

(2015) 03 BOM CK 0179

In the Bombay High Court

Case No : Criminal Writ Petition No. 167 of 2014

Shaikh Ali Akbar Mogal and Others

APPELLANT

Vs

Eajaj Khan Shafi Khan Pathan and Others

RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202
Penal Code, 1860 (IPC) — Section 109, 34, 364, 376, 494

Citation : (2015) ALLMR(Cri) 2209 : (2015) 2 DMC 869

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : V.Y. Bhide, for the Appellant; N.B. Narwade, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sadhana S. Jadhav, J.—Heard. Rule. Rule made returnable forthwith with the consent of the parties. The petitioners herein question the correctness and validity of the order passed by learned Additional Sessions Judge, Ahmednagar, dated 16th January, 2014, thereby dismissing the revision application challenging the order of issuance of process against the present petitioners for offence punishable under Sections 494, 109 r/w. Section 34 of the Indian Penal Code. Respondent No. 1 herein is the original complainant in RTC No. 351 of 2011. The complainant had filed a complaint before the learned Chief Judicial Magistrate, Ahmednagar on 18th May, 2011 alleging therein that the accused No. 1 is his wife. Accused No. 2 and 5 are the parents of original accused No. 1 and accused No. 3 and 4 are the brothers of accused No. 1. The complainant has alleged that, on 19th August, 2003 the original accused No. 1 (presently not before this Court) had eloped from her house and joined the company of the complainant. They got married. The marriage was performed against the wish/will of the present petitioners. They could not return to their village as the complainant apprehended that the present petitioners (original respondents) were influential persons in the said locality and would cause harm to him and his wife. It is

alleged that, subsequently the original accused Nos. 3 and 4 i.e. the petitioners No. 2 and 3 herein had lodged a report against the complainant at Sangamner Police Station alleging therein that the complainant had abducted their sister and ravished her. Hence, the complainant was being prosecuted for offence punishable under Sections 364 and 376 of the Indian Penal Code. The complainant was arrested and was taken into custody. He was in custody for about 13 months. After his release on bail, he had been to the house of the present petitioners however, he was not allowed to meet his wife. They had allegedly assured him that she is safe in their custody and she continues to be his wife. They had also assured him that they would drop his wife to his house subsequently, and had told him not to return. It is alleged in the complaint that, some months prior to filing of the complaint, he had learnt that his wife has got married to one Sohail Liyakat on 10th May, 2007 in the Hotel owned by the petitioners. He has alleged that, despite the knowledge that she was already the wife of the complainant, the present petitioners had performed her marriage to Sohail Liyaqat and, therefore, according to the complainant, the present petitioners are liable to be prosecuted under Sections 494, 109 r/w Section 34 of the Indian Penal Code. On 18th June, 2011 the learned JMFC, Ahmednagar, had heard the learned Counsel for the complainant at length. Since it was revealed that some of the accused are residing beyond the jurisdiction of the Court, the learned Court was pleased to issue notice under Section 202 of the Cr.P.C., and at the same time, in the same breath, the complaint was sent for investigation under Section 202 of the Cr.P.C. It appears that report under Section 202 of the Cr.P.C. was received by the learned JMFC on 9th February, 2012. On 9th July, 2012, the learned JMFC had considered the report under Section 202 of the Cr.P.C., and had directed the complainant to lead further evidence, if any. On 16th August, 2012, learned JMFC had considered the complaint, statement of complainant and witnesses examined on his behalf along with the documents annexed thereto and has issued process against the present petitioners and others for the offences punishable under Sections 494, 109 read with Section 34 of the I.P.C.

2. Being aggrieved by the order of issuance of process, the present petitioners had filed criminal revision application No. 223 of 2012 before the Sessions Judge at Ahmednagar. The learned Sessions Court has dismissed the revision application and has vacated the interim stay granted earlier. Hence, this writ petition.

3. Learned Counsel for the petitioners rightly submits that, in the complaint no specific allegation has been made against the present petitioners. It is only averred that the accused No. 1 happens to be daughter of accused Nos. 2 and 5 and sister of accused Nos. 3 and 5 and, therefore, in all probabilities the accused No. 1 has entered into a second marriage in connivance with the present petitioners.

4. Upon perusal of the complaint, it is apparent that the complainant has not

given the source of information about the second marriage. He has not stated the date and time when he had received the said information and, therefore, the allegation in all probabilities could be unfounded. All that is mentioned in the complaint is the date of alleged second marriage and the venue where the marriage was performed. It appears that the complainant has made omnibus allegations even in respect of the venue of the marriage since the complainant was fully aware that the said conspiracy was hatched by the present petitioners. The allegations in the complaint itself are unfounded. The learned Counsel for the petitioners rightly submits that the list of witnesses is not filed along with the complaint. The verification statement is also not signed and in spite of the said lacunas, the witnesses have been examined. In fact, in a complaint under Section 494 of Code of Criminal Procedure, it would be incumbent upon the complainant to not only give a list of witnesses but also to state as to whether they were witnesses to the alleged second marriage or that they would be able to throw light on the source of information.

