 0026

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : Suvarna M. Zaware, R.K. Kulkarni, B. V. Virdhe

Final Decision : Partly Allowed

Judgement

1 Present petition has been filed by the original complainant invoking the Constitutional powers of this Court under Articles 226 and 227 of the Constitution of India to challenge the order dated 09.02.2016 passed by learned Additional Sessions Judge, Kopergaon in Criminal Revision Application No.08/2015, whereby the said revision came to be allowed and the order passed by learned Judicial Magistrate First Class, Rahata on 30.12.2014 in Criminal Miscellaneous Application No.400/2014 later on registered as Regular Trial Case No.394/2014 for issuing process under Section 494 and 109 of the Indian Penal Code, came to be set aside.

2 Heard learned Advocate Mrs. S.M. Zaware for the petitioner and learned APP Mr. B.V. Virdhe for respondent No.14-State.

3 Learned Advocate for respondent Nos.1 to 8 and 10 to 13, was absent on 04.02.2020. He was absent on earlier occasion also, i.e. on 15.01.2020. On that day, submissions on behalf of petitioner were heard and the matter was kept on 04.02.2020 by giving an opportunity to learned Advocate for respondent No.2 to make submissions. Since he was absent, there was no question to adjourn the

matter for his sake.

4 It has been vehemently submitted on behalf of the petitioner-original complainant that the learned Trial Judge has adopted proper procedure as well as appreciated the facts of the case. In fact, when it was found by the learned Judicial Magistrate First Class, that some of the accused persons were not residing within the jurisdiction of the said Court, directions were given for inquiry under Section 202 of Cr.P.C. and the report was called. The process came to be issued after considering the contents of the complaint, verification and the report submitted by police under Section 202 of Cr.P.C.. Under these circumstances, the learned Revisional Court ought not to have interfered with the said impugned order. In fact, after the observation that the marriage between petitioner-wife with respondent No.1 was still subsisting, the husband had performed second marriage with the respondent No.2 on 21.03.2006; wrong observations are thereafter made that as she was residing in the same house shows that she was a consenting party to the same. Learned Revisional Court failed to consider that how the wife could have given consent for the second marriage of the husband. The delay in filing the complaint has been unnecessarily taken as fatal at the said stage, when it could have been explained by the complainant at the time of trial. Further, the learned Revisional court went wrong in coming to the conclusion, that there is nothing in the complaint to show that accused Nos.3 to 9, who were not family members of the husband and second wife were having knowledge about the existence of the first marriage with the complainant. The Revisional Court has considered those points, which could not have been considered at the said prima facie stage even by the learned Magistrate. The learned Additional Sessions Judge therefore went wrong in dismissing the complaint under Section 203 of Cr.P.C..

5 At the outset, it is to be noted that the present respondents, who had filed the revision application before the Revisional Court, had challenged the order of issuing process on the ground that certain factors which ought to have been considered by the learned Magistrate, were not considered. They had prayed for setting aside the order of issuing process. No prayer in clear terms was made for dismissal of the complaint under Section 203 of Cr.P.C.. But it would be the natural consequence if the order of issuing process is set aside.

6 It is required to be seen, as to whether the contents of the complaint, verification and the report under Section 202 of Cr.P.C. was sufficient to hold that prima facie case has been made out for issuing process. Complainant had come with a case that she got married to accused No.1 on 23.06.2004 and their said relationship as husband and wife still existing. She had stated that accused No.1 performed marriage illegally with accused No.2 on 21.03.2006. The other accused persons are the parents of accused No.2, accused No.5 and 6 are the paternal uncle and aunt of complainant. So also accused Nos.7 and 9 are the uncles of complainant. Accused Nos.10 to 13 are in-laws. It is stated that after the marriage the complainant went for cohabitation and she was treated properly

for about 5 years. She has three children from accused No.1. Accused No.1 used to come late and some times was not even coming to house 8-9 days in a month. Complainant came to know about the marriage between accused Nos.1 and 2. However, then she says that she was been driven out of the house by accused No.1, 10 to 13 about a year prior to lodging of report. She has thereafter, started residing with her maternal uncle. When she went to take certificates from the school of her children, at that time, she got knowledge that accused No.2 is having three children from accused No.1. Thereafter, she made inquiry and came to know from the eye witness that the marriage has been performed, however, the eye witness had not informed the said fact to the complainant, and therefore, she has lodged the said complaint alleging that the accused persons have committed offence punishable under Section 494 and 109 of the Indian Penal Code.

7 As aforesaid, after verification was recorded, since some of the accused persons were not residing within the territorial jurisdiction of learned Judicial Magistrate First Class, report under Section 202 of Cr.P.C. was called from the police. After perusal of the complaint, verification and report, process has been issued.

