

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

Criminal Writ Petition No. 01440 of 2015

District : Ahmednagar

Taskin d/o. Shaikh Ali Akbar Mogal,
Aged : 31 years,
Occupation : Nil,
R/o. C/o. Shaikh Ali Akbar Mogal,
Naikwadpura, Pune Road,
Sangamner, Dist. Ahmednagar. .. Petitioner.

versus

1. Eajaj Khan Shafi Khan Pathan,
Aged : 39 years,
Occupation : Service,
R/o. Eknath Nagar,
Nepti Road,
At & Post : Kedgaon,
Taluka & Dist. Ahmednagar.
2. The State of Maharashtra,
Through the PSO, Kedgaon P.S.,
Ahmednagar. .. Respondents.

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Mr. V.Y. Bhide, Advocate, for the petitioner.

*Mr. Sameer Shaikh & Mr. N.B. Narwade, Advocates,
for respondent no.01.*

*Mr. S.P. Sonpawale, Addl. Public Prosecutor, for
respondent no.02.*

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With

Criminal Writ Petition No. 01461 of 2015

District : Ahmednagar

1. Sayyed Soheli Liyakat,
Aged : 36 years,
Occupation : Labour.
2. Sayyed Ruksana Liyakat,
Aged : 64 years,
Occupation : Household.

Petitioners 1 & 2 R/o. -
Dargah Road,
Oppo. Kadri Masjid,
Mukund Nagar,
At Post & Dist. Ahmednagar.

.. Petitioners

versus

1. Eajaj Khan Shafi Khan Pathan,
Aged : 39 years,
Occupation : Service,
R/o. Eknath Nagar,
Nepti Road,
At & Post : Kedgaon,
Taluka & Dist. Ahmednagar.

2. The State of Maharashtra,
Through the PSO, Kedgaon P.S.,
Ahmednagar.

.. Respondents.

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*Mr. Shaikh Mazhar A. Jahagirdar, Advocate, for
petitioners.*

*Mr. Sameer Shaikh & Mr. N.B. Narwade, Advocates,
for respondent no.01.*

*Mr. S.P. Sonpawale, Addl. Public Prosecutor, for
respondent no.02.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving the
judgment : 23rd November 2017**

**Date of pronouncing the
judgment : 20th December 2017**

JUDGMENT :

01. Rule. Rule made returnable forthwith. Heard finally with consent of learned Counsel for respective parties.

02. Both the petitioners by invoking writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India as well as by invoking powers under Section 482 of the Code of Criminal Procedure, 1973 [For short, "Cr.P.C."], have challenged the order passed by the Judicial Magistrate (First Class), Court No.4, Ahmednagar, in R.T.C. No. 351 of 2011, on 16.08.2012, whereby process was issued against petitioner no.01 in Cri. W.P. No. 1440 of 2015 (original accused no.01) for the offence punishable under Section 494 of the Indian Penal Code and petitioners in Cri. W.P. No.1461 of 2015 (original accused nos.06 and 07) for the offence punishable under Section 109 read with Section 34 of the Indian Penal Code.

03. Respondent no.01 herein is the original complainant. The complaint is filed against the

petitioner in Cri.W.P. No. 01440 of 2015, who is original accused no.01, contending that she is the wife of the present complainant and during the subsistence of their marriage, she has performed marriage with petitioner no.01 in Cri.W.P. No. 01461 of 2015. Petitioner no.02 in Cri.W.P. No. 1461 of 2015 is the mother of petitioner no.01 therein. The complainant has alleged that the present petitioner - original accused no.01 had eloped from her house and joined the company of the complainant on 19th August 2003. Thereafter they got married. Consent by the parents of the wife was not there and, therefore, the couple could not return to their village. However, brother of the wife gave report to Sangamner Police Station, stating that the original complainant had abducted the sister and ravished her. On the basis of said report, the original complainant was prosecuted for the offence punishable under Section 364 and 376 of the I.P.C. During the course of investigation of the said matter, the complainant was in custody for about 13 months. Even he was released on bail, he was not allowed to meet his wife. It was only assured to him that she is in safe custody of the parents and brother and it was also stated that she continued to be his wife. The parents and brother of the wife assured the complainant that his wife would return for cohabitation but asked him to go from their house at that point of time. However, it is stated by the complainant that after some months, he came to know that his wife got married to Sayyed Sohel Liyakat i.e. petitioner no.01 in

Cri.W.P. 1461 of 2015 on 10th May 2007 in the hotel owned by the parents of the wife. It has been contended that despite knowledge that the original accused no.01 - wife was already married to the complainant, her marriage has been performed with original accused no.06 and, therefore, he contended that all the accused persons are liable to be prosecuted for the offence punishable under Sections 494, 109 read with Section 34 of the I.P.C.

