

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPLICATION (APL) NO. 1294/2021
Gokul Vithoba Dange..Versus...Dipali Gokul Dange and anr

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. V.R.Deshpande, Advocate for the applicant .
Mr. H.S.Chawan, Advocate for Respondent No.1
Mr. I. Damle, APP for respondent No. 2/State

CORAM : AVINASH G. GHAROTE, J.
DATE : 15/02/2022

1] Heard Mr. Deshpande, learned counsel for the applicant, Mr. Chawan, learned counsel for Respondent No.1 and Mr. Damle, learned APP for State.

2] The application seeks to challenge the order dated 14.6.2018 passed by the learned JMFC Court No. 4 Washim, whereby process has been issued against the accused Nos. 1 to 7 for the offence punishable under Section 494 r/w Section 34 of the IPC, on the ground that the applicant has performed the second marriage with the Respondent No.1.

3] Mr. Deshpande, learned counsel for the applicant submits that under Section 202 of the IPC, an obligation is cast upon the learned Magistrate before issuance of process

to make an enquiry into the case himself or direct an investigation to be made by 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, in case the accused is residing at a place beyond the area in which he exercises his jurisdiction.

4] In the instant case the complaint has been filed at Washim and the accused No.1 resides at Navi Mumbai and it is therefore his submission that the issuance of the process ought to have been postponed and an investigation ought to have been directed by the Police into the matter. He further contends that even if the learned Magistrate felt it appropriate to enquire it himself, he ought to have expressed his prima facie satisfaction regarding the existence of the offence under Section 494 of the IPC. Relying upon **Bhaurao Shankar Lokhande vs. State, AIR 1965 SC 1564** (paras 6 and 7), he contends that for the purpose of Section 494 of the IPC, what is necessary is the performance of the essential ceremonies for the valid marriage between the parties, unless it is pleaded that the custom provides otherwise. These essential ceremonies are (a) invocation before the sacred fire and (b) saptapadi. Further reliance is placed upon **Santi Deb Berma vs. Kanchan Prava Devi, 1991 Supp (2) SCC 616** (paras 7 and 8) which reiterates the requirement of a valid marriage. Further relying upon **Balasaheb Raghunath Katad**

vrs. Gayabai Balasaheb Katad and ors, 2003 ALL MR (Cri) 849 (paras 5 to 7), it is contended that a Magistrate while issuing process was obliged to keep in mind the essentials for a valid marriage or in case there was a custom pleaded indicating otherwise, necessary averments regarding the custom and its rites, absence of which would not sustain the issuance of process. **Kerabai Ramrao Nakhate vrs. Ramrao Laxman Nakhate, 2013 ALL MR (Cri.) 3515** has been relied upon to contend that the complaint must be specific in regard to the allegations and the customary rites and ceremonies required to infer the commission of offence under Section 494 of the IPC. **Sunil Todi and others vrs. State of Gujarat and another, 2021 SCC Online SC 1174** (para 39 to 44), is relied upon to contend that the scope of enquiry under Section 202 of Cr.P.C, would necessarily mandate for a Magistrate to postpone issuance of the process where the accused is residing at a place beyond the area in which the Magistrate exercises the jurisdiction and the expression “shall” necessarily mandates that enquiry or investigation, as the case may be, is mandatory before summons are issued and the Magistrate is duty bound to apply his mind to the allegations in the complaint together with the statements which are recorded in the enquiry while determining whether there are sufficient grounds for proceeding. He therefore submits that considering the statement of Damu Rayaji Gawai, the same would indicate that he does not speak about

the performance of the essential ceremonies required for a valid marriage, as indicated by the Hon'ble Apex Court, nor is there a pleading in the complaint regarding any custom prevalent in the community to which the applicant belongs or any other mode in which a legal and valid marriage is to be performed, in view of which it is contended that the order of issuance of process is vitiated in law. To substantiate this contention, he submits that the accused No. 3 was the father of the accused no.1/applicant, accused no. 4 - the mother and accused Nos. 5 to 7 are merely claimed to be present at the incident and even considering the language of Section 494 of the IPC, no process could have been issued against them at all for the reason that Section 494 of the IPC is addressed to either of the spouse performing a second marriage and makes such performance an offence. It does not according to him take into its compass anyone else, much less the parents of the either spouse or for that matter persons present at such an incident and the issuance of the process by the Magistrate even to the persons who are claimed to be merely present at the incident, namely accused Nos. 3 to 7 would again indicate non application of mind and absence of any enquiry by the learned Magistrate himself. He further contends that enquiry by the Magistrate as contemplated by Section 202 of Cr.PC is not a mere formality, but has to indicate the applicability of mind to the factual position as emanating from the complaint, the verification statement, documents

placed on record and the statement of any other person which may have been recorded viz-a-viz the requirement of the provision of law, under which the offence is alleged to have been committed. It is therefore, contended that the impugned order cannot be sustained.

