

(2011) 11 AHC CK 0027

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 3008 of 2011

Salma Syyed Abdul Qadir and Another

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 01-11-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 200, 202, 202(1), 482
Penal Code, 1860 (IPC) — Section 379

Citation : (2012) 1 ACR 1006 : (2012) 3 Crimes 554

Hon'ble Judges : Sudhir Kumar Saxena, J

Bench : Single Bench

Advocate : Ajai Krishna, for the Appellant; Alok Srivastava, for the Respondent

Final Decision : Allowed

Judgement

Sudhir Kumar Saxena, J.—By means of this petition u/s 482, Cr. P.C., the petitioners challenge the Criminal Proceedings of Complaint Case No. 1031 of 2010, Barkat Ali v. Salma Sayyad Abdul Qadir and others, u/s 379, I.P.C. pending in the court of Judicial Magistrate-II, Gonda, whereunder they are being prosecuted.

In short, petitioners' case is that Salma Syyed Abdul Qadir, petitioner No. 1 was married with son of respondent No. 2. Barkat Ali Idarsi on 23.5.2008 as per Muslim rites and rituals in Mumbai and fulfilled all the matrimonial obligations; After marriage both the husband and wife resided at Mumbai. However, husband turned out the petitioner No. 1 on 14.6.2008 and divorced her by pronouncing talaknama on 14th June, 2008 over phone. This talaknama was invalid and she continues to be legally wedded wife of son of the respondent No. 2. Since 15th June, 2008, the petitioner No. 1 is residing with her brother who was taking care of her all expenses. Petitioners regularly made request to the son of the opposite party No. 2 to bring back the applicant No. 1 but all the efforts to settle the matter have failed. Ultimately, petitioner No. 1 filed application u/s 125, Cr. P.C. in the Family Court at Bandra, Mumbai which was partly allowed on 3.4.2010 to

the extent that as interim maintenance ` 2,500 per month would be payable from the date of application, i.e., 18.5.2009. As a counter-blast, father-in-law of the petitioner No. 1 filed a complaint case u/s 379, I.P.C. before the Judicial Magistrate, Gonda. In the complaint case, he has alleged that Salma (petitioner No. 1) and his brother came to Gonda on 30th April, 2010. On 1.5.2010, complainant was to attend a marriage so he asked the petitioner No. 1 and her brother to accompany but they refused to do so, therefore, he had left them in his house. When he came back around 6 (?), he found the house locked and on inquiry from neighbour, namely. Sri Harishanker Singh, he found that the petitioners have taken Jewellery and cash amount of ` 35,000 and ran away. When complainant's son went to the petitioner's house in Mumbai they threatened with dire consequences. Statement of Barkat All was recorded u/s 200. Cr. P.C. and statements of Nankau and Harishanker Singh were recorded u/s 202, Cr. P.C.

2. Learned Magistrate vide order dated 19.10.2010, summoned the petitioners u/s 379 of the I.P.C. This very order is sought to be challenged on the ground that the petitioners are resident of Mumbai. This is an abuse of process of the Court summoning the petitioners and the said order has been passed without applying the mind etc.

3. I have perused the complaint and statements recorded under Sections 200 and 202, Cr. P.C.

4. In the complaint it is not stated that as to what was the relation between the complainant and the proposed accused persons. Only accused persons are said to be relative with visiting terms. Nankau in his statement recorded under Section 202, Cr. P.C. although states that the petitioners were on visiting terms but he too failed to mention the fact that she was the daughter-in-law of the complainant. Time for opening the door is mentioned to be 6 (?) in the complaint. In the statement recorded u/s 200. Cr. P.C., no specific time was given while in the statement recorded u/s 202. Cr. P.C. specific time was given.

5. Magistrate was supposed to apply his mind before passing the summoning order. Prosecution in a criminal case cannot be initiated merely on asking. The accused persons were resident of Mumbai. Learned Magistrate has not considered the impact of amended Section 202. Cr. P.C. which makes it incumbent upon him to make inquiry if the proposed accused persons are not residing within the jurisdiction vested with him. Magistrate should have carefully seen the complaint and the statements recorded in support thereof. Circulars of the High Court are specific that the statement u/s 200, Cr. P.C. would be recorded by Magistrate himself. This was done so that Magistrate may elicit the truth. Had Magistrate observed this, she would have immediately known that the petitioner No. 1 was daughter-in-law of the complainant. At least, he should have been asked to disclose the relationship which was supposedly so intense that complainant would hand over all the keys of his house.

6. In the complaint, it is mentioned that the accused-persons came to complainant's house on 30th April, 2010 and the complainant was supposed to participate in marriage which was scheduled for 1st May, 2010.

