

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 236 OF 2005

Mr. Ujwala w/o Yoganand Khetre,
Age 40 years, Occ. Advocate
R/o. Shahu Nagar, Beed,
Tq. and District Beed

...Applicant

versus

1. The State of Maharashtra,
Copy to be served on Public
prosecutor, High Court,
Aurangabad

2. Nivrutti @ Baban Borkar
Age 42 years, Occ. Agri.
R/o. Hissi, Taluka Sailu,
District Parbhani

3. Mrs. Shobha w/o Nivrutti @ Baban Borkar
Age 37 years, Occ. Agriculture
R/o. Hissi, Taluka Hissi
District Parbhani

4. Muktabai w/o Prakash Ingale,
Age major, Occ. Household,
R/o. Sailu Road in front of Sugar
Factory, Pathri, Tq. Pathri
District Parbhani

5. Uttam s/o Sadashiv Joshi
Age 40 years, Occ. Agriculture
R/o. Gugali, Damangaon
Tq. Sailu, District Parbhani

...Respondents

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Smt. A. D. Rakh, advocate for the applicant
Mr. M.B. Bharaswadkar, A.P.P. For respondent No.1 State.

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WITH
CRIMINAL REVISION APPLICATION NO. 468 OF 2004

1. Sadanand s/o Namdeo Khetre
Age 73 years, Occ. Agriculture
R/o. Kitti-Adgaon, Tq. Majalgaon
District Beed.
 2. Sow. Padmawati w/o Sadanand Khetre
Age 67 years, Occ. Household
R/o. Kitti-Adgaon, Tq. Majalgaon
District Beed.
 3. Rukmanand s/o Sadanand Khetre
Age 31 years, Occ. Business,
R/o. Majalgaon, District Beed
- ...Applicants

versus

1. The State of Maharashtra
(Copy to be served on Public
Prosecutor, High Court,
Aurangabad)
 2. Sow. Ujwala w/o Yoganand Khetre
Age 40 years, Occ. Advocate
R/o. Shahu Nagar, Beed
District Beed
- ...Respondents

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Mr. S. S. Choudhari, advocate for the applicants
Mr. M.B. Bharaswadkar, A.P.P. For respondent No.1 State.
Smt. A. D. Rakh, advocate for respondent No.2

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CORAM : V. K. JADHAV, J.
DATED : 30th NOVEMBER, 2016

ORAL JUDGMENT:-

1. Since both these matters arise out of one and same complaint and in view of the order passed by this Court in criminal application No. 236 of 2005, both these matters are being decided by this common judgment.

2. Being aggrieved by the order dated 31.12.2003 passed by learned Chief Judicial Magistrate, Beed below Exh.1 in R.C.C. No.130 of 2003 to the extent of dismissal of the complaint against original accused Nos.3 to 9 and the judgment and order passed by the III Adhoc Additional Sessions Judge, Beed dated 1.11.2004 in Criminal Revision Petition No.21 of 2004, confirming thereby the order passed by the learned C.J.M. Beed to the extent of dismissal of complaint against original accused No.6 to 9, the original complainant preferred Criminal Application No.236 of 2005 and being aggrieved by the judgment and order passed by the III Adhoc Additional Sessions Judge, Beed in aforesaid Criminal Revision Petition No.21 of 2004, original accused Nos. 3 to 5 approached this Court by filing Criminal Revision Application No.468 of 2004.

3. Brief facts giving rise to the present matters, are as follows:-

a) The petitioner original complainant has filed complaint bearing R.C.C. No.130 of 2003 before the learned C.J.M. Beed against 9 accused persons, including the present respondents for having committed the offences punishable under Sections 494 and 109 of I.P.C. Learned C.J.M. by order dated 31.12.2003 issued process under section 494 of I.P.C. against accused No.1 and under Section 494 r.w. 109 of I.P.C. against accused No.2 and further dismissed

the complaint against accused Nos.3 to 9. Being aggrieved by the same, the petitioner complainant filed Criminal Revision Petition No.21 of 2004 before the Sessions Court Beed and the learned III Adhoc Additional Sessions Judge, Beed, by impugned order dated 1.11.2004 partly allowed the said revision petition and set aside the order passed by the C.J.M. to the extent of dismissal of the complaint against the original accused Nos.3 to 5 but confirmed the rest of the order passed by the C.J.M. The petitioner original complainant has approached this Court by filing Criminal Application No.236 of 2005 to the extent of dismissal of complaint against the original accused Nos.6 to 9.

