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

CRIMINAL APPLICATION NO.266 OF 2019

1. Vijay s/o Moreshwar Kshirsagar,
Age 73 years, Occu. Pensioner,
R/o Guruprasad Nagar,
Beed bypass Road, Aurangabad.
2. Sanjay s/o Achyutrao Kshirsagar,
Age 45 years, Occu. Electrician,
R/o B & C Quarters, Nagar Road,
Beed, Tq. & Dist. Beed.
3. Achyutrao s/o Moreshwar Kshirsagar,
Age 90 years, Occu. Retired Employee,
R/o and C/o as of No.2 above. ... APPLICANTS
(Original Accused)

VERSUS

1. The State of Maharashtra
Through : Police Station, Jamkhed,
Tq. Jamkhed, Dist. Ahmednagar
(Copy to be served on Public Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad)
2. Sominath s/o Eknath Tagad
Age 67 years, Occu. Agril.,
R/o Dighol, Tq. Jamkhed,
Dist. Ahmednagar ... RESPONDENTS
(No.2 Orig. Complainant)

.....
Shri P.G. Godhamgaonkar, Advocate for applicants
Mrs. R.P. Gaur, A.P.P. for respondent No.1/ State
Shri U.S. Janephalkar, Advocate for respondent No.2
.....

CORAM: R.G. AVACHAT, J.

DATED : 19th AUGUST, 2019.

JUDGMENT :

This is an application under Section 482 of the Code of Criminal Procedure. The applicants herein seek quashment of the order of issuance of process, dated 5/9/2018, passed by learned Judicial Magistrate, First Class, Jamkhed in Criminal Misc. Application No.304/2018 (R.C.C. No.173/2018). By the impugned order, process has been issued against the applicants herein for offences punishable under Sections 504 and 506(2) read with Section 34 of the Indian Penal Code.

2. Heard. Shri P.G. Godhamgaonkar, learned counsel for the applicants would submit that, the civil disputes are pending between the applicants and the respondent No.2 (complainant) in Revision No.70-B of 2018. The applicants No.1 and 3 are 73 years and 90 years old respectively. Both were indoor patients on the day on which the alleged offence is said to have taken place. According to learned counsel, the complaint has been filed only with a view to harass the applicants. The learned counsel meant to say that, the complaint has been actuated with malafide intention on the part of respondent No.2. The learned counsel would further submit that the

applicants are residents of Aurangabad. The alleged offence took place at village Dighol, Taluka Jamkhed, District Ahmednagar. The learned counsel meant to say that the applicants have been residing beyond the territorial jurisdiction of the learned Magistrate who has passed order issuing the process. The impugned order is in clear breach of provisions of Section 202 of the Code of Criminal Procedure. The learned counsel ultimately urged for quashing of the impugned order.

3. Shri V.J. Janephalkar, learned counsel for respondent No.2 would, on the other hand, submit that, the Court cannot undertake exercise of roving enquiry so as to find out the truth. The learned counsel meant to say that, at this stage the Court is expected to see only whether the offence is made out from the allegations in the complaint. If the offence is made out, it is to be left to the trial Court to go into the truthfulness of the allegations in the complaint. Learned counsel ultimately urged for dismissal of the application.

4. The learned A.P.P. supported the impugned order.

5. Admittedly, a civil dispute is pending between the complainant/ respondent No.2 and the applicants/ accused. It needs no mention that, the pendency of an earlier dispute is a double-

edged weapon, meaning thereby, it could be a cause for commission of an offence or for making false allegations.

For issuance of a process or summoning a person as an accused in the case, it prima facie needs to be seen whether the allegations made in the complaint make out an offence. It is, therefore, necessary to advert to the allegations in the complaint.

It has been alleged in the complaint as under :--

“On 2/9/2018 at about 3.00 p.m., the applicants/ accused No.1 and 2 entered the agricultural field (Gat No.396). The respondent No.2/ complainant was engaged in agricultural operations. The applicants No.1 and 2 told him that the land Gat No.396 belonged to them. The complainant is a thief. The complainant got the said land recorded in his name by fraudulent means. The applicant No.2 told the complainant that they have come at the instance of the applicant No.3. The applicant No.3 has asked them to drive the complainant out of the land Gat No.396, and take possession thereof. The applicants No.1 and 2 abused the complainant in filthy language and gave threats to his life.”

6. The averments in the complaint undoubtedly indicate that applicant No.3 had not accompanied the applicants No.1 and 2.

The applicant No.3 is 90 years of age. What has been attributed against him is a role of an instigator/ an abettor to commit the alleged offence. The material sought to be relied upon to rope in the applicant No.3 in the alleged offence is what had been informed by the applicant No.2 to the complainant. The same indicates that it is in the nature of extra-judicial confessional statement of a co-accused. The same is not admissible in any of the Sections of the Indian Evidence Act except, under Section 30 thereof, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

7. Here is not a case of a proved confession to be let in evidence. As such, the allegations in the complaint so far as against the applicant No.3 are concerned, are inadmissible as an evidence in the case. Process, therefore, could not have been issued against the applicant No.3. The application would, therefore, be allowed, setting aside the impugned order so far as against applicant No.3 is concerned.

8. Admittedly, the applicants have been residing at a place beyond the territorial jurisdiction of the learned Magistrate. The

impugned order reads thus :

“1. Perused complaint and verification of the complainant. Complainant has made out prima facie case against accused persons. Hence, issue process against accused persons for the offences punishable under Sections 504, 506(2) r/w 34 of I.P.C.. on P.F. returnable on 6/10/2018.

2. Matter be registered as Reg. Criminal Case.”

9. The aforesaid order undoubtedly indicates that, before issuance of the process, the learned Magistrate did not enquire into the case himself or direct an investigation to be made by the police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. For better appreciation, Section 202 of the Code of Criminal needs to be adverted.

“202. Postponement of issue of process :-

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against

the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

10. Provisions of Section 202 of the Code of Criminal Procedure were subject of interpretation in case of **Vijay Dhanuka Etc. Vs. Najima Mamtaj Etc.**, reported in **[2014 AIR SCW 2095]**, wherein the Hon'ble Supreme Court observed :-

"Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. – The words "and shall, in a case where the accused

is residing at a place beyond the area in which he exercises his jurisdiction” was inserted by Section 19 of Code of Criminal procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23rd of June, 2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. – Hence, in view of the use of the express “shall” and the background and the purpose for which the amendment has been brought, it cannot be doubted that inquiry or the investigation, as the case may be is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.”

11. Since the impugned order has been passed in clear breach of provisions of Section 202 of the Code of Criminal Procedure, the same needs to be set aside with a direction to the learned Magistrate to comply with the statutory mandate before passing an order on the complaint.

12. In view of the above, the application is disposed of in terms of the following order :

ORDER

The Criminal Application is partly allowed.

The impugned order dated 5/9/2018 of issuance of process, so far as against the applicant No.3 is concerned, is hereby set aside. The complaint stands dismissed against the applicant No.3.

The matter is remanded back to the learned Magistrate for compliance of provisions of Section 202 of the Code of Criminal Procedure, before passing any order as regards allegations against the applicants No.1 and 2 only.

(R.G. AVACHAT)
JUDGE

fmp/-