

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 420 OF 2014

Hiraben w/o. Ganesh Choudhari .. Petitioner
Age. 51 years, Occ. Household,
R/o. Datta Colony, Behind T.V. Center,
Dongargaon Road, Shahada,
Dist. Nandurbar, at present -
R/o. Kalamsar Mohide,
Tq. Talode, Dist. Nandurbar.

Versus

1. The State of Maharashtra .. Respondents
Through the Investigating Officer,
Crime No. 177 of 2007,
Police Station Shahada,
Dist. Nandurbar.
2. Ganesh s/o. Bhabuta Chaudhari,
Age. 51 years, Occ. Agri.,
R/o. Waka, Tq. Nizar,
Dist. Tapi, State of Gujarat.
3. Chhababai Bhabuta Chaudhari,
Age. 68 years, Occ. Household,
R/o. Waka, Tq. Nizar,
Dist. Tapi, State of Gujarat.
4. Anita d/o. Sitaram Patil @
Anita w/o. Ganesh Chaudhari,
Age. 42 years, Occ. Household,
R/o. Waka, Tq. Nizar,
Dist. Tapi, State of Gujarat.
5. Sitaram Indas Patil,

Age. 77 years, Occ. Agriculture,
R/o. Shrikrishna Colony, Behind
Jail Plaza Hotel, Shahada,
Dist. Nandurbar.

6. Dattibai Sitaram Patil
Age. 73 years, Occ. Household,
R/o. Shrikrishna Colony, Behind
Jail Plaza Hotel, Shahada,
Dist.Nandurbar.[abated vide order dt.9.2.15]
7. Kalawatibai w/o. Ishwar Patil,
Age. 46 years, Occ. Household,
R/o. Nalve, Tq. & Dist.Nandurbar.
8. Mohan Narayan Patil,
Age. 53 years, Occ. Agriculture,
R/o. Dhulvad, Tq. & Dist.Nandurbar.
9. Lilawatibai w/o. Mohan Patil,
Age. 46 years, Occ. Household,
R/o. Dhulvad, Tq. & Dist.Nandurbar.
10. Ishwar Bula Patil,
Age. 53 years, Occ. Agriculture,
R/o. Nalve, Tq. & Dist.Nandurbar.
11. Kashinath Vitthal Patil
Age. 56 years, Occ. Agriculture,
R/o. Udhana Yard, Libamal, Nilgiri,
Ramnagar, Plot No.174, Surat,
Dist. Surat, State of Gujarat.
12. Rajaram Girdhar Patil
Age. 71 years, Occ. Agriculture,
R/o. Udhana Yard, Libamal, Nilgiri,
Ramnagar, Plot No.174, Surat,
Dist. Surat, State of Gujarat.

13. Vimalbai Rajaram Patil
Age. 66 years, Occ. Household,
R/o. Udhana Yard, Libamal, Nilgiri,
Ramnagar, Plot No.174, Surat,
Dist. Surat, State of Gujarat.

14. Sumanbai Kashinath Patel,
Age. 51 years, Occ. Household,
R/o. Udhana Yard, Libamal, Nilgiri,
Ramnagar, Plot No.174, Surat,
Dist. Surat, State of Gujarat.

Mr. Milind Patil, Advocate for the petitioner.

Mr. S.G. Nandedkar, APP for the respondent/State.

Ms. Chinmayee Deshpande h/f. Mr. S.V. Natu, Advocate for
respondent Nos. 2,4,5,7,8,10,11 & 14.

CORAM : SMT.SADHANA S. JADHAV,J.

DATED : 26.03.2015

ORAL JUDGMENT :-

1. Heard respective Counsel.

2. Rule. Rule made returnable forthwith with the
consent of the parties.

3. The petitioner herein happens to be original
informant in Crime No.196 of 2007 registered at Shahada
Police Station. The complainant had approached Shahada
Police Station on 22.12.2007 and lodged a report at the
police station that she has married to the present

respondent No.2 in the year 1983. The couple is blessed with two daughters and a son. She was residing with her husband in the matrimonial home. She was being harassed and ill-treated by the members of her matrimonial family on account of not being honoured properly at the time of marriage. According to her, her husband developed intimacy with her maternal cousin. They intended to get married. They were coercing her to give divorce in order to facilitate the second marriage of her husband with Anita, who happens to be her maternal cousin. She had denied to give consent. According to her the parents of Anita as well as Anita herself were coercing her to give consent for second marriage and on that count she was being mentally harassed and physically abused by Anita and her parents. It is alleged in the First Information Report that on 25.11.2007 her husband got married to Anita in Ganpati Mandir at Shahada. She has alleged that relatives of her husband were present at the time of marriage. She was driven out of her matrimonial house.

4. On the basis of her report filed under section 154 of Cr.P.C., Crime No.196 of 2007 was registered against the accused. The investigation was completed and charge-sheet was filed on 08.02.2008. The accused were charge-sheeted for the offences punishable under sections 498-A, 323, 504, 506 r/w 34 of the Indian Penal Code.

5. The case was registered as R.C.C. No.18 of 2008. The learned 2nd J.M.F.C., Shahada framed charge against the accused for offences with which they were charge-sheeted. The charge was framed on 05.08.2013. The Assistant Public Prosecutor conducting the trial in R.C.C. No.18 of 2008 filed an application before the learned J.M.F.C., Shahada on 14.03.2014, thereby praying therein that charge to be amended in accordance with law. In the said application, the learned APP had submitted as follows :-

"At the outset the contents of paragraph No.4 of the complaint encapsulates all the basic ingredients of the offence punishable under section 494 of the Indian Penal Code and therefore same deserves cognizance and inclusion in the said charge at Exh.47 in the interest of justice."