4. Learned counsel for the applicant in Criminal Application No.236 of 2005 submits that the complainant has made allegations in the complaint ascribing the specific role to all accused in performance of second marriage and in order to substantiate the same, examined two witnesses, who witnessed the said second marriage. On the basis of said evidence, learned C.J.M. had issued process against original accused No.1 and 2 and considering the said evidence, learned Adhoc Additional Sessions Judge, has also issued process against original accused Nos.3 to 5. The learned Additional Sessions Judge has however, erroneously observed that the original accused Nos.6 to 9 have no knowledge of the fact that

accused No.1 was performing the second marriage during the life time of his first marriage. The Courts below ought to have issued process against the respondents accused under sections 494 and 109 of I.P.C.

5. Learned counsel for the Applicants in Criminal Revision Application No.468 of 2004 submits that the evidence on record nowhere discloses as to how the petitioners original accused Nos.3 to 5 abetted accused No.1 for performing the second marriage. The respondent original complainant is not the witness to the alleged performance of second marriage. However, the witnesses examined by the respondent complainant in support of the allegations made in the complaint, have also not disclosed as to how the petitioners original accused Nos.3 to 5 abetted the performance of the second marriage by accused No.1. Learned counsel submits that the learned Adhoc Additional Sessions Judge, Beed has exercised the revisional powers without giving an opportunity of hearing to the petitioners original accused Nos. 3 to 5 and the same amounts to violation of principles of natural justice. Learned Sessions Judge has not followed the provisions of Section 399 (1) and the Section 401 (2) of the Cr.P.C. The order passed by the Adhoc Additional Sessions Judge, Beed dated 1.11.2004 to the extent of issuing process against the petitioners original accused Nos 3 to 5 is liable to

be quashed and set aside and the order passed by the learned Chief Judicial Magistrate, dated 31.12.2003 below Exh.1 in R.C.C. No.130 of 2003 is required to be confirmed.

6. On careful perusal of the contents of the complaint, verification statement of the complainant and evidence of witnesses, examined by her in support of her allegations made in the complaint, it appears that there is no sufficient material suggesting that the original accused Nos.6 to 9 have knowledge of the fact that original accused No.1 was performing second marriage during the life time of his first marriage.

7. The provisions of Sections 399 and 401 (2) of Cr.P.C. read as under:-

399. Sessions Judge's powers of revision :-

- (1) *In the case of any proceeding the record of which has been called for by himself the Sessions Judge may exercise all or any if the powers which may be exercised by the High Court under sub-section (1) of Section 401.*
- (2) *Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.*

- (3) *Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.*

401. (1)

(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.*

(3)

(4)

(5).

8. It is clear from the provisions of section 401(2) of Cr.P.C. that the High Court cannot pass any order to the prejudice of the accused or other persons unless that person has had an opportunity of being heard either personally or by pleader in his own defence. In view of the provisions of sub-section (2) of Section 399 of Cr.P.C. wherein proceedings by way of revision is commenced before the Sessions Judge, the provisions of sub-section (2) of Section 401 shall, so far as may be applied to such proceedings. It is thus, incumbent upon, the Sessions Judge to hear the applicant original accused Nos. 3 to 5 in criminal revision application 468 of 2004, if the Sessions Judge proposes to make any order adverse to them as against the order

passed by the learned Magistrate in their favour.

9. I am fortified by the views expressed by this Court in a case ***Bomab Rustom Irani Vs. State of Maharashtra (supra) reported in 2007 (1) Bom Cri 656.*** In paragraph No.9 of the said case, this Court has made following observations :-

“9. It is clear from section 401(2) of the Code that the High Court cannot pass any order to the prejudice of the accused or other person in its revisional power unless that person has had an opportunity of being heard either personally or by pleader in his own defence. Section 399 refers to Sessions Judges powers of revision. Sub-section (2) thereof states that where any proceeding by way of revision is commenced before a Sessions Judge, provisions of sub-section (2) of section 401 shall, so far as may be, apply to such proceeding and reference to High Court in the said sub-section shall be construed as reference to the Sessions Judge. Therefore, even the Sessions Judge is obliged to hear the accused or other person, if he proposes to make any order adverse to that person while exercising his revisional powers. Such person may be heard personally or through his lawyer.”

10. In view of the above discussion, criminal application No. 236 of 2005 is liable to be dismissed. In so far as the criminal revision application No. 468 of 2004 is concerned, the impugned order passed by the 3rd Adhoc Additional Sessions Judge, Beed, dated

1.11.2004 to the extent of issuing process against the petitioners original accused Nos. 3 to 5 is liable to be quashed and set aside.

Hence, I proceed to pass the following order:-

O R D E R

- I. Criminal application No. 236 of 2005 filed by the original complainant is hereby dismissed. Rule discharged.
- II. Criminal revision application No. 468 of 2004 is allowed in terms of prayer clause "B". Rule made absolute in the above terms.
- III. Criminal application No. 236 of 2005 and criminal revision application No. 468 of 2004 are disposed of accordingly.

(V. K. JADHAV, J.)

rlj/