
(2006) 09 BOM CK 0106

In the Bombay High Court

Case No : Criminal Applicatin No. 1445 of 2001

Wajidulla, Javedullakhan and Ahemadibegum

APPELLANT

Vs

Alamkhan and Others

RESPONDENT

Date of Decision : 22-09-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 203, 204, 204(4), 307
Penal Code, 1860 (IPC) — Section 494

Citation : (2006) 09 BOM CK 0106

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : R.M. Mantri, for the Appellant; M.A. Latif, for Respondent No. 1, S.G. Bharuka, for Respondent Nos. 2 to 5 and N.H. Borade, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.H. Bhatia, J.—Heard the learned Counsel for both the parties.

2. To state in brief the respondent No. 1 Alamkhan had filed a complaint registered as Regular Criminal Case No. 1122 of 1999 u/s 494 r.w. 34 of I.P.C. against seven accused persons. According to him the applicant No. 3 Ahemadibegum, who was original accused No. 1, is his wife. The marriage of the complainant and accused No. 1 is still subsisting. Because of certain dispute, she was living separate from her husband. He came to know that on 20.4.1999 she had married accused No. 2. Other accused had abetted the said marriage by playing different roles. Thus, according to him by this marriage, the accused No. 1 had committed an offence of bigamy u/s 494 and other accused being fully aware of the subsisting the marriage of the complainant and the accused No. 1, had abetted the commission of the said offence of bigamy.

3. The learned Magistrate recorded the statement of the complainant and referred the matter for investigation to police u/s 202 of Cr.P.C. The report was submitted by police, wherein it was indicated that the offence was committed.

However, taking into consideration the circumstances, the learned Magistrate did not accept the report and passed an order dated 19.9.2000 dismissing the complaint u/s 203 of Cr.P.C.

4. Being aggrieved by the dismissal of the complaint, the complainant-respondent No. 1 filed revision application No. 207 of 2000 before the Sessions Court challenging the dismissal of the complaint. In that revision application only the State of Maharashtra was shown as respondent and accused were not impleaded as respondents-parties. After hearing the complainant and the State, the learned III Additional Sessions Judge, allowed the revision application by judgment and order dated 5.1.2001 and set aside the order of the Magistrate dismissing the complaint. The learned Additional Sessions Judge remanded the matter to the trial court with a direction that the trial court shall call upon the complainant to lead the evidence before the issuance of process and then the learned Magistrate shall consider whether there is case to proceed against the accused or not. The complainant was directed to appear before the trial court on 15.1.2001.

5. After remand of the matter, the learned J.M.F.C. recorded the statement of two more witnesses produced by the complainant and he came to conclusion that prima facie the case was made out to issue process against the accused. Accordingly, he issued process against the accused No. 1 u/s 494 of I.P.C. and u/s 494 r.w. 109 I.P.C. against the accused Nos. 2 to 7. Challenging issuance of process, the original accused 1, 2 and 7 have preferred present application u/s 482 of Cr.P.C. They seek to quash the order passed by the Additional Sessions Judge as well as the learned Magistrate to issue process.

6. The main contention of the applicants before this Court is that they were not impleaded as parties in the revision application before the Additional Sessions Judge and without giving an opportunity of being heard, the order to their prejudice has been passed by the learned Additional Sessions Judge and this is in violation of the principles of natural justice as well as specific provisions of law and therefore, said order cannot be sustained.

7. There is no dispute about the facts narrated above at this stage. Admittedly, the learned J.M.F.C. had dismissed the complaint u/s 203 of Cr.P.C. by order dated 19.9.2000. That order was set aside by the Additional Sessions Judge in Criminal Revision No. 207 of 2000 by judgment dated 5.1.2001 without hearing the accused persons. The accused persons were not impleaded as parties in the said matter. Mr. Mantri, vehemently contended that in view of the provisions of Section 398 and Section 401(2) of Cr.P.C., no order under the revisional powers could be passed to the prejudice of the accused or other persons unless such person had an opportunity of being heard either personally or by pleader in his own defence. In support of this contention he placed reliance upon A.K. Subbaiah and Others Vs. State of Karnataka and Others, as well as Balasaheb Keshav Thakre and Ors. v. Kusumbai Manikrao Deshmukh and Anr 2000 (1) Mh.L.J.628

8. Mr. Latif, the learned Counsel for the complainant however, contended that as long as the process is not issued against the accused u/s 204, he is not entitled to be heard and therefore, if the complaint is dismissed u/s 203, in the revision against the said order also he does not get any right of being heard. He placed reliance upon three authorities of the learned Single Judges from Madras High Court. They are E. Mohammed Hussain and Others Vs. F. Jagbar Nachiar and Another, , Somu alias Somasundaram and Others Vs. The State and Another, and Commissioner of Income Tax Vs. Raja Corporation,

9. Section 398 of Cr.P.C. reads as follows:-

98. Power to order inquiry.- On examining any record u/s 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial may himself make or direct any subordinate Magistrate to make, further enquiry into any complaint which has been dismissed u/s 203 of Sub-Section (4) of Section 204 or into the case of any person accused of an offence who has been discharged:

Provided that no court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

Section 401(1) and (2) of Cr.P.C. read as follow:-

401. High Court's powers of revision.- (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

10. Section 398 is specifically applicable to the revision application filed against the dismissal of complaint u/s 203 of Cr.P.C. and the proviso to the said section clearly provides that no court shall make any direction under this section about the enquiry into the case of any person who has been discharged unless such person had an opportunity of showing cause why such directions should not be made. It means the order of fresh enquiry into the matter after dismissal of the complaint u/s 203 cannot be passed in revision petition unless the person against whom the complaint was filed is given an opportunity of hearing heard. Sub-Section (2) to Section 401 clearly provides that no order under this section shall be made to the prejudice of the accused or other person unless he had opportunity of being heard against it. Therefore, in view of this provision, no order to the prejudice of any person could be passed without giving opportunity of being heard in the revision.