8 The Revisional Court, it appears that, went wrong in taking into consideration that though it is stated that accused No.1 performed marriage with accused No.2 on 21.03.2006 and the complainant was driven out of the house in 2013, the learned Judge is presupposing that the complainant had the knowledge about the second marriage, since 2006 itself. Perusal of the complaint would show that the complainant intended to say, that though the marriage is stated to have taken place on 21.03.2006 between accused Nos.1 and 2, she got the knowledge later on. No doubt the date of knowledge has not been disclosed by the complainant, yet, no such inference can be drawn that she was having the knowledge about the second marriage of her husband and she was a consenting party to the same. In fact, without any such evidence on record the learned Revisional Court ought not to have made the sensitive statement that the "entire allegations show that the complainant-opponent No.1 was consenting party to the alleged bigamous marriage and this consent on the part of wife has the effect of compounding alleged offence punishable under Section 494 of the Indian Penal Code as per Section 320(2) of Cr.P.C.." The learned Revisional Court should have taken into consideration that there is a procedure prescribed for entering into a compromise or compounding an offence, when the complaint itself was not filed or offence itself is not registered, we cannot press Section 320 of Cr.P.C. into operation. It was wrong on the part of the Revisional Court to infer that the complainant was silent from 2006 to 2013 regarding the bigamous marriage. In fact, the cause of action would start after getting the knowledge about the same. There is nothing on record to show, that at any prior date than one year prior to complaint, the complainant had knowledge about the alleged marriage. For issuing process, a Magistrate is required to consider prima facie case and in view of the fact, that the Magistrate had adopted proper procedure, the Revisional

Court ought to have been slow. All those inferences, which could be drawn only after evidence would be adduced, ought not to have been drawn by the Revisional Court at the said stage, only on the basis of submissions made on behalf of the accused persons. Further, it is to be noted that there appears to be a typographical mistake in the complaint, wherein it is stated that the marriage between complainant and accused No.1 had taken place on 23.06.2014. When in fact, it ought to have been on 23.06.2004 and even point to that effect also been taken by the revision applicant in their revision. When accused No.1 has not denied the fact of marriage between him and complainant, the typographical mistake in the contents of complaint has no meaning at all. Further, the verification shows, that the date has been correctly mentioned. The learned Revisional Court failed to consider that the marriage between complainant and accused No.1 was still subsisting and it is stated that the accused No.1 performed second marriage with accused No.2, then it ought to have been considered as to whether any offence is transpiring from the material placed for taking cognizance. The complaint was within limitation, though may be belated, and when opportunity is definitely available to the complainant to explain the delay at the appropriate stage, the order of issuance of process ought not to have been interfered with on the ground of delay under revisional powers. Now, it is required to be considered as to whether after keeping those observations by the learned Revisional Court aside, there was any material shown by the original accused persons for setting aside the order of issuance of process against them.

9 Accused Nos.3 to 9 though related to the other accused or complainant, there was nothing on record except the omnibus statement that they had taken part in the marriage, and therefore, process ought not to have been issued by the learned Magistrate against them. As regards accused Nos.1, 2, 10 to 13, definitely they would have attended the marriage or would have had knowledge about the marriage. Definitely, the process issued against them ought to have been sustained in the revision petition also. The contents of the complaint, verification and report show prima facie case against accused No. 1, 2, 10 to 13.

10 Since a wrong approach has been taken by the Revisional Court in allowing the revision petition as against accused Nos.1, 2, 10 to 13, the said Judgment and order in the revision deserves to be set aside, as against them. Let them face the trial on the basis of the allegations made in the complaint. Learned Magistrate has wrongly passed the order of issuing process against original accused No. 3 to 9. Under such circumstance, case is made out for invoking the Constitutional powers of this Court under Article 226 and 227 of the Constitution of India to partly set aside the Judgment and order passed in the revision application. Hence, following order.

ORDER

1 Writ Petition stands partly allowed.

2 The Judgment and order passed in Revision Application No.8/2014 by learned

Additional Sessions Judge, Kopargaon on 09.02.2016, is hereby set aside, as against respondent Nos.1, 2, 10 to 13.

3 The order dated 30.12.2014 passed by learned Judicial Magistrate First Class, Rahata in Regular Trial Case No.394/2014 (Criminal M.A. No.400/2014), is hereby restored regarding issuance of process for the offence punishable under Section 494, 109 of the Indian Penal Code against original accused No. 1,2, 10 to 13.

4 The petition stands dismissed as against respondent Nos.3 to 8.

5 Respondent No.9 is reported to be dead, and therefore, the matter has abated against her.

6 The said complaint stands restored to the extent of above said respondents-accused persons.