5. In the case of *Malan and Others Vs. State of Bombay and Another*, AIR 1960 Bom 393 : (1958) 60 BOMLR 428 : (1960) CriLJ 1189 , it was held that "mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and to be aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position of rank or influence such that his countenancing what takes place may, under the circumstances be held a direct encouragement." In the present case, there is no allegation even remotely that the present petitioners were present at the time of the marriage or that the accused No. 1 had entered into the marriage with the consent and connivance of the present petitioners.

6. The learned Counsel for the petitioners has placed reliance upon the judgment of this Court in the case of *Pravin Padmakar Kamatkar vs. Pratibha Ratanlal Goyal* and another reported in 1999 (1) Mh.L.J. 190 : [1999 ALL MR (Cri) 344]. The Court has held that the only role that had been attributed against the petitioner was that it was on account of the conspiracy of the petitioner that bigamous marriage had been conducted. Except that allegation there was no material before the Court. There was not even allegation that the petitioner had participated in a marriage. On a mere allegation of conspiracy particularly, for committing an offence under Section 494 will not be sufficient ground to implicate the petitioner unless some overt act on the part of the petitioner as abettor under Section 494 was established. In view of the allegations relating to the petitioners contained in the complaint, being vague, it cannot be said that they had abetted the commission of the offence under Section 494 of the Indian Penal Code. The facts of the said case are para-materia the same. Prima facie, it appears from the facts of the case that the complainant was trying to ventilate his personal grievances and seek personal vendetta against the present petitioners. The allegations are totally unfounded and issuance of process and proceeding with the prosecution of the present petitioners would be an abuse of

process of law.

7. Learned Counsel for the respondent in order to support the judgment of revisional court has relied upon the observations made in para 6 of the impugned order wherein the learned revisional court has admitted that the statement of witnesses were not signed by him. However, what is taken into consideration is that they had stated that, marriage of Ajaz Khan had taken place in the year 2000 whereas; first marriage of complainant was solemnized in the year 2003. The Court has observed that, there is a discrepancy in respect of the order. All the three witnesses have clearly stated that accused No. 1 Taskin had performed second marriage without obtaining divorce from the complainant. The learned Counsel places implicit reliance upon the observations which are as follows.

"In this connection, he has drawn my attention to the copies of documents filed along with list exh. 14. If we go through the documents, the complainant Ajazkhan has not only filed copy of his marriage certificate regarding first marriage solemnized on 19.08.2003, but has also placed on record copy of marriage invitation card regarding the alleged second marriage of Taskin Pathan with Sayyed Sohel. Shri Shaikh, learned for the respondent/complainant has also pointed out to me that the name of petitioner Shaikh Ali Akbar who is the father of Taksin is also shown as host (Addai) to the marriage. Further, the place of alleged marriage is also shown as Hotel New Sudhir at Welhale, Tal. Sangamner, which is owned by accused."

Learned Counsel for the petitioner submits that, the said invitation card and other documents were not annexed along with the complaint nor were brought to the notice of the Court of JMFC however, the same were produced before the revisional Court and the same cannot be taken into consideration.

The learned Counsel for the respondent has placed reliance upon the judgment of the Hon"ble Apex Court in the case of Nupur Talwar Vs. Central Bureau of Investigation and Another, (2013) 2 ABR 345 : AIR 2012 SC 1921 : (2012) 4 CTC 422 : (2012) 5 SCALE 744 : (2012) 4 SCC 217 : (2013) AIRSCW 369 : (2012) 4 Supreme 158 . The said case pertains to a case of homicidal death where the act of conspiracy was being tried along with the actual act of commission of homicidal death. The Magistrate had passed a speaking order and the Hon"ble Apex Court had observed that the same cannot be faulted on the ground that it was a reasoned order. The facts of the said case do not apply to the present case in any manner and placing reliance upon the same would be unwarranted. In the eventuality that the prosecution is continued, the petitioners would have to undergo the verdict of facing a trial on unfounded ground without there being any material for their prosecution under Section 109 read with Section 34 of the Indian Penal Code. In view of this, for the reasons mentioned herein above, the writ petition deserves to be allowed and is accordingly allowed. Prosecution of the petitioners in RTC No. 351 of 2011 is hereby quashed and set aside. It is made clear that, the co-accused shall not avail of any benefit of this order. Rule made absolute in above terms.

Writ Petition is allowed and disposed of.