

Neutral Citation No. - 2023:AHC-LKO:58738

AFR

Reserved on 29.8.2023

Delivered on 11.9.2023

Court No. - 28

Case :- APPLICATION U/S 482 No. - 7795 of 2018

Applicant :- Mohammad Ayub Rizvi And Others

Opposite Party :- Smt. Salma Khan And Another

Counsel for Applicant :- Jageshwari Prasad Mathur

Counsel for Opposite Party :- Govt. Advocate, Manish Singh Chauhan, Sayyed Farooq Ahmad

Hon'ble Shree Prakash Singh, J.

1. Heard Sri Jageshwari Prasad Mathur, learned counsel for the applicants, Sri Sayyed Farooq Ahmad, learned counsel for the opposite party no.2, Sri Aniruddh Kumar Singh, learned A.G.A.-I and Sri Sanjay Kumar Yadav, learned A.G.A. for the State and perused the material placed on record.

2. Instant application has been filed with the prayer to stay the entire proceedings in Complaint Case No.942/18 (Smt. Salma Khan Vs. Mohammad Aizaz), under Section 498-A, 323 I.P.C. and Section 4 D.P. Act by the court of Civil Judge (Junior Division) FTC/Judicial Magistrate, Unnao alongwith the summoning order dated 13.9.2018.

3. Factual matrix of the case is that on 11.3.2012, the opposite party no.1 got married with Aayaz @ Babu son of applicant no.1 at Lucknow, and as Aayaz was working at Saudi Arabia, therefore, the opposite party no.1 is willing to live with him at Saudi Arabia. When Aayaz, while leaving the opposite party no.1 in India, went to Saudi Arabia on 20.4.2015 then she started creating trouble in the entire family and went to live separately at Balaganj and then to her parents' home at Unnao. Thereafter, a complaint was filed on 31.1.2018. Further an F.I.R. was also lodged on 16.2.2018. The trial court passed the order on 13.9.2018 and summoned the present applicant under Section 498A, 323 I.P.C. and

Section 4 of the Dowry Prohibition Act which is under challenge in the instant application.

4. Contention of the learned counsel for the applicants is that two criminal proceedings were initiated simultaneously - one by way of lodging F.I.R. on 16.2.2018 and another by way of instituting a complaint on 13.1.2018 wherein the present applicant has been summoned. He submits that the trial court has violated mandate of Section 202 (1) of Cr.P.C. He further added that admittedly, the applicants reside outside the territorial jurisdiction of the Magistrate concerned as the applicants reside at Lucknow and summons have been issued by the trial court at Unnao. He added that neither any enquiry nor any investigation has been done prior to proceeding in the matter, which is apparent from the order itself. Adding his arguments, he further submits that there is also violation of Section 210 of Cr.P.C. as once the Magistrate is proceeding in the complaint case and, during the course of hearing, if it comes in the knowledge of the Magistrate that an investigation by the police is in progress in relation to the offence, which is the subject matter of enquiry or trial by him, the Magistrate shall stay proceedings of such enquiry or trial and shall call for a report in the matter from the police officer conducting the investigation. It is further prayed that if a report is made under Section 173 Cr.P.C., such Magistrate shall enquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on the police report. He added that so far as the present case is concerned, the F.I.R. was also lodged on 16.2.2018 for the same offence and without calling any report from the Investigating officer, the trial court proceeded in the complaint case which is against the provisions of Section 210 Cr.P.C. He further argued that the summoning order dated 13.9.2018 is unreasoned and have been passed in a cavalier manner. He submits that it has been a settled law that while proceeding in the matter arising out of complaint case if a Magistrate is of the view that summon be issued to the accused persons,

the reason must be recorded which is missing in the impugned order dated 13.9.2018 and, in this view also, the order dated 13.9.2018 is not sustainable.

5. Further contention of the learned counsel for the applicants is that the applicants are in-laws, husband and brother in law of the opposite party no.1. There are general allegations against the applicants for committing torture for the dowry though the applicants are residing separately and since long back the opposite party no.2 is not residing with them and, therefore, the question does not arise for demand of dowry or torture of the opposite party no.2. He added that after the husband of the opposite party no.2 alone went to Saudi Arabia, she is annoyed as she was not taken by him and, therefore, the applicants being the soft target are being harassed as criminal proceedings have been initiated against them.

6. Learned counsel for the applicants placed reliance on the Judgments of the Apex Court rendered in the cases of **Geeta Mehrotra Vs. State of U.P. and others, 2012 (10) ADJ 464** and **Kahkashan Kausar @ Sonam and others Vs. State of Bihar and others, (2022) 6 SCC 599** and submits that the case of the applicants are fully covered under the ratio of the judgments.

7. Concluding his arguments, he submits that the dispute, if any, may be in between the husband and wife and the present applicants being in-laws, have nothing to do with any kind of offence as has been mentioned in the complaint by the opposite party no.2. He submits that there is no cogent piece of evidence against the applicants so as to connect them in committing offence under which the present applicants have been summoned by way of impugned order dated 13.9.2018. Therefore, the submission is that the order dated 13.9.2018 may be set aside and criminal proceedings against the applicants may be dropped.

