IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 3066 of 2007

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NEEL DILIP SHAH & 3 - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR MITESH R AMIN for Applicant(s) : 1 - 4.
PUBLIC PROSECUTOR for Respondent(s) : 1,
MR BR GUPTA for Respondent(s) : 2,

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 29/02/2008

ORAL JUDGMENT

1. By this application under section 482 of the Code of

Criminal Procedure, 1973 (the Code), the petitioners seeks quashment of the compliant registered vide Criminal Case No.2163/07 instituted in the Court of the Metropolitan Magistrate, Ahmedabad, Court No.22 for the offence punishable under section 498A of the Code read with sections 34 and 114 of the Code.

2. In brief the facts giving rise to the present petition as stated in the petition are that the marriage of the petitioner No.1 and respondent No.2 was solemnized at Ahmedabad on 20th May, 1990. The matrimonial home is situated at Delhi. Petitioner No.2 and 3 are the parents of petitioner No.1 and petitioner No.4 is the brother of petitioner No.1. Out of the wedlock between petitioner No.1 and respondent No.2 there are two minor sons Tanay and Raj aged 15 and 10 years.

3. After their marriage, the petitioner No.1 and respondent No.2 initially resided at Delhi. Thereafter they moved to the Republic of Ireland in September 1993 and lived there till June 1996 after which they moved to London and lived there till 1998. They then moved to Yeovil County Sumerset in U.K. from where they moved to Torquay County Devon in the month of October 1999. Soon after they shifted there, the respondent No.2 deserted petitioner NO.1 and their two children and went to a friend in London and thereafter moved to the U.S.A. where she was living with her brother and then went to Ahmedabad in November/December 1999. In the last week of November 1999, petitioner No.2 came

back to India with both the children. Finally, the petitioner No.1 was forced to take a decision to leave his job in the U.K. and return to Indian permanently. He accordingly returned to India in February 2000 and is working as a Senior Consultant Surgeon at the Apollo Hospital, New Delhi. According to the petitioners during the period between October, 1999 to March, 2001 petitioners No.1, 2 and 3 looked after both the children and the respondent No.2 never even bothered to inquire about the children, their education or welfare.

4. The petitioner No.1's maternal grandmother expired at Delhi in March, 2001 whereupon the respondent NO.2 and her mother attended the Besana and met the petitioner No.2 and on account of efforts made by the petitioner No.2, respondent No.2 eventually decided to join the petitioner No.1 and the children at New Delhi and moved to New Delhi in the Month of March, 2001 and lived there till June 2006. In June 2006, respondent No.2 visited Ahmedabad and returned on or about 27th June, 2006 and things were absolutely normal after here return. However, on 6th July, 2006, under the pretext of taking the children to tennis and science classes, respondent NO.2 took the evening flight to Ahmedabad taking the children with her without informing the petitioners No.1, 2 and 3.

5. After trying in vain to contact respondent No.2 lodged a complaint regarding not being able to establish contact with the respondent No.2 and their children. At 11:30 at

night the respondent No.2's father informed the petitioner nO.1 that respondent No.2 and the children had reached Ahmedabad. According to the petitioners they had found that the respondent No.2 had left with clothes, books etc. was well as ornaments belonging to petitioners NO.1 and 3 and cash in excess of Rs.4.00 lacs, hence on 10th July, 2006 petitioner No.1 lodged a complaint against the respondent No.2 at Chittranjan Police Station, New Delhi.

6. ON 10th July, 2006 the respondent, No.2 filed a family suit being Family Suit No.650/2006 seeking permanent injunction restraining the petitioner No.1 from forcibly taking away the custody of the two children from her wherein summons were served upon the petitioner No.1 on or about 15.7.2006 along with copy of plaint as well as copy of complaint filed by respondent No.2 on 6.7.2006 before the Ellisbridge Police Station.

7. On 31.7.2006, the petitioner No.1 filed a family suit seeking divorce as well as custody of minor children being Family Suit No.728/2006 in reply to which, on 28.9.2006, the respondent No.2 made an application for interim alimony. Thereafter the petitioner No.1 filed an application for transfer of Family Suit No.650/2007 in the Supreme Court of India, which was not accepted.

