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IN THE HIGH COURT OF BOMBAY AT GOA

Criminal Writ Petition No.192 of 2019

Jerome D'Cunha,
Son of Shri Paulo D'Cunha,
Aged about 45 years, Indian National and
R/O H. NO.1008,
Behind St. Cruz High School
1st Bairo, Str. Cruz, Ilhas-Goa.

Petitioner

Versus

1. Matilda Milagrina Josephine Finiana Rego ,
Daughter of late Gregory Gaspar Rego,
Aged about 57, Indian National and
R/o H. NO.1059, Premeiro Bairo,
St. Cruz, Ilhas-Goa.
2. Mr. Francisco Tomas Fortunto Braganza,
Son of Augustinho Braganza,
Aged about 63 years, Indian National and
H. No.1410, Bairo, Bondir,
St. Cruz, Ilhas-Goa.
3. State of Goa,
Through Public Prosecutor,
Panaji-Goa.

Respondents

Mr. Deepak Gaonkar, Advocate for the Petitioner

Mr. E. Dias, Advocate, for the Respondent no.1.

Mr. Arjun Naik, Advocate for the Respondent no.2.

**Mr. Pravin Faldessai, Additional Public Prosecutor for the
Respondent no.3-State**

CORAM: MANISH PITALE, J

DATED: 22nd September, 2021

Oral Order:

1. By this Writ Petition, the petitioner (original complainant) has approached this Court challenging order dated 22/10/2012 passed by the Judicial Magistrate First Class, at Panaji, whereby an application filed by the respondent no.2 for dropping proceedings was entertained by the Magistrate. After entertaining the application, the Magistrate partly allowed the same, with the result that process already issued under section 193 of the I.P.C against the respondents stood dropped and it was observed that the complaint would proceed only in respect of section 465 of the I.P.C.

2. The short point raised on behalf of the petitioner is that such an application could not have been entertained by the Magistrate at all in view of the law laid down by the Hon'ble Supreme Court in the case of *Adalat Prasad Vs. Rooplal Jindal and others 2004 ALL MR (Cri) 3131* (S.C.). It is contended that although the petitioner has an answer on the merits of the matter also, but since the Magistrate could not have entertained the application filed by the respondent no.2, any argument on merits are unnecessary, as the matter is covered in favour of the petitioner, as per aforesaid judgment of the Hon'ble Supreme Court in the case of *Adalat Prasad Vs. Rooplal Jindal (supra)*.

3. On the other hand, Mr. Arjun Naik, the learned counsel appearing for the respondent no.2 submitted that the order dated 19/11/2012, whereby process was issued under sections 193 and 465 of the I.P.C. was in fact made subject matter of challenge by the respondent by filing Criminal Revision Application no.02 of

2013. It was submitted that unfortunately the said revision application was dismissed in default by the Sessions Court, which could not have been done. Thereafter, the respondent no.2 moved the aforesaid application for dropping the proceedings. The learned counsel for the respondent no.2 could not dispute the position of law laid down by the Hon'ble Supreme Court in the aforesaid judgment in the case of ***Adalat Prasad Vs. Rooplal Jindal (supra)***.

4. In the present case, the record shows that the Magistrate passed an order on 19/11/2012, issuing process against the respondent-accused for offences under sections 193 and 465 of the IPC. Thereafter, as noted above, the aforesaid application, was filed on behalf of the respondent no.2 on 6/8/2018 seeking dropping of proceedings. In other words, the respondent no.2 sought an order of review/recall of the order dated 19/11/2012 whereby process was issued by the Magistrate. The short question is, as to whether such an application could be entertained at all by the Magistrate.

5. The learned counsel for the petitioner is justified in relying upon, the aforesaid Judgment of the Hon'ble Supreme Court in the case of ***Adalat Prasad Vs. Rooplal Jindal (supra)***. The relevant portion of the aforesaid judgment reads as follows:

“14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process

by way of summons under [section 204](#) of the Code. Therefore what is necessary or a condition precedent for issuing process under [section 204](#) is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under [section 202](#) that there is sufficient ground for proceeding with the complaint hence issue the process under [section 204](#) of the Code. In none of these stages [the Code](#) has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in [the Code](#). It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under [sections 200](#) and [202](#), and the only stage of dismissal of the complaint arises under [section 203](#) of the Code at which stage the accused has no role to

play therefore the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under [section 203](#) of the Code for a reconsideration of the material available on record is impermissible because by then [Section 203](#) is already over and the Magistrate has proceeded further to [Section 204](#) stage.

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](#), 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.”

6. The aforesaid position of law laid down by the Hon'ble Supreme Court clearly demonstrates that the Magistrate in the present case could not have entertained the application filed on behalf of the respondent no.2 for dropping the proceedings, as

such an application is not contemplated in law. Therefore, the very exercise of power by the Magistrate was unsustainable. Hence, the impugned order dated 22/10/2018 is found to be unsustainable and it is liable to be set aside.

7. There is no substance in the contention raised on behalf of the respondent no.2 that the very order impugned herein was challenged by the said respondent by filing Criminal Writ Petition no.197 of 2018, although the said petition was later withdrawn. Much emphasis was placed on an observation made in the said order dated 20.3.2019 passed by this Court, to the effect that the petition stood disposed of as withdrawn and all the rival contentions of the parties were left open. It was emphasised that the petitioner was represented by a counsel and that this ought to have a bearing on consideration of the present writ petition. This Court is of the opinion that there is no substance in the said contention for the reason that the impugned order passed by the Magistrate is found to be wholly unsustainable.

8. Accordingly, the writ petition is allowed and the impugned order is quashed and set aside.

9. In so far as the request made on behalf of the respondent no.2 that he may be granted liberty to assail the order passed by the Sessions Court dismissing the revision application in default, this Court is of the opinion that no such liberty is necessary, because if the said respondent seeks to avail a remedy available in law, it will obviously be considered in accordance with law. Needless to say, the interim order granted in this petition stands

vacated and the Magistrate shall now proceed further in the matter.

MANISH PITALE, J.

MARIA
AURA
PEREIRA



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by MARIA AURA
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