

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 28 of 2016

Order Reserved on : 08.07.2021

Order Delivered on : 06.08.2021

Smt. Rachana Ghale, W/o Chaman Ghale, Aged About 33 Years,
R/o Plot No. 11, Block No. 16, Radhika Nagar, Bhilai, P.S. Supela,
Tahsil & District- Durg (C.G.)

---- Petitioner

Versus

1. Chaman Ghale, S/o Radheshyam Ghale, Aged About 32 Years, R/o 11/12, Ispat Nagar, Risali, P.S. Newai, Tahsil & District- Durg (C.G.)
2. Radheshyam Ghale, S/o Late Puran Das Ghale, Aged About 55 Years.
3. Smt. Shanti Ghale, W/o Radhe Shyam Ghale, Aged About 50 Years.

Respondent No. 2 & 3 are R/o 5/38, Ispat Nagar, Risali, P.S. Newai, Tahsil & District- Durg (C.G.)

4. State of Chhattisgarh, through: P.S. Newai, Bhilai Nagar, District- Durg (C.G.)

---- Respondents

For Petitioner	:	Mr. T.K. Tiwari, Advocate
For Respondent No. 1 to 3	:	Mr. Manish Upadhyay, Adv.
For State/Res No. 4	:	Mr. Uddhav Sharma, G.A.

Hon'ble Shri Justice Narendra Kumar Vyas

CAV Order

1. The petitioner has filed this petition under Section 482 of the Cr.P.C. against the order dated 15.10.2015 (Annexure P/6) passed by Judicial Magistrate First Class, Durg (C.G.) in Complaint Case No. 5498/2015 (Smt. Rachna Ghale Vs. Chaman Ghale), in which the learned Judicial Magistrate First Class has recalled the order dated 20.07.2015 of registration of complaint, rejected the application filed by complaint u/s 156(3) of Cr.P.C., further directed that application be treated as complaint under Section 200 of Cr.PC and fixed the case for complaint's evidence before registration of the complaint.

2. The brief facts as projected by the petitioner in the complaint as well as in the Petition are that marriage of the petitioner was solemnized with respondent No. 1 on 07.07.2007 at Bhilai as per Buddhist customs. After marriage, the petitioner was residing at her matrimonial home with respondents No. 1 to 3. Just after 3 to 4 days of marriage, respondents No. 1 to 3 started causing harassment to the petitioner for demand of dowry making false and frivolous allegations against her. The petitioner was compelled to leave her matrimonial home and driven out from her matrimonial home on 03.03.2008. The Respondent No. 1 filed divorce petition before Family Court, Durg, but the application filed by respondent No. 1 against the petitioner was dismissed on 28.07.2008. After dismissal of the said divorce petition, respondents No. 1 to 3 approached the petitioner and her parents, tendered apology for their conduct and for making false allegation and filing divorce petition.
3. The petitioner and her family members accepted the request of respondents No. 1 to 3 and again she was living with her husband and in-laws, they again started causing physical and mental torture to the petitioner between the year 2008 to 2014 many times. In the midnight of 01-02.11.2014, respondents No. 1 to 3 again badly assaulted the petitioner as a result of which, she sustained injuries at her head, chest and mouth. When she was crying for her rescue, respondents No. 1 to 3 gagged her mouth forcefully by putting cloth in her mouth in order to silent her. The petitioner called her parents on 02.11.2014, went to police station and lodged report against respondents No. 1 to 3. Respondent No. 4 sent the petitioner for medical examination, in which, injuries were found on her chest and other parts of her body. In spite of the medical examination and receiving the injury report, respondent No. 4 has not registered any offence against respondents No. 1 to 3.
4. Learned counsel for the petitioner would submit that the learned Judicial Magistrate First Class vide order dated 20.07.2015 registered the complaint as the report was already

received and thereafter, issued notice for appearance of the respondents No. 1 to 3. He would further submit that the learned Judicial Magistrate has committed mistake by recalling its order, therefore, it is against the judgment of Hon'ble the Supreme, therefore, the same is liable to be quashed.