8. Subsequently the respondent No.1 filed the complaint in question on 13.3.2007 before the learned Metropolitan

Magistrate, Court No.22, Ahmedabad alleging commission of offences punishable under sections 498A, 34 and 114 of the Indian Penal Code against the petitioners. The said case was registered as Criminal Case No.2163/07 and summons were issued against the petitioners and the petitioners were directed to furnish sureties of Rs.5000/- and summons were made returnable on 30th March, 2007 which has given rise to the present petition, interalia on the ground that the learned Metropolitan Magistrate has no territorial jurisdiction to decide the complaint.

9. Heard learned Senior Advocate Mr. Mihir J. Thakore with Mr. Rahul Pandya and Mr. Mitesh Amin learned Advocates for the petitioners, Mr.B.R. Gupta learned Advocate for respondent No.2 and Mr. M.R. Mengdey learned Additional Public Prosecutor for respondent No.1 State of Gujarat.

10. Mr. Thakore learned Senior Advocate put forward mainly two contentions. Firstly that the learned Metropolitan Magistrate, Ahmedabad had no jurisdiction to entertain the complaint; and secondly that in any event the learned Metropolitan Magistrate was not justified in issuing process without making inquiry as envisaged under the provisions of section 202(1) of the Code.

11. The learned Senior Advocate submitted that a bare

reading of the complaint would show that no part of the cause of action arose within the territorial jurisdiction of the Metropolitan Court at Ahmedabad, where the complaint was filed. Therefore, the entire proceedings had no foundation. The learned Senior Advocate took the Court through the entire complaint to point out that none of the allegations made therein pertain to commission of any offence at Ahmedabad and that all the alleged incriminating acts are stated to have been committed at Delhi and not at Ahmedabad. It is also pointed out that the only allegations pertaining to acts having been committed at Ahmedabad are contained in paragraph No.4 of the complaint petition, wherein it is alleged that the petitioner No.1 was trying to entice away his minor sons from the complainant's custody. The learned Senior Advocate has stressed that the only offence alleged against the petitioners is under section 498A read with sections 34 and 114 of the Indian Penal Code, 1860 (IPC), and submitted that the allegations of enticement and retention of streedhan would not constitute offence under section 498A, whereas all other incriminating acts are alleged to have been committed at Delhi. In any event, it is submitted that after the complainant left the matrimonial home with the children, if the petitioner No.1-father tried to talk to his children and persuade them to come to New Delhi with him, the same cannot be said to be enticement so as to constitute any offence under the IPC.

12. The learned Senior Advocate referred to the scheme of

Chapters XIV and XV of the Code to submit that in view of the provisions of section 201 of the Code, a Magistrate may take cognizance of an offence, but thereafter, the moment he finds that he has no jurisdiction, he is required to transfer the case to the Court of competent jurisdiction. According to the learned Senior Advocate, prior to issuance of process the learned Magistrate is required to first apply his mind to the facts of the case to see whether or not he has jurisdiction to deal with the case, if he fails to do so the issuance of process is bad. On facts it is pointed out that the learned Metropolitan Magistrate has issued process under section 204 of the Code without applying his mind as to whether he has the territorial jurisdiction to deal with the case.

13. However, the core of the submissions advanced by the learned Senior Advocate was that in view of the amended provisions of section 202 of the Code, issuance of process without making inquiry as envisaged under sub-section (1) of section 202 of the Code was in breach of the said provision. It was contended that after the amendment of 2005, which was brought into force with effect from 23rd June, 2006, in case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, it has become mandatory for the Magistrate to postpone the issue of process and make inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding. On facts it is pointed out that the

petitioners No.1, 2 and 3 who are the main accused, are residing outside the area in which the learned Metropolitan Magistrate exercises his jurisdiction.

14. It is next contended that insofar as the petitioner No.4 is concerned, he resides at Ahmedabad and has been falsely roped in. It is pointed out that the only allegations against him are contained in paragraph 16 of the complaint petition, which make it abundantly clear that the allegations against him are vague and are only made with the malafide intention of roping in as many persons as possible.

