



AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.311 OF 2023

Mamata Banerjee ... Applicant
V/s.
Vivekanand Dayanand Gupta & Anr. ... Respondents

Mr. Majeed Memon with Mr. Siddhant Dhavale, Mr. Zulfiquar Memon, Mr. Parvez Memon, Mr. Waseem Pangarkar, Mr. Ravi Mishra, Mr. Mateen Qureshi, Mr. Khalil Gaikwar and Mr. Tapish Jain i/by MZM Legal LLP for the applicant.

Mr. Vivekanand Gupta, respondent no.1, present in-person.

Mr. A.R. Patil, APP for respondent no.2/State.

CORAM : AMIT BORKAR, J.

DATED : MARCH 29, 2023

P.C.:

1. The challenge in this criminal application is to the order dated 12th January 2023 passed by the Additional Sessions Judge, Court Room No.54, Greater Mumbai, in Criminal Revision Application No.160 of 2023. By the impugned order, the revisional Court has set aside the order of issuance of process for an offence under section 3 of the Prevention of Insults of National Honour Act, 1971 (hereafter "1971 Act", for short), remitting proceedings back to the learned Magistrate to comply with the procedure mandated under section 200 and 202 of the Code of Criminal

Procedure, 1973 (hereafter "Code", for short).

2. The Applicant aggrieved thereby has challenged the legality and validity of the said order mainly on the following grounds:

a) The revisional Court has recorded a categorical finding that essential ingredients of an offence under section 3 of the 1971 Act have not been fulfilled and, therefore, no purpose would be served by remitting proceedings back to the Magistrate;

b) Holding inquiry under section 202 of the Code would cause unnecessary harassment to the public servant; and

c) Allowing inquiry under section 202 of the Code would amount to an abuse of process of the Court as the complaint filed is with the oblique motive of publicity.

3. Having considered the submissions made on behalf of the applicant, in my opinion, the seminal issue involved in the present application is whether the revisional Court, while remitting the complaint back for inquiry under section 202 of the Code, is entitled to consider merits of the complaint and dismiss it on merits. The said issue is no longer *res integra* in view of the judgment of the Apex Court in **National Bank of Oman v. Barakara Abdul Aziz & Anr.** reported in (2013) 2 SCC 488. The Apex Court, in paragraph 12 of the said judgment, has held as under:

“12. All the same, the High Court instead of quashing the complaint, should have directed the Magistrate to pass fresh orders following the provisions of Section 202 CrPC. Hence, we remit the matter to the Magistrate for passing fresh

orders uninfluenced by the prima facie conclusion reached by the High Court that the bare allegations of cheating do not make out a case against the accused for issuance of process under Section 418 or 420 IPC. The CJM will pass fresh orders after complying with the procedure laid down in Section 202 CrPC, within two months from the date of receipt of this order.”

4. The judgment of the Apex Court in **National Bank of Oman** (supra) has been interpreted and followed by a learned Single Judge of this Court in **Harish & Ors. v. Sau. Kiranlata** reported in 2016 SCC OnLine Bom 5158. Accordingly, this Court, in paragraph 8 of the said judgment, has held that the Apex Court, in the case of the National Bank of Oman, directed that instead of quashing the complaint while remitting back the matter to hold an inquiry under section 202 of the Code, the Court is not justified in dismissing the complaint on merits.

5. In view of the decision of the Apex Court in **National Bank of Oman** (supra), in my opinion, no fault can be found with the course adopted by the learned Sessions Court.