5. This Court vide order dated 12.01.2016 issued notice to respondent No. 1 to 3, but no reply has been filed by them. The State/ respondent No. 4 has filed reply contending that this petition under Section 482 of the Cr.P.C. is not maintainable as the process initiated by the learned trial court is legal and justified and there is no abuse of process of law, therefore, this petition is liable to be dismissed.
6. Learned counsel for the petitioner would submit that the learned trial court has already issued summon to the complainant and process was already been initiated vide its order dated 27.07.2015 and thereafter the matter was listed on 22.08.2015. The case was fixed for consideration on the report submitted by the police and that matter was listed on 15.10.2015, on that date the trial court recalled its order and has rejected the report submitted by the police. The action taken by learned trial Court is amounting to recalling of summon, which is not permissible in view of the judgment passed by Hon'ble the Supreme Court.
7. Learned counsel for the petitioner would refer to the judgment of Hon'ble the Supreme Court in **Devendra Kishanlal Dagalia Vs. Dwarkesh Diamonds Private Limited & others**¹ and would submit that the procedure adopted by the learned Judicial Magistrate First Class directing to review/ recall is not permissible under the Cr.P.C. as remedy lies against the said order is before High Court under Section 482 of Cr.P.C. or Article 227 of the Constitution of India available to respondents No. 1 to 3.

1 (2014) 2 SCC 246

8. Learned State counsel as well as learned counsel for respondents No. 1 to 3 would support the order passed by the learned Judicial Magistrate First Class. Learned State counsel would refer to Section 460 of Cr.P.C and would submit that the Magistrate has committed irregularities which do not vitiate proceedings, therefore, the order passed by the learned Judicial Magistrate First Class is legal and justified, which is not liable to be interfered by this Court while exercising power under Section 482 of the Cr.P.C. It is necessary to extract Section 460 of the Cr.P.C., which is as under:-

“460. Irregularities which do not vitiate proceedings- If any Magistrate not empowered by law to do any of the following things,

- (a) to issue a search- warrant under section 94;
- (b) to order, under section 155, the police to investigate an offence;
- (c) to hold an inquest under section 176;
- (d) to issue process under section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;
- (e) to take cognizance of an offence under clause (a) or clause (b) of sub- section (1) of section 190;
- (f) to make over a case under sub- section (2) of section 192;
- (g) to tender a pardon under section 306;
- (h) to recall a case and try it himself under section 410; or
- (i) to sell property under section 458 or section 459, erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

9. Three judges Bench of Hon'ble the Supreme Court in **Adalat Prasad Vs. Rooplal Jindal & others**², has examined the power of Magistrate for recalling of process of summon at paragraph 15 of the judgment, which is as under:-

“15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202,

2 (2004) 7 SCC 338

the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code. ”

10. Hon'ble the Supreme Court in **Devendra Kishanlal Dagalia (Supra)**, at paragraph 10 held as under:-

“10. The aforesaid provisions make it clear that the Magistrate is required to issue summons for attendance of the accused only on examination of the complaint and on satisfaction that there is sufficient ground for taking cognizance of the offence and that it is competent to take such cognizance of offence. Once the decision is taken and summon is issued, in the absence of a power of review including inherent power to do so, remedy lies before the High Court under Section 482 Cr. P.C or under Article 227 of the Constitution of India and not before the Magistrate. ”

11. Learned counsel for the State as well as respondents No. 1 to 3 would submit that the procedure followed by learned Judicial Magistrate First Class is correct which is not liable to be interfered by this Court.
12. From perusal of Section 460 of the Cr.P.C., it is perceptible that the irregularities which do not vitiate proceedings have been enumerated in this Section and recall of order by Magistrate for whatsoever reason does not fall within this Section. If any Magistrate is not empowered by law to recall its order, therefore, the impugned order dated 15.10.2015 is non-est, illegal and deserves to be quashed by this Court. As such, the order dated 15.10.2015 passed by the learned Judicial Magistrate First Class is quashed.
13. As an upshot of the above discussion and considering the law laid down by Hon'ble the Supreme Court, the order dated 15.10.2015 so far as recalling of the summon, rejection of the report submitted by the police, is quashed and subsequent direction for recording of preliminary evidence of the

complainant for registration of FIR is also illegal and the same is liable to be and is hereby quashed.

14. It is held that once the complaint has been registered, summon has been issued, it cannot be recalled. The registration of complaint will not preclude right of respondents No. 1 to 3 to challenge the issuance of process by the Judicial Magistrate First Class, further proceeding initiated by the Judicial Magistrate First Class including order dated 15.10.2015, before appropriate forum without being influenced by any of the observations made by this Court.
15. With the aforesaid observations and directions, this petition is allowed.

Sd/-
(Narendra Kumar Vyas)
Judge