15. Lastly it is contended that the married life of the petitioner No.1 and the complainant was of 16 years. The complainant left the matrimonial home on 6th July, 2006 after which she had filed a family suit in the year 2006. The petitioner No.1 had also filed a divorce petition in the year 2006, whereas the complaint in question has been lodged as late as on 12th March, 2007. It is submitted that in the circumstances, the complaint is required to be quashed on the ground that the same has been filed after a substantial delay.

16. In support of his submissions, the learned Senior Advocate has placed reliance upon the following decisions:

[a] The decision of the Supreme Court in the case of

Emperor v. Goverdhan Ridkaran, 30 BLR 387.

[b] The decision of the Supreme Court in the case of ***Emperor v. Ramnarayan Baburao Kapur***, 39 BLR 61.

[c] The decision of the Supreme Court in the case of ***Narumal v. State of Bombay***, AIR 1960 SC 1829.

[d] The decision of the Supreme Court in the case of ***Sujata Mukherjee (Smt) v. Prashant Kumar Mukherjee***, (1997) 5 SCC 30.

[e] The decision of the Supreme Court in the case of ***Abrahma Ajith and others v. Inspector of Police, Chennai***, (2004)8 SCC 100 Y.

[f] The decision of the Supreme Court in the case of ***Ramesh and others v. State of T.N. Territorial***, (2005)3 SCC 507.

[g] The decision of the Supreme Court in the case of ***Manish Ratan and others v. State of M.P. And another***, (2007)1 SCC 262.

[h] The decision of the Supreme Court in the case of ***Trisuns Chemical Industry v. Rajesh Agarwal and others***, (1999)8 SCC 686.

[i] The decision of the Supreme Court in the case of

State of Karnataka and another v. Pastor P. Raju, (2006)6 SCC 728.

[j] The decision of the Allahabad High Court in the case of ***Hari Singh and another v. State of U.P.***, 1992 Cri.L.J. 1802.

[k] The decision of this Court in the case of ***State of Gujarat v. Patel Jivraj Khimji and others***, 1966 GLR 935.

[l] The decision of the Supreme Court in the case of **Jamuna Singh *and others v. Bhadai Shah***, AIR 1964 SC 1541.

17. In response, Mr. Gupta learned Advocate for the complainant-wife respondent No.2 herein, submitted that there is no statutory provision for the time being in force, which prevents the complainant from enforcing her statutory rights which give her a right of remedy and that no limitation has been provided for invoking such legal remedies. It is urged that the complaint was not lodged immediately as the respondent No.2 did not want to precipitate the situation.

18. It is emphatically argued that considering the law laid down by the Supreme Court in the case of ***Trisuns Chemical Industry*** (supra) the learned Metropolitan Magistrate was duly empowered to take cognizance of the offence, hence the present proceeding is not

maintainable at law. It was pointed out that the petitioner No.1 had sought to get the family suit filed by the respondent No.2 wife transferred to a Court at Delhi on the ground of lack of jurisdiction, which had been rejected by the Supreme Court, to submit that what could not be achieved before the Supreme Court, is sought to be achieved here. It is further pointed out that the petitioner No.1 had himself filed a petition under section 13 of the Hindu Marriage Act, read with section 25 of the Guardian and Wards Act, 1890 before the Family Court at Ahmedabad seeking a decree of divorce as well as custody of both the children and had accordingly submitted to the jurisdiction of the Courts at Ahmedabad, hence it was now not open for the petitioners to contend that the learned Metropolitan Magistrate lacks the territorial jurisdiction to deal with the case.

19. On the question of territorial jurisdiction it was submitted that the petitioners had tried to entice away the children from the custody of the complainant at Ahmedabad, hence part of the cause of action arose at Ahmedabad, accordingly, the complainant had a choice to invoke jurisdiction either at Ahmedabad or Delhi. Referring to the definition of the expressions “entice”, “enticement” and “enticement of a child” contained in West’s Legal Thesaurus/ Dictionary by William Statsky, P Ramanatha Aiyar’s Concise Law Dictionary as well as Black’s Law Dictionary (Sixth Edition) etc. it was sought to be contended that the act of the petitioners in trying

to entice away the minor children was indeed an offence as envisaged under the Indian Penal Code.

