

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

CRIMINAL WRIT PETITION NO. 391 OF 2021

1. Sunil Bapurao Gawalwad,
Age : 41 years, Occu. : Service,
R/o. Sarpanch Nagar, Taroda (Kd.),
Tq. & District : Nanded.
2. Kamalbai w/o Bapurao Gawalwad,
Age : 71 years, Occu. : Household,
R/o. Sarpanch Nagar, Taroda (Kd.),
Tq. & District : Nanded.
3. Pundlik s/o Maisaji Thotve,
Age : 59 years, Occu. : Service,
R/o. Irrigation Office, Pune-11.
4. Jaishri w/o Pundlik Thotve,
Age : 51 years, Occu. : Household,
R/o. Irrigation Office, Pune-11.
5. Maroti s/o Laxman Gaikwad,
Age : 49 years, Occu. : Service,
R/o. HUDCO,
Tq. & District : Nanded.
6. Surekha w/o Maroti Gaikwad,
Age : 44 years, Occu. : Teacher,
R/o. HUDCO,
Tq. & District : Nanded.
7. Vijaykumar s/o Anand Rode,
Age : 39 years, Occu. : Service,
R/o. Satara Road, Aurangabad.
8. Sunita w/o Vijaykumar Rode,
Age : 34 years, Occu. : Service,
R/o. Satara Road, Aurangabad.

9. Namdeo s/o Vitthal Gaikwad,
Age : 59 years, Occu. : Agri.,
R/o. Mandgi, Tq. Degloor,
District : Nanded.
10. Kalawati w/o Namdeo Gaikwad,
Age : 55 years, Occu. : Agri.,
R/o. Mandgi, Tq. Degloor,
District : Nanded.
11. Gangabai w/o Vitthal Gaikwad,
Age : 79 years, Occu. : Household,
R/o. Mandgi, Tq. Degloor,
District : Nanded.
12. Lingu s/o Vitthal Gaikwad,
Age : 59 years, Occu. : Agri.,
R/o. Mandgi, Tq. Degloor,
District : Nanded.
13. Anusaya w/o Lingu Gaikwad,
Age : 57 years, Occu. : Agri.,
R/o. Mandgi, Tq. Degloor,
District : Nanded.
14. Chandar s/o Vitthal Gaikwad,
Age : 54 years, Occu. : Agri.,
R/o. Mandgi, Tq. Degloor,
District : Nanded.
15. Sambhaji s/o Rachappa Mandgikar,
Age : 79 years, Occu. : Agri.,
R/o. Mandgi, Tq. Degloor,
District : Nanded.

.. Petitioners

Versus

1. The State of Maharashtra,
Through its A.P.P Kandhar,
Tq. Kandhar, District Nanded.
2. Savitribai w/o Sunil Gawalwad,
Age : 37 years, Occu. Household,
R/o. Priyadarshini Nagar, Kandhar,
Tq. Kandhar, District Nanded.

.. Respondents

Mr. Sushant V. Dixit, Advocate for the Petitioners.
Mr. S. R. Yadav-Lonikar, APP for Respondent No. 1.
Mr. G. R. Syed, Advocate for Respondent No. 2.

CORAM : KISHORE C. SANT, J.

DATED : 18th JANUARY, 2023.

ORAL JUDGMENT :-

. Heard learned advocates for the parties. Taken up for final disposal at the stage of admission.

2. The petitioners/accused persons against whom an order of issuance of process is passed are before this Court. Against the petitioner No. 1 the process is issued for the offence punishable under Section 494 of the Indian Penal Code (for short "I.P.C.") and against petitioner Nos. 2 to 15 the process is issued for the offence punishable under Section 109 of the I.P.C. by order dated 15.09.2012 in R.C.C. No. 109/2011 by the learned J.M.F.C., Kandhar. There is long history before passing of this order. Initially, respondent No. 2-wife filed complaint in the Court of learned J.M.F.C., Kandhar against the petitioners and one Pushpa @ Pinki w/o Sunil Gawalwad for the offence punishable under Section 494 of the I.P.C. Accused No. 2 - Pushpa who is not before this Court and it is alleged that there is no such girl by name Pushpa Sunil Gawalwad. For the accused Nos. 3 to 16 process is issued for the offence punishable under Section 109 of the

I.P.C. The learned Magistrate by order dated 27.07.2011 had issued process. However, the said order came to be challenged by filing revision bearing Criminal Revision Application No. 21/2011 in the Court of learned Additional Sessions Judge, Kandhar on various grounds including that no case is made out to issue process. The learned Additional Sessions Judge, Kandhar by judgment and order dated 17.10.2011 was pleased to partly allow the revision application holding that the learned Magistrate has not taken sufficient care before passing the order. The learned Magistrate was directed to pass appropriate legal order by following provisions of law. It was on the ground that only the complainant was examined by the learned Magistrate. The persons who have directly witnessed the offence were not examined.

3. The order of remand was challenged by the petitioners by filing Criminal Writ Petition No. 1008/2011 in this Court. This Court has considered only the aspect of procedure followed by the learned Magistrate while issuing process. This Court found that no error is committed by the learned Sessions Judge while remanding the matter and disposed off the criminal writ petition by its order dated 08.01.2013.