7. In para 4 of the counter-affidavit, it is admitted that Salma was the wife of Yousuf who is the son of Barkat Ali, the complainant. It is further stated that this marriage was in the knowledge of Barkat Ali while he has failed to mention this fact in his complaint. It is also mentioned in para 3 that the complainant went to attend the marriage on 1st May, 2010. The complainant asked the accused persons to accompany him but in the statement recorded u/s 200, Cr. P.C., it is said that he went to attend the marriage ceremony on 30th April, Moreover, it is also stated in the statement that when he came back on 1st May, 2010 in the morning, he found the house locked then he searched for key and got the key from neighbours. When he opened the door he found that the jewellery and cash amounting to ` 35,000 has been taken away by Salma and Jubed. Nankau as well as Harishankar Singh have stated in their statement that Barkat Ali came from the marriage at 6 p.m. in the evening on 1.5.2010 then key was given to him. This was a major contradiction.

8. Learned Magistrate has failed to ensure that only Salma and Jubed and nonelse could have taken the jewellery and cash as key of the house has been given to his neighbour Harishankar Singh and same remained with him from 12 to 6 p.m., Railway ticket has been filed alongwith the counter-affidavit which shows that two persons travelled from Lokmanyatilak Terminus to Gorakhpur on 29th April, 2010 while complainant is resident of district Gonda. The arrival time in the Gorakhpur is shown in the ticket is 7 : 20 a.m. on 1st May, 2010, while complainant's case is that petitioners arrived there at the residence of complainant on 30th April, 2010. It is true that Magistrate is not supposed to closely evaluate the statements and materials available on record but it is definitely expected from him to have applied his mind to the facts of the case while passing the order. Magistrate was supposed to consider the entire evidence, material available on recored and probabilities as well.

9. In order to check the abuse of process of Court, Section 202, Cr. P.C. has been amended on 23.6.2006 and it has been made obligatory upon the Magistrate that : "he 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 persons as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding". This amendment shows the intention of Legislature to stop the proceedings where the accused is sought to be summoned from far of places and inquiry be made by Magistrate if he chooses not to order investigation.

10. The cases where the persons from far of place are summoned on complaints have assumed the dangerous proportion, as such. Legislature Intervened to check this malady by introducing the aforesaid amendment. The word "inquiry"

occurring in Section 202 (1) assumed significance in this background. This inquiry has to be meaningful inquiry and not just an eyewash. Where the accused persons sought to be summoned do not belong to the jurisdiction vested with the Magistrate, he is supposed to act more actively for eliciting the truth and not just act in a mechanical manner. Ordeal of facing criminal prosecution that too from far off places tantamounts punishment as such, a greater duty is cast upon the Court before issuing process. In this case, Magistrate has failed to carry out the mandate of Legislature. In the complaint, there is no mention of relationship between the complainant and the accused persons, no details of Jewellery which is said to have been removed has been given. Even no specific time of opening the door has been mentioned (a.m. or p.m.). It is true that it may not be necessary to give all the details in the complaint but it was bounden duty of Magistrate to clear his doubts by examining the complainant u/s 200, Cr. P.C. or other witnesses. Magistrate should have asked the complainant to give the details of jewellery and details of relationship, exact timing and if that had been done. Magistrate would have immediately known that allegations in complaint are aimed at only harassing his daughter-in-law and her brother. Complaint was absolutely vexatious and frivolous.

11. The prosecution case as stated in complaint does not Inspire confidence. Although the petitioners have also filed railway ticket which shows that they had gone to Ajmer and returned from Nizammuddin to Bandra Terminus on the relevant dates but defence cannot be seen at this stage.

12. This Court under the jurisdiction of Section 482, Cr. P.C. is not supposed to evaluate the evidence but could definitely ensure that process of the Court is not abused. Learned Magistrate has failed to apply his mind to the complaint, statements of Barkat Ali etc. Salma being daughter-in-law came from Mumbai alongwith Juber on 30th April and committed theft and returned to Mumbai, does not inspire confidence. The contention that complaint case has been lodged as counter-blast by opposite party No. 2 to maintenance case filed in Mumbai wherein the order for interim maintenance has been passed on 3rd April, 2010 has force. Entire prosecution case appears to be improbable, as such, the proceedings in Complaint Case No, 1031 of 2010 are liable to be quashed.

13. It is manifest that the order suffers from vice of non-application of mind. Summoning order is blatant abuse of process of the Court, as such, it is a fit case where the powers u/s 482, Cr. P.C. should be exercised. Consequently, complaint and proceedings are liable to be quashed. Petition u/s 482, Cr. P.C. is allowed. Proceedings of Complaint Case No. 1031 of 2010. Barkat Ali v. Salma Sayyad Abdul Qadir and others u/s 379, I.P.C. pending In the court of Judicial Magistrate-II, Gonda, and summoning order dated 19.10.2010 are quashed.