20. It was submitted that in any case the offences alleged in the complaint petition were continuing in terms of section 178(c) of the Code, and, therefore, the Metropolitan Court at Ahmedabad had the jurisdiction to deal with the matter. According to the learned Advocate, non-maintenance of legally wedded wife and children also constitutes mental cruelty and that withholding of streedhan also amounts to an offence under sections 405 and 406 IPC. It was submitted that though the compliant may have been filed alleging commission of the offence under section 498A IPC, it is not the label but the substance of the complaint which decides which provisions are invoked. Non-mentioning of section 406 IPC which is ex facie attracted will not matter and the Magistrate can proceed under the said section at the time of trial. It is emphatically submitted that while considering the question of jurisdiction it is not only the place where the offence has been committed which is to be looked into but also the place where the consequences ensue. It is submitted that withholding of streedhan and other articles belonging to the respondent No.2 and her sons causes undue mental cruelty and hardships to them at Ahmedabad. Hence, as the consequences of the offences committed by the petitioners ensue at Ahmedabad, the Metropolitan Court had the territorial jurisdiction to deal with the case.

21. Answering to the contention regarding non compliance of the mandatory provisions of section 202(1) of the Code it is submitted that an inquiry under section 202 of the Code contemplates recording the statement of the complainant on oath, therefore, it is deemed that the learned Metropolitan Magistrate had made enquiry as envisaged under section 202 after recording the statement on oath of the complainant and had thereafter issued process. It is contended that issuance of process itself signifies that on the basis of the inquiry made, the learned Metropolitan Magistrate was satisfied that process is required to be issued and had accordingly issued process. According to the learned Advocate, the nature of inquiry in case of marital offences would not be any different than examining the complainant on oath. Hence, inquiry under section 200 and 202 would be the same. It is, accordingly, urged that there was due compliance with the provisions of sub-section (1) of section 202 of the Code.

22. The learned Advocate next referred to the provisions of section 460(e) and (f) of the Code to submit that taking cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190 by a Magistrate not empowered by law to do so, is merely an irregularity, which does not vitiate the proceedings. Attention is also drawn to the provisions of section 462 and 465 of the Code to point out that there is no failure of justice if a case is tried by another Magistrate. It is urged that the approach of the higher Courts in cases involving

matrimonial disputes should be to interpret the provisions in favour of the wife.

23. It is next submitted that the issue of jurisdiction is a mixed question of law and facts, which is required to be decided in the light of the peculiar facts of each case. It is argued that in proceedings under section 482 of the Code, all that the Court is required to examine is as to whether the allegations made in the complaint even if taken at face value can be said to constitute the offence alleged. It is submitted that in the facts of the case, on the basis of the allegations made in the complaint petition, it cannot be said that the offence under section 498A is not made out; hence, the question of quashing the complaint does not arise. Hence, even if this Court were to hold that the learned Metropolitan Magistrate does not have the jurisdiction to entertain the complaint, the complaint in its entirety cannot be quashed, but is required to be returned for production before the appropriate Court.

24. In support of his submissions, the learned Advocate has placed reliance upon the following decisions:

[a] The decision of the Supreme Court in the case of ***Rashmi Kumar (Smt) v. Mahesh Kumar Bhada***, (1997)2 SCC 397.

[b] The decision of this Court in the case of ***State of***

Gujarat v. Amrutlal Prabhudas, 1964 GLR 1059.

[c] The decision of the Supreme Court in the case of ***Smt.Sujata Mukherjee v. Prashant Kumar Mukherjee***, AIR 1997 SC 2465.

[d] The decision of the Supreme Court in the case of ***Arun Vyas and another v. Anita Vyas***, AIR 1999 SC 2071.

[e] The decision of the Punjab & Haryana High Court in the case of ***Rajesh Kumar and others v. State of Punjab***, 1992 Cri.L.J. 1815.

