

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 4608 OF 2015

Smt. Mariamma Thomas and others

.....Petitioners

V/s.

The State of Maharashtra and another

....Respondents

Mr. Chacko Joseph Advocate for Petitioners.

Mr. Lawrence Augustine D'Costa Respondent no. 2 in person.

Mr. V. B. Konde-Deshmukh APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : JUNE 6, 2016.

PC :

Heard.

- 2) Rule. Rule made returnable forthwith with the consent of the parties.
- 3) Petitioners herein question the correctness and validity of the order dated 31/10/2015 passed by Ad-hoc Additional Sessions Judge, City Civil Court, Borivali Division, thereby dismissing Revision Application No. 138 of 2013.
- 4) Petitioners herein are original accused in C.C. No. 2400048/SW/11. Learned Additional Chief Metropolitan Magistrate, 24th Borivali, by an order dated 18/10/2013 was pleased to issue process against present petitioners for

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offence punishable under section 405, 406 and 463 of Indian Penal Code. Petitioners had filed Criminal Revision Application No. 138 of 2013 before Sessions Court. Learned Sessions Court was pleased to allow revision application and quashed and set aside the order dated 18/10/2013 thereby issuing process against present petitioners. Learned Revisional Court was pleased to remand the matter to the Court of learned Magistrate thereby directing him to reconsider the police report as well as the complaint and verification and pass an appropriate and reasoned order thereon, in accordance with the Law. Revision application was disposed of by the Sessions Court.

5) Being aggrieved by the said order, original complainant had filed Writ Petition No. 2012 of 2014 before this Hon'ble Court. This Court (Coram : Revati Mohite Dere, J.). By an order dated 01/07/2014 was pleased to allow the writ petition. This Court had observed as follows:

“8. It is not disputed that an order issuing process need not be a detailed and reasoned order, but must prima facie reflect application of mind. There was no occasion for the Additional Sessions Judge to remit the matter to the Trial Court for reconsideration. In fact, the observations made by the learned Sessions Judge in paras 6 and 7 of the impugned order are on the merits of the matter and ought not to

have been made, if the matter was being remitted back to the Trial Court for reconsideration. The impugned order dated 3rd February, 2014 passed by the Additional Sessions Judge, Borivali Division, Dindoshi, Mumbai in Criminal Revision Application No. 138/2013 is thus quashed and set-aside and the Criminal Revision Application is restored to the file to its original number and is remitted back to the Additional Sessions Judge, Borivali Division, Dindoshi to consider the same on its own merits in accordance with law, uninfluenced by the earlier order dated 3rd February, 2014. All contentions of all parties are kept open”.

- 6) This Court had further directed learned Sessions Court to consider the matter on its own merits without being influenced by the earlier orders. Hon'ble Court in para 10 had specifically observed as follows:

“The order dated 18th October, 2013 passed by the learned Additional Chief Metropolitan Magistrate, Court No. 24, Borivali, Mumbai, issuing process, stands revived. Rule is made absolute on the aforesaid terms”.

- 7) The predecessor Bench (Coram : Revati Mohite Dere, J.) was pleased to remand the matter to the Court of Sessions. Learned Revisional Court had thereafter, observed rightly as follows:

“All that Revisional Court can do is examine if there were materials

before Magistrate to take a view that there were sufficient grounds for proceeding against persons against whom process was issued. So long as view of Magistrate on materials before him is a plausible one, Revisional Court cannot interfere on the ground that a different view was possible”.

8) Revisional Court had further observed that learned Magistrate had consider the material placed before him and after considering the complaint, verification and report under section 202, Magistrate had arrived at a conclusion that the case of issuance of process was made out. Hence, Revisional Court was pleased to dismiss the revision application by an order dated 31/10/2015. Petitioners herein have challenged the said order.

9) This Court (Coram : A. V. Nirgude, J.) by an order dated 18/12/2015 was pleased to stay the effect of the impugned order and the said order was kept in abeyance. Proceedings of the Trial Court were also stayed. Respondent was present in the Court on 18/12/2015. Interim relief was extended from time to time and the proceedings have been stayed.

10) Complainant appearing in person has submitted today that he was not heard by the Court at the time of passing of the order granting interim relief. Complainant/respondent rightly submits that order passed by the predecessor

Court dated 01/07/2014 was not challenged by the present petitioners and had attained finality. This Court in the order dated 01/07/2014 had specifically observed that order of issuance of process is revived. Criminal application was dismissed thereafter.

11) Learned counsel for the petitioners submits that complainant has failed to bring on record sufficient material to demonstrate that petitioners herein have committed an offence punishable under section 406 and 463 of Indian Penal Code and therefore, order of issuance of process deserves to be quashed and set aside.

12) It is a settled position in Law that order of issuance of process should not be interfered with, unless there is perversity in passing of the said order and smacks of miscarriage of justice.

13) Upon query made by the Court as to whether accused would have an opportunity to substantiate that no case is made out after the complainant adduced evidence before charge, learned counsel for the Petitioners was initially of the opinion that offence under section 406 of Indian Penal Code is not a warrant triable case and therefore, there was no occasion for adducing evidence before charge. However, upon reading the provisions in the Statute,

learned counsel has agreed that it is a warrant triable case since classification of the offence under section 406 of Indian Penal Code reads as follows:

“Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Classification of Offence – The offence under this section is cognizable, non-bailable, compoundable with permission of the Court before which any prosecution of such offence is pending and triable by Magistrate of the first class”.

14) Learned counsel for the Petitioners had made an irresponsible statement, however, without going into merits of the matter as to whether order issuing process was justified or not on the facts of the case is a subject matter of inquiry by the learned Magistrate and does not call for any interference. Learned Magistrate had specifically observed that perusal of the complaint and verification statement of complainant would disclose, *prima facie*, the offence having been committed by the accused under section 406 and 463 r/w 34 of Indian Penal Code. The order of issuance of process was revived by this Court before remanding the matter to the Revisional Court. Hence, the Revisional Court had rectified the earlier order and dismissed the Revision. There is no perversity in the said order. It cannot be either said that

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the Court was influenced by the observations made by the High Court.

15) The petition is filed under Article 227 of the Constitution of India. Article 227 of the Constitution of India confers power of superintendence over all Courts/Tribunals which fall under the jurisdiction of the concerned High Court. However, in exercise of power of superintendence, it would be appropriate to rectify Court's procedural error or a perverse order could be set aside. In the present case, learned Revisional Court, after matter was remanded has corrected itself and has rightly held that at the stage of issuance of process it is incumbent upon the Court to see as to whether a *prima facie* is made out. It would not be necessary to appreciate the niceties of the complaint at the stage of issuance of process.

16) There is no reason to interfere with the order passed by learned Magistrate as Petitioners are not simply challenging the order of issuance of process, but what is under challenge is order passed by Revisional Court dismissing the application seeking relief of quashing of issuance of process.

17) No case is made out. Petition being sans merits, stands dismissed. Rule is discharged.

(SMT. SADHANA S. JADHAV, J.)