04. As some of the accused were residing beyond the jurisdiction of the learned Magistrate, the learned Judicial Magistrate (F.C.), Ahmednagar, postponed the issuance of process and took up the proceedings as contemplated under Section 202(2) proviso of the Cr.P.C. In that process, the complaint was sent for investigation under Section 202 of the Cr.P.C. Thereafter, the report was received by the learned Magistrate on 09.02.2012. The report was considered and the complainant was further directed to lead evidence, if any. In pursuant to the evidence and other documents on record, the learned Judicial Magistrate (F.C.) issued process against accused no.01 for offence under Section 494 of the I.P.C. and against accused nos.02 to 07 for the offence punishable under Section 109 read with Section 34 of the I.P.C., by his order dated 16.08.2012. The said order is under challenge in these petitions.

05. It will not be out of place to mention here

that original accused nos.02 to 05 had approached this Court by filing Criminal Writ Petition No. 0167 of 2014. This Court has allowed the said writ petition on 26th March 2015.

06. Learned Counsel appearing for the petitioners have vehemently submitted that the order of issuance of process passed by the learned Judicial Magistrate (F.C.) suffers from illegality and it is without application of mind. The learned Magistrate had not considered that there was absolutely no evidence before him to prove that actually marriage was performed between original accused nos.01 and 06. Only an invitation card was filed but that was not sufficient. None of the persons who had attended the ceremony was examined either by the Police when the enquiry under Section 202 of the Cr.P.C. was conducted or after the complainant was directed to lead evidence.

07. Learned Counsel for the petitioners have relied on a decision of this Court in the case of *Vaidya Kuldip Raj Kohil Vs. The State of Maharashtra & another* [2002(2) Mh.L.J. 830] wherein it has been held by this Court that when no offence was disclosed in the Police report and even in evidence, no offence was transpired, the Magistrate has misused the powers of the court in issuing the process. Further, when the Magistrate had directed an enquiry under Section 202 of the Cr.P.C. and the report was submitted, he was not justified in permitting the complainant to lead

evidence. Reliance has been placed in this regard on a decision of this Court in the case of *Ramesh Damodar Nagare Vs. Ashok Damodar Nagare & another* [1998(1) Mh.L.J. 798]. The order passed by the learned Magistrate is without application of mind and in order to support the said contention, reliance has been placed on a decision of this Court in the case of *Michael Jackson, U.S.A. Vs. Michael Jackson Fashion (India) Ltd., Mumbai & another* [2003(4) Mh.L.J. 1056]. Further reliance has been placed on a decision of this Court in the case of *Shri Balasaheb Reghunath Katad & others Vs. Sou. Gayabai Balasaheb Katad* [2003 Cri.L.J. 2343] wherein it has been held that averment in the complaint, that complainant after hearing chanting of *shlokas* and *mantras* went near assembly and inferred that her husband was marrying another woman, cannot be the basis for issuing process for the offence of bigamy when there are no averments in the complaint that customary rights and ceremonies prevalent in the caste or tribe were performed. In the case of *Vithoba s/o. Kachruji Kathole & others Vs. Pushpa w/o. Vithoba Kathole (Deceased through L.Rs.)*, [2009 ALL MR (Cri.) 2882], it has been held that when the observations of the Magistrate, that a *prima facie* case is made out was contrary to record, then the order of issuing process is required to be set aside. It was also pointed out that only on the basis of hearsay evidence, the learned Magistrate ought not to have issued process. Admittedly, the complainant and his parents whose evidence has been recorded by the learned Magistrate, have not personally seen the alleged marriage between accused no.01 and accused no.06. In order to substantiate

this part of their argument, learned Counsel for petitioners have relied on a decision of this Court in the case of *Prakash s/o. Limbaji Dhole Vs. The State of Maharashtra & another* [2013 ALL MR (Cri.) 3886].

08. Per contra, it has been argued that when it was found that the accused persons are not residing within the jurisdiction of the learned Magistrate, the enquiry was ordered and the learned Magistrate was then justified in calling upon the complainant to lead any evidence in support. When there was *prima facie* case made out, the learned Magistrate was not required to give a detail order. Scope of the enquiry under Section 202 of the Cr.P.C. was very much limited. He relied on a decision of Jharkhand High Court in the case of *Frank Henary Vs. State of Jharkhand & another* [2004 Cri.L.J. 1920] and a decision of Andhra Pradesh High Court in the case of *Vidavaluru Balaramaiah & others Vs. State of A.P. & another* [2003 Cri.L.J. 3192]. Further, he submitted that when Criminal Writ Petition No. 0167 of 2014 was decided by this Court, a specific note has been put that the observations made in the said writ petition cannot be availed by the co-accused and, therefore, the present petitioners cannot rely on the observations made by this Court while deciding the said writ petition.

09. It appears that the complaint has a chequered history. However, we are required to constrain ourselves to the allegations made in the present complaint taking into consideration the

contention that offence under Section 494, 109 read with Section 34 of the I.P.C. is stated to have been committed. The circumstances under which the complainant got married to accused no.01 and whether their marriage is still subsisting or not, is not a relevant fact. Complainant has come with a case, that he performed marriage with accused no.01 after 19.08.2003. He was then arrested on the complaint lodged by the father of the original accused no.01 and he was in jail for about 13 months. According to him, at that time, accused no.01 was residing with accused nos.02 to 04. Even if for the sake arguments, it is accepted that the marriage between complainant and accused no.01 is subsisting, what is more relevant here in this case, is whether there was any *prima facie* evidence before the learned Magistrate to come to the conclusion that accused no.01 has performed marriage with accused no.06. Initially, when it was found that some of the accused were not resident of the jurisdiction of the learned Magistrate, he had directed the enquiry under Section 202 of the Cr.P.C. After the report was submitted, at that time also, it appears that the learned Magistrate was not satisfied and directed the complainant to lead further evidence.