[f] The decision of the Supreme Court in the case of ***Mohan Baitha and others v. State of Bihar and another***, AIR 2001 SC 1490.

[g] The decision of the Madhya Pradesh High Court in the case of ***Faisal Nabi v. State of Madhya Pradesh***, 2001 CRI.L.J. 1598.

[h] The decision of the Supreme Court in the case of ***Vijaya v. Laxmanrao and another***, (1998)8 SCC 415.

[i] The decision of the Supreme Court in the case of ***Vanka Radhamanohari (Smt) v. Vanka Venkata Reddy and others***, (1993)3 SCC 4.

[j] The decision of the Supreme Court in the case of ***Dhanlakshmi v. R.Prasanna Kumar and others***,

AIR 1990 SC 494.

[k] The decision of the Supreme Court in the case of ***Deepti alias Arati Rai v. Akhil Rai and others***, (1995)5 SCC 751.

25. In rejoinder, Mr. M.J. Thakore learned Senior Advocate has referred to the provisions of section 460 and 461 of the Code in detail, to point out that the said provisions do not take within their sweep, section 202 of the Code. It is accordingly submitted that the contention that non-compliance with the mandatory provisions of section 202 of the Code does not vitiate the proceedings is misconceived. It is urged that firstly the mandatory provision of sub-section (1) of section 202 of the Code has not been complied with, secondly the said provision is not covered under section 460 and thirdly the petitioners are raising objection at the earliest stage, hence the provisions of section 460 of the Code will not have any applicability to the facts of the present case.

26. In the background of the facts and contentions noted hereinabove, the main issues that arise for consideration before this Court are (i) Whether the learned Metropolitan Magistrate, Ahmedabad has the territorial jurisdiction to deal with the case? (ii) If the answer is in the negative whether the learned Metropolitan Magistrate is still empowered to take cognizance of the case and issue process? (iii) Whether the issue of process is bad on the ground of non-

compliance with the mandatory provisions of sub-section (1) of section 202 of the Code?

27. As contended by the learned Advocate for the respondent No.2, the issue regarding territorial jurisdiction is indeed a mixed question of law and fact. However as the learned Counsel for the contesting parties have made elaborate submissions on this issue, this Court deems fit to decide the issue, instead of relegating the parties to the concerned court. The issue of territorial jurisdiction of the Court has to be examined in the light of the allegations made in the complaint petition. The factual position in the present case is that on account of cruelty meted out to her, the complainant was forced to leave the matrimonial home at New Delhi on 6th July, 2006 and had come to Ahmedabad and started residing with her parents. Thereafter there is not even a whisper of allegations about commission of any act constituting an offence. That being so the provisions of section 178(c) of the Code relating to continuance of the offence cannot be applied. A bare reading of the complaint shows that all the allegations regarding physical and mental cruelty are in respect of acts committed at Delhi. The only allegation pertaining to Ahmedabad is regarding the petitioner No.1 trying to entice away the minor sons from the complainant's custody. This Court has perused the provisions of section 361 and 498 IPC as well as the definitions of the expression "entice" and other related terms on which reliance has been placed by the learned Advocate for

the respondent No.2. However, in the opinion of this Court the act of the petitioner No.1 father in trying to talk to and persuade his minor sons to go with him to Delhi cannot be said to be enticement so as to amount to an offence under the Indian Penal Code. Retention of streedhan also cannot be said to be an offence, which has been committed within the territorial jurisdiction of the Metropolitan Court at Ahmedabad. Besides, as can be seen from the complaint, the offence alleged against the petitioners is under section 498A read with section 34 and 114 IPC. The allegations regarding enticement of minor children and withholding of streedhan, do not in any case fall within the scope of the section 498A IPC.

28. It is settled law that cause of action consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or arise. The crucial question is whether any part of the cause of action arose within the jurisdiction of the concerned Court. In terms of Section 177 of the Code it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused.

29. Applying the aforesaid legal principles to the factual

scenario disclosed by the complainant in the complaint petition, the inevitable conclusion is that no part of the cause of action arose in Ahmedabad, and the Metropolitan Magistrate had no jurisdiction to deal with the case beyond the stage of taking cognizance of the offence.