8. Per contra, learned counsel for the State and the opposite party no.2 vehemently opposed the contention aforesaid and has categorically replied the contention raised by the learned counsel for the applicants and submit that so far as the question with respect to violation of mandate of Section 202 Cr.P.C. is concerned, the Magistrate has recorded the statements of complainant and the witness, wherein the witness, in his statement, has stated the name of the present applicants, which clearly shows that the applicants are the persons, who have committed the offence and, therefore, the procedure prescribed under Section 202 Cr.P.C. has not been violated.

9. It is submitted that the applicants are admittedly the in-laws but the opposite party no.2 is residing in the same house where the present applicants are living and, therefore, merely saying that the opposite party no.2 is residing at Unnao, is not correct. Further submitted that there is no erroneousness in the summoning order as the fact as well as the reasons have very well been mentioned in the same, which are apparent from the bare perusal of the order dated 13.9.2018. He added that truth is being belied by the applicants though the complaint is supported by the statement of the complainant under Section 200 and the statement of witness under Section 202 of Cr.P.C. which is the prima facie statutory requirement for proceeding in the matter and the applicants would have all opportunity to say before the trial court, therefore, submission is that there is no perversity or unlawfulness in the order passed by the trial court.

10. Having heard learned counsel for the parties and after perusal of the records, it transpires that a complaint was instituted by the opposite party no.2 on 31.1.2018, whereby, it has been stated that the applicants have tortured the opposite party no.2 for dowry and, on the other hand, an F.I.R. was also lodged on 16.2.2018, with same allegations.

11. When this court examined the contention raised by the learned counsels for the applicants that whether there is any violation of mandate of Section 210 of Cr.P.C., it reveals from the record that after lodging the complaint on 31.1.2018, an F.I.R. was lodged at 16.2.2018, for the same incident, whereas the procedure prescribed under Section 210 of Cr.P.C. is very specific that if the case is instituted otherwise than the police report and it appears to the Magistrate during the course of enquiry or trial that an investigation by the police is in progress which is the subject matter of the enquiry or trial held by him, the Magistrate shall stay proceeding of such enquiry or trial and call for a report from the police conducting such investigation but so far as the present case is concerned, the learned trial court ignoring the provisions of Section 210 Cr.P.C., proceeded in the matter and has summoned the present applicants under Sections 498A, 323 I.P.C. and Section 4 of the Dowry Prohibition Act.

12. Further, so far the plea is raised that the provisions of Section 202 (1) Cr.P.C. has been violated, it reveals from the record that the statement of the complainant and the witness under Sections 200 and 202 Cr.P.C., respectively, have been recorded, wherein there is no whisper regarding the genuineness of the applicants/accused persons and their address as the provision prescribed under Section 202 (1) clearly speaks that if the proposed accused are living outside territorial jurisdiction of Magistrate concerned, he shall make an enquiry or investigation though if the statement of the witnesses or complainant are enough to show the genuineness of such proposed accused persons, no further investigation or enquiry is required.

13. In case of *Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and another*, (2017) 3 SCC 528, it has been held that requirement of conducting enquiry or directing investigation before issuing process is not an empty formality and, therefore, the Magistrate or court is to follow the 'enquiry' other than the trial under the Code, though it is not

prescribed in Section 202 Cr.P.C. that what would be specific mode or manner of enquiry.

14. The Apex Court in the case of **Anil Kumar and Others Versus M.K.Aiyappa and Another**, reported in **(2013)10 Supreme Court Cases 705** in paragraph no. 11 of the said Judgment held as under :-

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation".

15. Hon'ble Apex Court has held that the Magistrate is required to apply it's mind and the application of mind by the Magistrate must be reflected in the order and the mere statement that he has gone through the complaint, documents and heard the complainant, will not be sufficient.

16. Further the Hon'ble Supreme Court in case of **Maksud Saiyed Versus State of Gujarat and Others**, reported in **(2008)5 Supreme Court Cases, 668** has held in paragraph no. 13 which is quoted hereinunder :-

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for

attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

17. Now, it emerges that reasons essentially be recorded in the summoning order, if the matter is arising out of complaint case. Apparently from perusal of the impugned summoning order, it transpires that the reasons have not been recorded and, therefore, the same vitiates in the eyes of law.

18. In view of the aforesaid submissions and discussions, this Court is of the considered opinion that the impugned summoning order dated 13.9.2018, passed by the trial court is against the settled proposition of law.

19. Consequently, impugned summoning order dated 13.9.2018 passed by the trial court is hereby set aside.

20. The matter is remitted back to the trial court concerned to pass fresh order within a period of 45 days from the date of this order, in accordance with law.

21. The office shall communicate this order to the trial court forthwith.

22. With the aforesaid observations, instant application is hereby **allowed**.

Order Date :- 11.9.2023

Ram Murti