

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 4326 OF 2012

Ganesh Deshmukh

.....Petitioner

V/s.

Shripad Shankarrao Kamat and another

....Respondents

Mr. S. S. Patwardhan for Petitioner

Mr. V. V. Purwant for respondent no. 1

Mr. A. S. Patil APP for the State

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : SEPTEMBER 1, 2015.

PC :

Heard respective counsel.

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

3) Respondent no. 1 herein filed complaint under section 2 (d) of Code of Criminal Procedure, 1973 before Judicial Magistrate First Class, Kolhapur on 02/11/2007. It was alleged in the said complaint that there is a long standing dispute between Kolhapur Municipal Corporation and Kamat family and that the employees of the Municipal Corporation, Kolhapur are making every attempt to harass Kamat family. It is alleged that complainant was running a residential lodge named as Kanchan in

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Laxmipuri, Kolhapur. They had two liquor shops. On 05/08/1999, employees of the Corporation attached boxes of liquor on the ground that no octroi was paid or rather there was no record to show that octroi was paid. Pursuant to the action taken by the employees of the municipal corporation, complainant was compelled to pay fine amount of octroi. It is alleged that action was taken at the behest of accused no. 1 who is Deputy Commissioner of Kolhapur municipal corporation and Chief Officer of octroi, Deputy Superintendent of octroi, octroi inspector and other employees. According to the complainant, employees of the corporation had no right or authority to enter in to the shop. Complainant has further alleged that as per the directions of accused no. 2, employees had illegally entered into the shop.

4) Learned Magistrate had recorded the evidence of 7 witnesses to determine as to whether case was made out against accused. By an order dated 08/04/2009, complaint was dismissed by learned Judicial Magistrate First Class, Court No. 5 vide section 203 of Code of Criminal Procedure, 1973. Complainant had approached Court of Sessions by filing Revision Application No. 613 of 2008. Learned Revisional Court

had remanded the matter for the purpose of issuance of process against the accused, however, learned Revisional Court had not directed for which offence, the process is to be issued. There was no observation or finding as to the commission of offence by the accused persons, therefore, process could not be issued against accused at this stage. On 20/07/2011, learned Magistrate has directed the complainant to produce copies of documents which was produced at the time of filing of complaint, so that 'D' file can be reconstructed.

5) By this petition, petitioner is challenging the order passed by Sessions Court remanding the matter to the Court of Judicial Magistrate First Class for issuance of process. Learned Revisional Court had passed an order to the effect that order dismissing the complaint is quashed and set aside. Records be returned back to the lower court for the purpose of issuance of process against opponent/accused. The impugned order is under challenge. This Court had stayed the further proceedings vide order dated 03/04/2013 and therefore, the matter has not proceeded before learned Judicial Magistrate First Class, Kolhapur.

6) Upon perusal of the records as well as orders passed by Sessions Court, it is apparent that under section 397 r/w 401 of Code of Criminal Procedure, 1973, it was incumbent upon Revisional Court to issue notice to accused persons. Section 401 (2) of Code of Criminal Procedure, 1973 contemplates:

“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.”

7) In the present case, although the order was passed to the prejudice to the petitioners/accused, no notice was issued to the accused persons, moreover, Revisional Court directed learned Magistrate to issue process. An order issuing process contemplates application of judicial mind by the Court issuing process. In the present case, the reasons were explicitly recorded by Judicial Magistrate First Class for dismissing complaint. Learned Magistrate had recorded the evidence and had also recorded his subjective satisfaction for dismissing the complaint. Hence, in fact, order did not warrant any interference, however, learned Revisional Court has passed an order

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that learned Magistrate shall issue process against the accused. The order passed by the Revisional Court therefore, deserves to be interfered with. It prima facie appears that learned Revisional Court has exercised powers beyond section 397 and 401 of Code of Criminal Procedure, 1973.

8) It appears from the records that the learned Magistrate had, upon subjective satisfaction dismissed the complaint after recording reasons. The direction of remand included the direction of issuance of process. The learned counsel for the applicant rightly submits that it would amount to review of earlier order.

9) In the case of **Adalat Prasad Vs Rooplal Jindal & Ors in Appeal (Crl) 91 of 2002** The Hon'ble Apex Court has held that:

“In our opinion the observation of this Court in the case of Mathew (supra) that for recalling an order of issuance of process erroneously, no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law.”

10) In view of the Judgment of the Hon'ble Apex Court (Cited supra), this Court is of the opinion that the impugned order amounts to

superceding the Law laid down in the case of **Adalat Prasad Vs Rooplal Jindal & Ors.** Hence, petition deserves to be allowed. Hence, following order.

ORDER

- (i) Writ petition is allowed.
- (ii) Matter is remanded to Revisional Court i.e. Sessions Court, Kolhapur for reconsideration of the Revision Application only after issuing notice to the accused persons and defence of the accused who happens to be public servant shall also be taken into consideration before passing the final order.
- (iii) It is made clear that Revisional Court shall not be influenced by the observations made by this Court as they are prima facie in nature.
- (iv) Rule is made absolute in above terms.

(SMT. SADHANA S. JADHAV, J.)