30. The next question that arises for consideration is whether the learned Metropolitan Magistrate despite lack of territorial jurisdiction is empowered to take cognizance of the offence and issue process? This issue is no longer res integra. The Supreme Court in the case of ***Trisuns Chemical Industries*** (supra) has held that it is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. It was held that the provisions of section 177 of the Code do not trammel the powers of any court to take cognizance of the offence. The Court after considering the provisions of section 190 and 193 of the Code was of the view that “any” Magistrate of the First Class has the power to take cognizance of any offence, no matter that the offence was committed within his jurisdiction or not. That the jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. It is therefore a fallacious thinking that only a Magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking

cognizance he may have to decide as to the court, which has jurisdiction to enquire into or try the offence, and that situation would reach only during the post-cognizance stage and not earlier. In the circumstances, insofar as taking cognizance of the offence is concerned, it cannot be stated that the learned Metropolitan Magistrate, Ahmedabad was lacking jurisdiction. However, after taking cognizance he may have to decide as to the Court, which has jurisdiction to enquire into or try the offence.

31. The principal contention raised by the learned Senior Advocate is that on account of non-compliance with the mandatory provisions of sub-section (1) of the section 202 of the Code, the issue of process was bad. In this regard, it would be necessary to refer to the provisions of section 202 of the Code, which reads as under:

> *"**Section 202 – Postponement of issue of process.** -*
>
> *[1] Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] 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 is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

[a] where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

[b] where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

[2] In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

[3] If an investigation under sub-section (1) is made by a person not being a police officer, he shall

have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

32. A plain reading of the said provision shows that any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192 may, if he thinks fit postpone the issue of process against the accused, and (i) 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 is sufficient ground for proceeding. Thus, it is well within the discretion of the concerned Magistrate to postpone the issue of process if he thinks fit. However, by the amendment of 2005, sub-section (1) of section 202 has been amended, which makes it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there is sufficient ground for proceeding against the accused. This has been done to see that innocent persons are not harassed by unscrupulous persons. Thus, in view of the amendment in case where the accused is residing beyond the area in which he exercises jurisdiction, the discretion of the Magistrate is taken away, and it becomes mandatory for him to postpone the issue of process till inquiry as envisaged

under sub-section (1) of section 202 is made.

33. It is an admitted position that petitioners No.1 to 3 are residing at New Delhi which is beyond the area in which the learned Metropolitan Magistrate, Ahmedabad exercises his jurisdiction. The complaint in question has been lodged after the coming into force of the said amendment; hence, the amended provisions of section 202 would be squarely applicable in the present case. It, therefore, becomes necessary to examine as to whether there is due compliance with the same.

34. A perusal of the record shows that the complaint in question was lodged on or about 12th March, 2007. On 13th March, 2007 the learned Metropolitan Magistrate examined the complainant on oath and reduced the substance of the examination to writing, which is signed by the complainant and the Magistrate. Hence, it can be assumed that the learned Magistrate has taken cognizance of the offence as envisaged under section 200 of the Code. Thereafter on the same day, that is, on 13th March, 2007 the learned Magistrate has passed an order in Gujarati language in the following terms:

> *"The complaint be registered. Summons be issued against the accused for the offence under section 498A, 114 and 34 IPC upon payment of process returnable on 30.3.2007.*

On that date the accused shall be required to produce surety of Rs.5000/-"

35. As is evident from the facts noted hereinabove, the learned Magistrate has after taking cognizance of the offence, directed issuance of process against the accused. It therefore, becomes imperative to determine whether the amended provisions of sub-section (1) of section 202 have been complied with. On behalf of the petitioners it is contended that no inquiry as envisaged under the said sub-section has been carried out. Whereas on behalf of the respondent No.2 complainant it is contended that the issue of process itself implies that the same is made after making due inquiry. It is sought to be submitted that in any case in a marital offence, the inquiry made under section 202 would not be anything more than examining the complainant and the witnesses on oath as contemplated under section 200 of the Code.

