

(2013) 06 BOM CK 0150

In the Bombay High Court

Case No : Criminal Writ Petition No. 267 of 2011

Sattar Bhaimiya Mansuri

APPELLANT

Vs

Sau Shabana Arif Mansuri

RESPONDENT

Date of Decision : 11-06-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 2159

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Final Decision : Allowed

Judgement

T.V. Nalawade, J.—Rule made returnable forthwith. By consent of parties, petition is heard finally. This Petition is filed to challenge the order of issue process made in R.T.C. No. 5/07 by JMFC, Kopargaon, Dist. Ahmednagar in private complaint filed by respondent No. 1. The Magistrate has issued process for offence punishable u/s. 498-A, 500, 34 etc. of IPC. Petitioner nos. 1 and 2 are parents of the husband of respondent No. 1 and other petitioners are also relatives of the husband. In the complaint, the place of residence was given as Belapur Road, Shrirampur, Dist. Ahmednagar. The matter was filed in the Court of JMFC, Kopargaon, which is a separate Tahsil. It is the case of petitioners that in view of amendment effected to Section 202 of Cr.P.C., the Magistrate ought to have held enquiry or Magistrate ought to have made order of investigation with regard to present petitioners as amendment had come in effect on 23/6/2006, while complaint was filed on 15/12/2006. Both sides cited some reported cases on this point. In the case reported as National Bank of Oman Vs. Barakara Abdul Aziz and Another, ; Udai Shankar Awasthi Vs. State of U.P. and Another, the Apex Court has laid down that in view of the amendment effected to Section 202 of Cr.P.C. It is incumbent upon the Magistrate to carry out an enquiry or order investigation u/s. 202 of Cr.P.C. before issue process when the accused are residing beyond the area over which the Magistrate concerned exercises jurisdiction. It is observed by the Apex Court that it is obligatory upon the

Magistrate to follow this procedure and if the procedure is not followed, the order of issue process can be set aside. Similar observations are made by this Court in the case reported as Satish @ Rajendra Tiwari and Others Vs. State of Maharashtra and Smt. Chhaya Tiwari,

2. On the other hand, the learned counsel for respondent placed reliance on the case reported as Calcutta High Court. Rameshwara Jute Mills Limited Vs. Sushil Kumar Daga and Others, In this case, the High Court held that the postponement of issue process by Magistrate is not mandatory and the Magistrate has discretion in this regard. The argument that the accused were residing in adjacent tahsil was considered by High Court in this reported case. As there a case of Apex Court, this Court holds that it is not possible to follow the Calcutta High Court case. For this single reason, the order of issue process needs to be set aside and the matter needs to be remitted back.

3. The learned counsel for respondent placed reliance on the case ported as Ashok Mehta Vs. State of Maharashtra and Others Bombay High Court, Nagpur Bench. This Court held that when efficacious alternate remedy like preferring revision is available, the proceeding like Writ Petition against order of issue process is not maintainable. For respondent No. 1, reliance is placed on another case reported as ASR Systems Private Ltd. and Rohit Wadhwa, Managing Director of ASR Systems Private Ltd. Vs. Kimberly Clark Hygiene Products Pvt. Ltd. and The State of Maharashtra, Bombay High Court. In this case, facts were different and the Court was considering the matter filed for offence u/s. 138 of Negotiable Instruments Act.

4. On the other hand, for petitioner, reliance was placed on the case reported as 2009 ALL MR (Cri) 234 (S.C.) [Dhariwal Tobacco Products Ltd. and others V/s State of Maharashtra and another]. In this case, this Court discussed provisions of Sections 482 and 397 of Cr.P.C. and it is observed that when the order of issue summons is challenged in High Court, the proceeding cannot be dismissed only on the ground that alternate remedy of filing revision u/s. 397 of Cr.P.C. is available. This Court holds that in the present case, interference is warranted. In view of the facts, following order:

The Petition is allowed. The order of issue process made in R.C.C. No. 5/07 by JMFC Kopergaon against petitioners is hereby set aside. The matter is remitted back to the same Magistrate for passing fresh order uninfluenced by observations made by this Court in the reasonings. The Magistrate is to reconsider the matter for making fresh order of issue process and the Magistrate is to comply the procedure given in Section 202 of Cr.P.C. This is to be done by the learned Magistrate within two months after receipt of copy of this decision. Rule is made absolute in aforesaid terms.