11. In A.K. Subbaiah v. State of Karnataka (supra) the Supreme Court observed as follows in para 13:-

Sub-section (2) of this Section talks of a situation where an order is being passed against any person and it was contended by the learned Counsel that the section not only talks of accused persons but also of "or other person unless he has had an opportunity of being heard". Apparently this sub-section contemplates a situation where a person may not be an accused person before the court below but one who might have been discharged and therefore if the revisional court after exercising jurisdiction u/s 401 wants to pass an order to the prejudice of such a person, it is necessary that that person should be given an opportunity of hearing but it does not contemplate any contingency of hearing of any person who is neither party in the proceedings in the court below nor is expected at any stage even after the revision to be joined as party.

The facts in Balasaheb v. Kusumbai (supra) were almost identical with the facts of the present case. After referring to rival submission for both the parties, the learned Single Judge of this Court observed as follows in para 6 of the said judgment:-

On the last date of hearing of the revision petition, without assigning any reasons right of hearing is denied and that part of the judgment is not in consonance with the judicial discipline. The Sessions Judge should have remembered that in view of the order being passed u/s 203 of Criminal Procedure Code by the Judicial Magistrate discharging them from the complaint and refusing to take cognizance of the offence, there is a right created in favour of the petitioners to protect the said order when it is challenged before the appropriate Forum namely before the Sessions Court. By protecting the said order, petitioners protect themselves from the criminal prosecution which may have adverse effect on their reputation and status in the society, and therefore, when adverse proceedings are being carried out by the Sessions judge against the petitioners, it was bounden duty of the Sessions Judge to hear the petitioners on merits and thereafter to pass the order. In view of these aspects, the order passed by the Sessions Judge stands vitiated and requires to be set aside.

12. It may be noted that similar view has been taken in number of matters by the Patna High Court. In Awdesh Kumar Mehta v. State of Bihar and Or 2006 (3) Crimes 161 the learned Single Judge of Patna High Court observed as follows in paras 9 and 10:-

9. Now, so far as the order of the learned Additional Sessions Judge, Section 401 of the Code which provides for High Court power of revision in its Sub-section (2) it has been provided that "no order under this section shall be made to the prejudice of the accused or any other person unless he has had an opportunity of being heard either personally or by pleader on his own defence". This provision is applicable also in the case of power exercised in revision u/s 399 of the Code by the Sessions Judge. 10. The Ranchi Bench of this Court in the above case while

dealing with this issue, observed that since the accused were materially benefited by the order of the Magistrate dismissing the complaint u/s 203, Cr.P.C. as they were not given opportunity of hearing in the Sessions Court in revision, they were certainly prejudiced when the order of the Sessions Court turned to be detrimental to their interest. The Court, accordingly set aside the order of the Sessions Court passed in revision.

13. Thus, the consistent view has been taken by different High Courts and the legal position as settled by the Supreme Court itself, that when the complaint is dismissed u/s 203 of Cr.P.C. by the Magistrate that order cannot be set aside in revision unless the persons, who are likely to be prejudiced by such order, are given an opportunity of being heard because the protection which has become available to them in the form of discharge due to dismissal of the complaint is likely to be taken away by such order. In the above referred three authorities of Madras High Court, it is held that since the Magistrate had passed an order u/s 203 without hearing the accused, he also could not be heard by the Sessions Court. In view of the legal position discussed above, I respectfully disagree with the view taken by the Madras High Court in those three cases.

14. Taking into consideration the legal position involved in this case, it is clear that the impugned order passed by the Additional Sessions Judge in revision was not only against the basic principles of natural justice but also against the specific provisions of law u/s 398 and 401(2) of Cr.P.C. Therefore, that order is liable to be set aside. Mr. Mantri, contended that the proceedings before the Magistrate may also be quashed. I am unable to accept this contention. In fact once the order passed by the Additional Sessions Judge is set aside, the subsequent order passed by the learned J.M.F.C. to issue process will automatically stand set aside but that does not mean that the revision filed by the complainant before the Additional Sessions Judge should also stands dismissed. The revision application will have to be remanded back to the Additional Sessions Judge to pass appropriate order after hearing not only the complainant but also the accused. For that purpose it will be necessary for the complainant to implead the accused persons as respondents.

15. For the aforesaid reason, the application is allowed. The impugned order passed by the learned Additional Sessions Judge on 5.1.2001 is hereby set aside and as a natural consequence the order passed by the learned 9th J.M.F.C. Aurangabad on 27.1.2002 to issue process against the accused also stands set aside. The revision application No. 207 of 2000 is hereby remanded back to the Additional Sessions Judge, Aurangabad for hearing afresh after giving opportunity not only to the complainant but also the accused persons, who are likely to be affected by the order. The accused persons shall be impleaded as respondents in the said revision application.

15. Rule made absolutely accordingly.