36. With a view to determine the controversy in issue it would be necessary to examine the scheme of Chapters XIV and XV of the Code in the light of various decisions of the Supreme Court in this regard.

37. In the case of ***Jamuna Singh and others v. Bhadai Shah*** (supra) the Supreme Court held that it is well settled now that when on a petition of complaint being filed before him, a Magistrate applies his mind for

proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under S. 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence. Section 200 of the Code itself states that the Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant and the witnesses present, if any, upon oath. Examination by the Magistrate under S. 200 of the Code of Criminal Procedure puts it beyond doubt that the Magistrate did take cognizance of the offences mentioned in the complaint. After completing such examination and recording the substance of it to writing as required by S. 200 the Magistrate can issue process at once under S. 204 of the Code of Criminal Procedure or can dismiss the complaint under S. 203 of the Code of Criminal Procedure. It is also open to him, before taking either of these courses, to take action under S. 202 of the Code of Criminal Procedure. That section empowers the Magistrate to "postpone the issue of process for compelling the attendance of persons complained against, and either enquire into the case himself or if he is a Magistrate other than a Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint". If and when such investigation or

inquiry is ordered the result of the investigation or inquiry has to be taken into consideration before the Magistrate takes any action under Section 203 of the Code of Criminal Procedure.

38. In ***Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others*** (supra) the Supreme Court held as follows:

> *"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the*

accused."

39. On behalf of the petitioners reliance has been placed upon a decision of this Court in the case of ***Ramanlal Chhaganlal Bhavsar*** (supra) wherein a learned Single Judge of this Court had held that it is imperative for the City Magistrate to give some reasons which indicate application of mind to the facts of the case in respect of which he considers inquiry necessary before issuing process against him. However, in the case of Kanaksinh Hathisinh Jadeja & others v. Balabhadrasinh Narendrasinh Jhala and Another, 1987(2) GLR 1219 it has been held that observations made in the said decision for recording reasons are no more a good law in view of the legislative changes inasmuch as in section 202 of the Code, 1973 the obligations to record the reasons in writing postponing the issue of process are specifically not included.

40. In the case of ***A.R. Antulay v. Ramdas Sriniwas Nayak***, (1984) 2 SCC 500, the Supreme Court in the context of the unamended provisions of section 202(1) of the Code, held that upon a complaint being received and the court records verification, it is open to the court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue of process that the court of necessity must hold the inquiry envisaged by section 202 or direct investigation as contemplated therein. The matter is left to the

judicial discretion of the court whether on examining the complainant and the witnesses if any as contemplated by section 200 to issue process or to postpone the issue of process.

41. In ***Adalat Prasad v. Rooplal Jindal***, (2004)7 SCC 338 the Apex Court has held that a condition precedent for issuing process under section 204 is the satisfaction of the Magistrate, either by examination of the complainant and the witnesses or by the inquiry contemplated under section 202 that there is sufficient ground for proceeding with the complaint.

42. In the case of ***Muzaffar Ali Sajjad and others v. State of A.P. and others*** (2004)4 SCC 764, the Supreme Court was dealing with the provisions of section 10 of the Child Marriage Restraint Act, 1929 which reads as under:

> "*10. Preliminary inquiries into offences.- Any Court, on receipt of a complaint of an offence of which it is authorised to take cognizance, shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1973, either itself make an inquiry under section 202 of that Code or direct a Magistrate subordinate to it to make such inquiry*."

The Court held thus:

> "*6. In the case of child marriage, offences are punishable under the Child Marriage Restraint Act and Section 10 of the Act specifically provides that*

there should be an enquiry under Section 202 CrPC. From the sworn statement of the complainant and the records produced by the complaint, we are not satisfied that a proper inquiry was conducted by the Magistrate."