5] Mr. Chawan, learned counsel for Respondent No.1 places heavy reliance upon the statement of Damu Rayaji Gawai to contend that he was the person who was present at the spot and had witnessed the second marriage being performed and therefore his testimony was enough to have pointed out a prima facie case for the purpose of issuance of process by the learned Magistrate. Reliance is placed upon **Birla Corporation Ltd Vrs. Adventz Investments and Holdings Ltd., (2019) 16 SCC 610** (para 59), to contend that the Magistrate who is conducting an investigation under Section 202 of Cr.P.C. has full power in collecting the evidence and examining the matter and once the Magistrate has exercised his discretion, it is not for the Sessions Court or High Court to substitute its own discretion for that of the Magistrate to examine the case on merits and the Magistrate may not embark upon a detailed enquiry or discussion of the merits/demerits of the case, but the Magistrate is required to consider whether a prima facie case has been made out or not and apply the mind to the materials before satisfying himself that there are sufficient grounds to be proceeded

against the accused. It is therefore contended that considering the material on record, the Magistrate being satisfied of existence of the material on record has rightly issued the process.

6] Mr. Damle, learned APP supports the arguments advanced by the learned counsel for Respondent No.1.

7] A perusal of Section 494 of the IPC, which relates to the offence of bigamy i.e. of the spouse during the life time of the husband or wife marrying again, would indicate that the offence is committed by the spouse who performs such marriage and not by any other person and definitely not by any person who may have remained present during the performance of such marriage, considering which prima facie the issuance of process by the learned Magistrate against the accused Nos. 2 to 7 was clearly against the provisions of law. However, since they are not before me, I refrain from taking this any further. This is only to indicate that the order of issuance of process by the learned Magistrate did not indicate an application of mind to the requirement of the provision of Section 494 of the IPC for had it been so, surely the Magistrate would not have issued any process to the accused Nos. 2 to 7. That apart, the impugned order indicates that the alleged second marriage was performed on 18.4.2018, which in fact is not the date

even mentioned in the complaint, which is mentioned as 29.1.2018. One can always give a benefit of doubt in respect of incorrect mentioning of date, however, what is further material to note is that verification statement of Damu Rayaji Gawai merely states that there was an exchange of garlands between applicant/accused no.1 and the accused no. 2, both of whom profess to belong to the Hindu religion. Considering what has been held by the Hon'ble Apex Court in **Bhaurao Shankar Lokhande** and **Santi Deb Berma** (supra), the essential requirements of a legal and valid Hindu marriage or for that matter even for the subsequent marriage so as to attract the provisions of Section 494 of the IPC would be the performance of the essential ceremonies namely the invocation before the sacred fire and the saptapadi, both of which are absent in the statement of Damu Rayaji Gawai, who is claimed to be present on the spot at the time of the alleged marriage. What is stated by him is merely that there was exchange of garlands in the temple, considering which the learned Magistrate ought to have made an enquiry, as to whether there was a custom pleaded in the complaint that in the community to which the complainant and accused No.1 belong, the marriage was performed by an exchange of garlands alone. However, as rightly pointed out by the learned counsel for the applicant, the complaint does not bear any such averment, neither does the verification statement of the complainant or for that matter Damu Rayaji

Gawai contains any such averments, which in my considered opinion indicates that there was no proper enquiry as contemplated by Section 202 of Cr.PC whatsoever by the learned Magistrate as to even a prima facie indicate satisfaction of the requirement of section 494 of the IPC as held by the Hon'ble Apex Court in **Sunil Todi** (supra). **Birla Corporation Ltd** (supra) relied by learned counsel for Respondent No.1 has been considered by the Hon'ble Apex Court in **Sunil Todi** (supra).

8] Considering the above position, I do not feel that the impugned order satisfies the requirement of law, regarding a prima facie satisfaction as contemplated by Section 202 of Cr.P.C. in respect of enquiry even by the learned Magistrate as appears to be the case in the present matter. Though this Court normally ought not to exercise its discretionary power, however, the fact of the present case demand so. The judgment of the learned Sessions Court does not delve into the above aspect altogether.

9] The impugned order passed by the learned Magistrate as well as the judgment of the learned Sessions Court cannot be sustained. The same are therefore quashed and set aside and the matter is remanded back to the learned Magistrate to conduct a fresh enquiry as contemplated by Section 202 of Cr.P.C either by himself or through Police

Officer and then after applying his mind to decide upon the question of issuance of process.

10] It is made clear that the learned Magistrate may not be influenced by the observations in the above order and shall decide the existence or non-existence of the prima facie case by applying his mind appropriately.

JUDGE

Rvjalit