



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

901 CRIMINAL WRIT PETITION NO. 875 OF 2022

1. Rajesh s/o Manchak Malve,
Age : 43 years, Occu.: Service,
in Gondia District
2. Deepak s/o Manchak Malve,
Age : 34 years, Occu.: Business,
3. Pradeep s/o Manchak Malve,
Age : 32 years, Occu.: Student
4. Dnyaneshwar s/o Manchak Malve,
Age : 41 years, Occu.: Govt. Serice
in Bhandara District,

All R/o.: Permanent Address
New Mondha, Gangakhed, Ta. Gangakhed
District : Parbhani

... **PETITIONERS**

VERSUS

1. The State of Maharashtra
Through Incharge Officer,
Gangakhed Police Station,
Gangakhed, District Parbhani
2. Dr. Sarika D/o Bhagwan Bade,
Age : 37 years, Occu.: Medical Practioner,
R/o.: Bhandari Colony, Gangakhed,
Tq. Gangakhed, Dist. Parbhani
3. Bhagwan s/o Tukaram Bade,
Age : 65 years, Occu.: Retired / Pensioner,
R/o.: Bhandari Colony, Gangakhed,
Tq. Gangakhed, Dist. Parbhani

... **RESPONDENTS**

...
Mr. Pawar D. B., Advocate for the Petitioners
Mr. N. D. Batule, APP for Respondent No.1-State
Mr. Nirmal Ramchandra J., Advocate for Respondent Nos.2 & 3

....
CORAM : Y. G. KHOBRADE, J.
DATED : 06/12/2024.

P. C. :

1. Rule. Rule made returnable forthwith. With the consent of both the sides, it is heard finally at the stage of admission.

2. The issue involved in the present case is no more *resintegra* as per the ratio laid down in the case of ***Amol Pralhad Bharati and others vs. The State of Maharashtra, 2018 ALL MR (Cri.) 4395.***

3. By the present petition, the petitioners takes exception to the order dated 18/02/2022 passed by the learned Additional Sessions Judge, Gangakhed, below Exhibit-64 in Sessions Trial No. 30 of 2016, thereby ordered to transfer RCC No.51 of 2017 arising out of Crime No.80 of 2015 from the file of the learned Judicial Magistrate (First Class), Court No.2 to it's Court to try and decide with the Sessions Trial No.30 of 2016. The learned Additional Session Judge held that, in both cases counter FIRs have been registered arising out of one and same incident.

4. The learned counsel appearing for the petitioners canvassed in vehemence that, the petitioners are brother-in-laws of respondent No.2. The marriage between respondent No.2 and Dr. Sandip was solemnized on 28/06/2012 at Samarth Gangadhar Mangal Karyalaya, Gangakhed. After marriage, both are cohabited for one month. Thereafter respondent No.2 left her matrimonial house. Dr. Sandip had issued a legal notice dated 27/10/2013 under Section 9 of the Hindu Marriage Act. Subsequently, FIR No.79 of 2015 came to be registered on 03/04/2015 for the offence punishable under Sections 307, 329, 427, 365, 342, 147, 148, 149, 323 of IPC.

5. Again on the same day, another FIR No.80 of 2015 came to be registered for the offences punishable under Sections 307, 498-A, 323 & 504 read with Section 34 of IPC. However, the investigating officer filed charge sheet in said crime only for the offences punishable under Sections 498-A, 323 & 504 read with Section 34 of IPC. These offences are exclusively triable by the court of Judicial Magistrate (First Class). However, offences pertaining to Crime No.79 of 2015 are under Sections 307, 329, 427, 365, 342, 147, 148, 149, 323 of IPC, are exclusively triable by the court of Sessions.