6. In the prayer clause, there was no specific prayer for addition of section 494 of Indian Penal Code. Neither there was prayer that the charge be added. The learned J.M.F.C. by order dated 19.03.2014 after assigning sufficient reasons has rejected the said application filed by the State. Hence, this writ petition.

7. At this stage, it is pertinent to note that the rejection of the said application has not been challenged by the State, but is being impugned by the original complainant. At this stage, there is nothing on record to indicate that the complainant was prosecuting the Trial under section 301 (2) of Cr.P.C. It is, therefore, clear that present petitioner is only witness in the said case and would be examined as a witness to substantiate the allegations made under section 154 of Cr.P.C. Learned Counsel for the petitioner has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **Ushaben Vs. Kishorbhai Chunilal Talpada & Ors., 2012 AIR SCW 2398(1)**. The Hon'ble Apex Court has held that :-

"Section 190(1) empowers the Magistrate to take cognizance of any offence, upon receiving complaint of facts which constitute such offence; upon police report of such facts; upon information received from any person other than a police officer or upon his knowledge that such offence has been committed. Section 198 which relates to prosecution for offences against marriage brings in the concept of complaint by an aggrieved person. A conjoint reading of provision of Ss.190,198, 198A of Criminal Procedure Code makes it clear that a complaint under S.494 of the IPC must be made by the aggrieved person. Section 498A does not fall in Chapter XX of IPC. It falls in Chapter XXA. Section 198A permits a Court to take cognizance of offence punishable under Section 498A upon a

police report of facts which constitute offence. Explanation to Section 2(d) makes it clear that a report made by a police officer after investigation of a non-cognizable offence is to be treated as a complaint and the officer by whom such a report is made is to be deemed to be the complainant. Thus if a complaint contains allegations about commission of offence under Section 498A of the IPC which is a cognizable offence, apart from allegations about the commission of offence under Section 498A of the IPC which is a cognizable offence, apart from allegations about the commission of offence under Section 494 of the IPC, the Court can take cognizance thereof even on a police report. No fetters can be put on the police preventing them from investigating the complaint which alleges offence under Section 48A of the IPC and also offence under Section 494 of the IPC."

8. According to the learned Counsel, in view of judgment of the Apex Court, there is no impediment for adding charges under section 494 of IPC.

9. Section 198 of Cr.P.C. reads thus:-

"No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1960) except upon the complaint made by some persons aggrieved by the offence".

10. Section 198-C contemplates that where the person, aggrieved by offence punishable under Section 494 or 495 of the Indian Penal Code, is wife, complaint may

be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister's with the leave of the Court by any other person related to her by blood, marriage or adoption.

11. Needless to say that the foundation for offence punishable under Section 494 of Indian Penal Code has to be laid in the form of complaint, which is defined under Section 2(d) of Criminal Procedure Code which reads thus;

“Complaint” means any allegations made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether the known or unknown has committed an offence, but does not include a police report”.

12. In the present case the report lodged by the present petitioner is not a complaint as contemplated under Section 2(d) of the Criminal Procedure Code, but is report under Section 154 of Criminal Procedure Code, which only sets law into motion. The investigation is conducted by the Police Officer and charge-sheet is filed under Section 498A, 323, 504, 506 read with 34 of Indian Penal Code.

13. The basic feature which distinguishes present

case from the case of Ushaben Vs Kishorbhai is that in the case of Ushaben, the Hon'ble Apex Court had considered that the said case was at the stage of investigation and therefore explanation to section 2(d) of Cr.P.C. was considered. The Hon'ble Apex Court has held that a final report/charge-sheet is also deemed to be a complaint under section 2 (d) of the Cr.P.C. In para 13 of the judgment it is as held as follows :-

"13. Above provisions, lead us to conclude that if a complaint contains allegations about commission of offence under Section 498A of the IPC which is a cognizable offence, apart from allegations about the commission of offence under Section 494 of the IPC, the Court can take cognizance thereof even on a police report."

. The Hon'ble Apex Court has concluded that "No fetters can be put on the police preventing them from investigating the complaint which alleges offence under section 498-A of the Indian Penal Code and also offence under section 494 of the Indian Penal Code. The police shall investigate the complaint in accordance with law".

. The said judgment cited Supra is in the facts of that case and therefore cannot be considered to be binding in the present case.

14. In the present case charge-sheet was not filed for offence punishable under section 494 of Indian Penal Code. Charge was framed. There was no application filed by State under section 173 (8) of Cr.P.C. seeking further investigation for offence punishable under section 494 of Indian Penal Code and an omnibus prayer was subsequently made at a belated stage for framing of charge and therefore Section 198(A) of Cr.P.C. would come in to play.

15. In-fact, application filed by the State for adding charge under Section 494 of Criminal Procedure Code was not maintainable as Section 198 of Cr.P.C. specifically contemplates that the complaint has to be filed either by the person aggrieved or by the relatives of the aggrieved person with the leave of the Court. In the present case the application being filed by the State was not maintainable and therefore the learned Judicial Magistrate, First Class has assigned sound and justifiable reason for rejecting the said application. Learned counsel for the respondents submits that in the present case there is no embargo on the Judicial Magistrate, First Class to frame charge in the course of recording substantive evidence, if he arrives at a conclusion that an offence under Section 494 is made out. Such contention though not acceptable by this Court, can

be considered by the Judicial Magistrate, First Class as and when the said issue arises. This Court is of the opinion that the very application filed by the prosecution was not maintainable. The order passed by the learned Judicial Magistrate, First Class, does not warrant any interference as the learned Judge has assigned sound and justifiable reasons for rejecting the said application. Allowing such application would be an abuse of process of law and hence the writ petition deserves to be dismissed. Rule is discharged. The writ petition stands dismissed and disposed of.

[SMT. SADHANA S. JADHAV, J.]