4. It is thereafter the learned Magistrate again examined the

respondent No. 2 and other two witnesses namely Yadav Nivrutti Baswante and Digambar Nagorao Nampalle who allegedly have witnessed the incident of second marriage. After examining these witnesses the learned Magistrate issued process by order dated 15.09.2012 against the accused persons. The petitioners again filed Criminal Revision Application No. 40/2012 in the Court of learned Additional Sessions Judge, Kandhar. The learned Additional Sessions Judge found that no ground is made out to interfere with the order and has dismissed the criminal revision application by its judgment and order dated 17.08.2018. It is specifically observed that, all the grounds raised in the criminal revision application are the grounds raised by way of defence including the plea of alibi that was raised by petitioner No. 3 and no defence can be considered at this stage. It is thus now the petitioners have filed this petition before this Court.

5. The main contention of the learned advocate for the petitioners is that now even in the second order the learned Magistrate has not followed the proper procedure. The order of issuance of process does not show application of mind. The learned J.M.F.C. has not discussed as to how ingredients of sections are attracted and how the offence is made out. He further submits that, the place where the marriage as allegedly taken place itself is not in existence. The petitioner No. 3 was

serving at Pune and on the date of alleged incident he was in Pune. He has also produced on record a log book of his car since he is in service as Class I officer. There is no log book maintained of his car. He further produced on record a certificate issued by the Chairman of Shri Maruti Mandir Sansthan to the effect that no such marriage has taken place on the date mentioned in the complaint. It is submitted that, the learned revisional Court has failed to consider all the grounds.

6. Learned advocate for respondent No. 2 submits that, clearly a case is made out attracting the ingredients of section. The learned Magistrate has examined three witnesses and it is only after a satisfaction the process is issued. The grounds of defence cannot be considered while considering the revision application or this writ petition challenging the order of issuance of process. At this stage, what is to be seen is only whether the Court was prima facie satisfied and whether the offence was made out by taking the complaint as it is and therefore, he prays that no interference is called for.

7. Learned advocate for the petitioners relies upon the judgment of the Hon'ble Apex Court in a case of **Pepsi Foods Ltd. And another VS. Special Judicial Magistrate and others** reported in **(1998) 5 SCC 749** more particularly, upon paragraph No. 28 of the said judgment. He submits that the summons in a criminal case cannot be issued likely.

The issuance of summons is a serious matter merely on the basis of statements of some witnesses. The criminal law cannot be set into motion.

8. Learned advocate for the petitioners further relies upon the judgment of the Hon'ble Apex Court in a case of **Maksud Saiyed Vs. State of Gujarat and others** reported in **(2008) 5 SCC 668**. He invited attention to paragraph No. 13 of the said judgment wherein, it is held that, the Magistrate is required to apply his mind. It was a case where the question of vicarious liability on the part of the Managing Director or the Directors of the company was considered. It is in the facts of that case, an order of issuance of summons was set aside. This judgment is helpful to the petitioners only on the point that the learned Magistrate is required to apply his mind. In tune, there is no dispute about this proposal. It is necessarily therefore to be seen in the fact of each case as to whether the learned Magistrate has applied his mind or not.

9. Third judgment relies upon by the learned advocate for the petitioners is the judgment of this Court in a case of **State of Maharashtra Vs. Shashikant Eknath Shinde** reported in **2013 ALL MR (Cri) 3060**. It was a case where the summons was issued. It was under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act.

In that case, it is held that the learned Magistrate has to apply his mind. It is only when the allegations made in the complaint make out the ingredients to constitute an offence. The learned Magistrate can pass an order under Section 156 (3) of the Cr.P.C.

10. Thus, from all the judgments, learned advocate for the petitioners submits that there has to be application of mind by the learned Magistrate while issuing process. It is therefore, needs to be seen in the present case as to whether the learned Magistrate has applied his mind properly.

11. In this case, the allegations are that, the petitioner No. 1 married with accused No. 2 Pushpa. Other petitioners were present in the marriage. Not only it is alleged that they have present, but it is alleged that they have played some role in the marriage. In paragraph No. 4 of the complaint, it is seen that the persons who are examined as witnesses happen to see the second marriage. They in fact, requested the petitioners not to do the said act when they are aware that earlier marriage of petitioner No. 1 and respondent No. 2 was in existence. In spite of that, the allegations show that the petitioners did not pay any heed. Looking to the averments and looking to the statements recorded by the learned Magistrate, it is clearly seen that the statements of witnesses support the contents of the complaint.

12. Coming to the question of defence that, the petitioner No. 3 was not present and was at Pune as he is a Government officer or that whether girl namely Pushpa is in existence or not, all the questions necessarily to be decided during the course of trial being the defence of the petitioners. This Court does not find perversity or illegality committed by the learned Additional Sessions Judge while dismissing the revision application. Consequently, this Court finds that, no case is made out calling for interference at the hands of the Court.

13. Rule is therefore discharged.

14. Needless to say that, all the observations are only for the purpose of decision of this case and which shall not be considered as recording of any finding in the case.

(KISHORE C. SANT, J.)

P.S.B.