6. The result of the impugned order is setting aside the order of issuance of the process. Once the order of issuance of process is set aside, the applicant cannot be termed as an 'accused'. It is well settled that until the Court issues the process, the accused has no right to participate in the proceedings before the Magistrate. The position of law would remain the same even after the revisional Court sets aside the order of issuance of process by remitting back the proceedings. The Apex Court in **Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel**, reported in

(2012) 10 SCC 517 at page 544:

“53. We are in complete agreement with the view expressed by this Court in *P. Sundarrajan* [(2004) 13 SCC 472 : (2006) 1 SCC (Cri) 345] , *Raghu Raj Singh Rousha* (2009) 2 SCC 363 : (2009) 1 SCC (Cri) 801] and *A.N. Santhanam* [(2012) 12 SCC 321 : (2011) 2 JCC 720] . We hold, as it must be, that in a revision petition preferred by the complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code at the stage under Section 200 or after following the process contemplated under Section 202 of the Code, the accused or a person who is suspected to have committed the crime is entitled to hearing by the Revisional Court. In other words, where the complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process. We answer the question accordingly. The judgments of the High Courts to the contrary are overruled.”

7. The Apex Court has observed that it is mandatory to hear the accused while considering the validity of the order of dismissal of the complaint in exercise of power under section 401 of the Code, as the accused would be a person falling within the category of "other persons". The Apex Court held that once the order of issuance of process is set aside, the accused has no right to

participate in the proceedings thereafter till the order of issuance of process is passed. Therefore scope present application at the instance of a person who is not accused is minimal.

8. In so far as the submission made on behalf of the applicant that the revisional Court has conclusively adjudicated that no offence under section 3 of the 1971 Act has been made out, in my opinion, would amount to a misreading of the judgment as a whole. The reference to the judgment of the Jammu and Kashmir High Court in paragraph 18 merely refers to the ratio/observations in the judgment. Both in paragraph 18 and in paragraph 19, there is no finding recorded by the revisional Court that an offence under section 3 of the 1971 Act is not made out.

9. Regarding the finding recorded in paragraph 22, it is necessary to read the paragraph minutely to ascertain whether the revisional Court has recorded the finding on merits to hold that no case is made out. Paragraph 22 of the judgment reads as under:

“22. In the case at hand, the Id. Metropolitan Magistrate relied upon the statement of the complainant in the form of affidavit which is contrary to the provision under Section 200 of the Cr.P.C. Apparently, it seems that the Id. Metropolitan Magistrate deviated from the mandatory provisions as laid down under Sections 200 and 202 of the Cr.P.C. Having regard to the entire gamut of the circumstances including nature of the allegations, the material placed in support of it and improper verification of the complainant, I am of the considered view that the Id. Metropolitan Magistrate is not justified in issuing process against the accused for the offence punishable under Section 3 of the Act. Point no.1 is, thus, answered in the negative.”

10. On careful reading of paragraph 22, it is clear that the revisional Court was considering the necessity to hold an inquiry under section 202 of the Code, and in that context, the revisional Court has held that the Magistrate was not justified in issuing process against the accused for an offence under section 3 of the 1971 Act. However, the said finding, if read in the context of the earlier judgment, would make it clear that the order of issuance of the process was faulted only on the ground of absence of inquiry under section 202 of the Code as the accused are indisputably residing outside the territorial jurisdiction of the Court.

11. Paragraph 23 of the judgment makes it clear that the revisional Court has directed Magistrate to determine whether a prima facie case to the offence as alleged against the accused warranting issuance of process is made out or not. Therefore, in my opinion, the findings on point no.1 have been recorded on the ground of absence of inquiry under section 202 of the Code as the accused persons are residents outside the Court's territorial jurisdiction.

12. Even otherwise, the revisional Court could not have decided the complaint on merits once it was brought to the notice of the Sessions Court that the accused persons are residing outside the territorial jurisdiction of the Magistrate and no inquiry under section 202 of the Code was held. The course adopted by the Sessions Judge in not deciding the complaint on merits nor recording a conclusive finding on merit and remitting the matter back to the Magistrate for holding an inquiry under section 202 of the Code is in consonance with the judgment of the Apex Court in

National Bank of Oman (supra).

13. Therefore, in my opinion, there is neither error of jurisdiction nor patent illegality calling for interference in the present proceedings.

14. The criminal application is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)