

Chandrakant and Others Vs. the State of Maharashtra and Another

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Court : Mumbai Aurangabad

Decided On : Nov-21-2013

Judge : Abhay M. Thipsay

Appeal No. : Criminal Writ Petition No. 463 of 2013

Appellant : Chandrakant and Others

Respondent : The State of Maharashtra and Another

Judgement :

Oral Judgment:

Rule. By consent, Rule made returnable forthwith. By consent, heard finally.

2. The petitioners are the accused in R.T.C. No. 315 of 2012 pending before the Judicial Magistrate, First Class, Shrigonda, Dist. Ahmednagar. The said case arises on the basis of a complaint lodged by the respondent no.2 herein, alleging commission of offences punishable under section 494 of the Indian Penal Code (IPC) and section 495 of IPC, read with section 109 of IPC. The Magistrate, after examining the respondent no.2 on oath, in accordance with the provisions of section 200 of the Code of Criminal Procedure (hereinafter referred to as the Code), directed to issue process against the petitioners with respect to the aforesaid offences, by an order dated 05.01.2013. Being aggrieved by the said order, the petitioners have approached this Court invoking its constitutional jurisdiction.

3. Heard Mr. N.V. Gaware, the learned counsel for the petitioners. Heard Mr. S.R. Palnitkar, the learned Additional Public Prosecutor for Respondent/State. Heard Mr.R.R. Karpe, the learned counsel for the respondent No.2.

4. The learned counsel for the petitioners submitted that it was apparent from the complaint itself that barring two persons, named as accused, all other accused were residing beyond the territorial jurisdiction of the learned Magistrate, who issued the process. He submitted that after the amendment of section 202 of the Code by Act 25 of 2005, the legal position is that in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, it would be incumbent upon the Magistrate to postpone the issue of process against the accused, and either to hold an inquiry into the matter or direct an investigation to be made by a police Officer or any other person for the purpose of deciding, whether or not, there are sufficient grounds for proceeding. He submitted that since admittedly the process came to be issued without holding any inquiry or investigation as contemplated in section 202 of the Code, the order issuing process is bad in law and needs to be set aside.

5. Mr. R.R. Karpe, the learned counsel for the respondent no.2 attempted to suggest that the provision requiring holding of an inquiry is merely directory and not mandatory. He submitted that failure to hold inquiry would not necessarily vitiate the order issuing process. He placed reliance on the decision rendered by a learned Single Judge of this Court in the case of **Bansilal S. Kabra V/s Global Trade Finance Ltd., anr. {2010(2) Bom.C.R. (Cri.) 754}** in support of this contention.

6. Indeed, in the case of **Bansilal Kabra (supra)**, such a view was taken by the learned Single Judge, but as pointed out by the learned counsel for the petitioners, contrary view has been taken in several other decisions rendered by different learned Single Judges of this Court. In any case, the learned counsel for the petitioners pointed out that a Division Bench of this Court in **Barakara Abdul Aziz V/s National Bank of Osman (S.A.O.G.) anr. {2013(2) LJSOFT 95}** has clearly held the relevant provision to be mandatory, observing that the said provision casts an obligation on the Magistrate to postpone the issue of process against the

accused and either inquire into the case himself, or direct an investigation to be made by a police officer (or by such other person as he thinks fit) for the purpose of deciding, whether or not, there are sufficient grounds for proceedings in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction.

7. Mr. Gaware also pointed out a recent judgment of the Supreme Court of India in the case of **Udai Shankar Awasthi V/s State of U.P. and anr. {2013(6) LJSOFT (S.C.) 296}**, wherein also Their Lordships have opined the relevant provisions to be mandatory (Para No.26 of the reported judgment).

8. Thus, there can be no doubt that failure to hold an inquiry before issuing process, where the accused person/persons are residing beyond the territorial jurisdiction of the Magistrate concerned, would vitiate the order issuing process. In view of this settled position of law, the impugned order needs to be set aside.

9. The Petition succeeds.

The order issuing process, as passed by the learned Magistrate, is set aside.

The learned Magistrate shall deal with the complaint in accordance with law and keeping in mind the provisions of section 202 of the Code.

10. The Writ Petition is allowed in the aforesaid terms.

11. Rule is made absolute accordingly.

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