10. If we peruse the order dated 09.07.2012 passed by the learned Magistrate, it can be said that it is a very cryptic order which does not spell out why he was not satisfied with the report of the Police. It is to be noted that the said report is

not against the complainant. No doubt, it was in the discretion of the Judicial Magistrate to rely on the said report or not, but in the order, he does not in specific words say that he is not relying upon the said report and discarding it. Under such circumstance, it was necessary for the learned Magistrate to say in clear words as to why he is giving an opportunity to the complainant to lead further evidence. The reasons for his dissatisfaction on the report submitted by the Police were utmost necessary which would show that whether he has exercised the judicial discretion properly or not. The learned Magistrate has not treated the complaint as a protest petition nor a separate protest application was filed by the complainant. When it was in fact a report under Section 202 of the Cr.P.C., the procedure that has been contemplated under the decision of the Apex Court in the case of *Abhinandan Jha Vs. Dinesh Mishra* [1968 Cri.L.J. 97 (SC)] is not required to be followed because the said procedure is specifically meant in respect of negative report given when the investigation under Section 156(3) of the Cr.P.C. is directed. Therefore, the ratio laid down in the case of *Ramesh Damodar Nagare (supra)* is squarely applicable here. The procedure that was adopted by the learned Magistrate was not proper and legal when he by merely stating, that in the peculiar facts and circumstances of the case, is directing the complainant to lead further evidence. Unless he has the power and the procedure permits him, he cannot direct the complainant to lead further evidence. The

decision in the case of *Vidavaluru Balaramaiah & others (supra)*, relied by respondent no.01 is not helpful to respondent no.01 because the facts are different and that stage is already undertaken by the learned Magistrate earlier.

11. The facts, in this case, would show that even in the enquiry under Section 202 of the Cr.P.C. conducted by Police and the opportunity given by the learned Magistrate to the complainant to lead evidence has not yielded proper evidence even to take cognizance of the matter. Along with the Police report, the agreement of marriage between the complainant and accused no.01 has been fetched and the invitation card has been collected. Merely on the basis of the said invitation card, it cannot be stated that the marriage was performed between accused no.01 and accused no.06 on the given date and at the given venue. Police had not examined any person who attended the said marriage ceremony nor the *Kazi* who performed the *Nikah* was examined. Same is the case when the learned Magistrate allowed the complainant to lead evidence. Only three persons have been examined, the complainant himself, his brother and mother. They were admittedly not present when the alleged marriage took place between accused no.01 and accused no.06. There was no hurdle for the complainant to examine any such person who had seen the marriage / *Nikah* or any person who performed a major role at the time of *Nikah*. There was only hearsay evidence before the learned Magistrate and,

therefore, the observations in the case of *Prakash s/o. Limbaji Dhole (supra)* would be helpful to the petitioners. As regards the basic ingredient of the offence under Section 494 of the I.P.C. is concerned, the complainant was duty bound to produce evidence that the marriage is actually performed. The evidence in respect of that basic ingredient is absent in the present matter.

12. As regards the impugned order of taking cognizance is concerned, again a cryptic order is passed by the learned Magistrate. No doubt, when cognizance is taken, a learned Magistrate is not required to give detailed order. However, such order should reflect judicial mind of the concerned Magistrate taking into consideration the facts and the evidence that has been adduced before him or her. In view of the observations in the case of *Michael Jackson, U.S.A. (supra)*, the Magistrate was obliged to give judicial consideration before coming to the conclusion that prima facie case has been made out to take cognizance of the offence. In the present case, the impugned order does not show that judicial considerations were adhered to. No doubt, in Criminal Writ Petition No. 0167 of 2014, this Court had observed that the advantage of the reasons in the said petition are not available to the present petitioners, but independently also, if we consider the case that has been made out in the complaint, there was nothing before the learned Magistrate which would prompt him to take cognizance of the offence

under Section 494 of the I.P.C. against accused no.01 and under Section 109 read with Section 34 of the I.P.C. against accused nos.06 and 07. Therefore, the said order of taking cognizance is patently illegal. The petitioners need not be asked to face the trial unnecessarily and, therefore, the petitions succeed.

13. In the result, both writ petitions are allowed.

(a) The order of issuing process against the petitioners in both the petitions (original accused nos.01, 06 and 07), passed in R.T.C. No. 351 of 2011, by the Judicial Magistrate (First Class), Court No.4, Ahmednagar, on 16.08.2012, is hereby quashed and set aside. The complaint against the petitioners is hereby quashed and set aside.

(b) Rule made absolute in the above terms.

(Smt. Vibha Kankanwadi)
JUDGE

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