6. No doubt, on 18/11/2021, accused Bhagwan Tukaram Bade filed an application Exhibit-64 in Sessions Trial No.30 of 2016 and prayed that RCC No.51 of 2017 (State vs. Manchakrao) arising out of Crime No.80 of 2015), which is pending on the file of the learned Judicial Magistrate (First Class) Court No.2, Gangakhed, be tried with Sessions Trial No.30 of 2016. Accordingly, on 18/02/2022, the learned Additional Sessions Judge, Gangakhed passed the impugned order holding that, RCC No.51 of 2017 (Crime No.80 of 2015, Police Station Gangakhed) pending on the file of Judicial Magistrate (First Class), Court No.2 Gangakhed, which is a counter case of Sessions Trial No.30 of 2016, be tried in its court. Therefore, directed to the learned Judicial Magistrate (First Class), Gangakhed to send RCC No.51 of 2017 (arising out of Crime No.80 of 2015, Police Station Gangakhed) for trial before the same court.

7. The learned counsel appearing for the petitioners placed reliance on the case of **Amol Pralhad Bharati and others vs. The State of Maharashtra** (supra), wherein this court considered the case of **Anil Bhaskar Sonavane vs. State of Maharashtra, BLR-1976 (78) BOMLR 325** as well as Section 323 of Cr.P.C. and held in para No.10 as under :

“10. Before parting with the order, it may be noted that certain instances have come across relating to counter cases where the parties applied before the Sessions Court for transfer of the case under Section 408 of the Code and the Sessions Court also passed the order transferring such cases from the Court of Judicial Magistrate, First Class to the Court of Session. As per Section 193 of the Code, except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code. If the Sessions Court passed an order for transfer of a criminal case pending before the Judicial Magistrate, First Class, for being tried before the Court of Session, there would be a bar for taking cognizance under Section 193 of the Code, since that case is not committed by the learned Magistrate. Such practice is highly deprecated and it should be stopped.”

8. Though the learned counsel appearing for the respondents Nos.2 & 3 placed reliance on **judgment dated 13/03/2023 passed by the Karnataka High Court in case of Dr. Sanjeev Kumar Hiremath vs. State of Karnataka and another**, wherein the procedure for trial of cross cases has been contemplated, but this judgment is not applicable to the facts and circumstance of the present case because it does not deal with issue about having the powers to the Additional Sessions Judge to transfer case by invoking powers under Section 323 or 408 of the Cr.P.C.

9. In case in hand, it *prima facie* appears that, the learned Additional Sessions Judge invoked the powers under Sections 323 of Cr.P.C., and directed the learned Judicial Magistrate (First Class) to commit RCC No.51 of 2017 to its court for trial with Sessions Trial No.30 of 2016.

10. Sections 323 and 408 of Cr.P.C. provide as under :

“Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed: If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained.”

“408. Powers of Sessions Judge to transfer cases and appeals.

- (1) Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.*
- (2) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested, or on his own initiative.*
- (3) The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of Section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) as they apply in relation to an application to the High Court for an order under sub-section (1) of Section 407, except that sub-section (7) of that section shall so apply as if for the words “one thousand*

rupees" occurring therein, the words "two hundred and fifty rupees" were substituted."

11. Therefore, considering Section 323 as well as Section 408 of Cr.P.C. when the instances arise about conducting of trial of counter cases arising out of two counter FIRs out of one and same incident, in that case either Judicial Magistrate (First Class) can exercise powers under Section 323 of Cr.P.C. and commit case to the Court of Sessions where trial is pending or in alternative either parties to the said crime can approach to the Sessions Court under Section 408 of Cr.P.C., and pray for transfer of case arising out of the FIR registered for the offences, which are triable by the court of Judicial Magistrate (First Class), to the Court of Sessions for trying it with counter case. However, in case in hand, the learned Additional Sessions Judge passed the impugned order under Sec. 323 of Cr. P.C., which is certainly without jurisdiction. Therefore, the impugned order is liable to be quashed and set aside.

12. Accordingly, rule is made absolute. The impugned order dated 18/02/2022 is hereby quashed and set aside. Both the Parties vis-versa in both cases, are set at liberty to approach either to the learned Judicial Magistrate (First Class), Gangakhed under Section

323 of Cr.P.C. or before the Session Court u/s 408 of Cr.P.C., for transfer of RCC No.51 of 2017 arising out of Crime No.80 of 2015.

(Y. G. KHOBRAGADE, J.)

VS Maind/-