43. In the light of the aforesaid decisions it becomes abundantly clear that examining the complainant on oath under section 200 and making inquiry as envisaged under section 202 of the Code are different stages. Prior to making inquiry under section 202 of the Code, there has to be an order directing inquiry under sub-section (1) thereof, either by the Magistrate himself, or investigation by a police officer or by such other person as he thinks fit. But the nature of inquiry under section 202 is not the same as examining the complainant on oath for the purpose of taking cognizance under section 200. In the circumstances, in the facts of the present case where there is no order directing inquiry as envisaged under section 202(1), and except for examining the complainant on oath as envisaged under section 200 of the Code no other procedure has been followed, it cannot be said that the learned Metropolitan has made any inquiry as envisaged under section 202 of the Code prior to the issue of process. As a natural corollary, it follows that the provisions of sub-section (1) of section 202 which mandates that the issue of process shall be postponed till enquiry envisaged under the said sub-section is made, have not been satisfied. The contention of the

learned Advocate for the respondent No.2 that it is deemed that the learned Magistrate has made inquiry before the issue of process is misconceived and does not merit acceptance. It, therefore, becomes imperative to quash the issue of process against the petitioners No.1 to 3.

44. On the point of limitation, this Court is of the view that the case of the complainant cannot be nullified at the very threshold on that ground. Besides, in case of a complaint alleging commission of offence under section 498A IPC, the delay in filing the present complaint cannot be said to be so great as so as to throw out the complaint at the inception.

45. Insofar as the main relief prayed for in the petition, namely to quash the complaint in question is concerned, it is settled legal position that in proceedings instituted on a complaint, exercise of inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence. The complaint has to be read as a whole. If its appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, in that event there would be no justification for interference by the High Court. In the present case, on a plain reading of the complaint at its face value it cannot be said that no offence under section 498A is made out insofar as petitioners No.1, 2 and 3 are concerned.

46. Whereas there are specific allegations of cruelty and illtreatment insofar as petitioners No.1 to 3 are concerned, insofar as petitioner No.4 is concerned the only allegations against him are as follows:

> *"16. It is submitted that in so far as the accused No.4 is concerned, he takes intense interest in the interse disputes and difference between the complainant and the accused No.1 to 3, incites the latter against the former and her minor sons, and is in hand and glove and acting in collusion and connivance with them in causing physical and mental cruelty and harassment to the complainant and her minor sons. In fact, the accused No.4 had abetted the acts of omission and commission on the part of accused No.1 to 3 both at New Delhi and Ahmedabad where he happened to be at the relevant time, and through written and oral communications with them. Hence, he is equally liable and responsible for the offences committed by the accused No.1 to 3 and, therefore, he has been impleaded as a party accused for being dealt with in accordance with law."*

Reading the complaint as the whole, it is evident that the allegations made therein are specifically levelled at the petitioners No.1 to 3. There is nary a reference to the petitioner No.4 in the entire complaint except in the

paragraph reproduced hereinabove. In the circumstances, the bald allegations made against the petitioner No.4 brother-in-law seem to suggest the anxiety of the complainant to rope in as many of the husband's relations as possible. The complaint against the petitioner No.4 is therefore, required to be quashed.

47. In view of the above discussion, the petition succeeds partly and is accordingly allowed in the following terms:

(i) In the light of the decision of the Supreme Court in the case of ***Trisuns Chemical Industry*** (supra) it is held that the learned Metropolitan Magistrate, Ahmedabad has the power to take cognizance of the offence, however, the learned Metropolitan Magistrate does not have the territorial jurisdiction to inquire into or try the case.

(ii) It is further held that while issuing process, the mandatory provisions of sub-section (1) of section 202 of the Code have not been complied with. Hence, issuance of process is bad on both counts, viz. lack of territorial jurisdiction as well as breach of the mandatory provisions of section 202 of the Code.

(iii) The impugned order dated 13th March, 2007 passed by the learned Metropolitan Magistrate, Court No.22, Ahmedabad is hereby quashed and set aside.

(iv) The learned Metropolitan Magistrate is directed to transfer the complaint to the Court of competent jurisdiction at New Delhi.

(v) Criminal Case No.2163/07 instituted in the Court of the Metropolitan Magistrate of Ahmedabad, Court No.22 is quashed qua the petitioner No.4, Kail Dilip Shah.

48. Rule is made absolute to the aforesaid extent.

[HARSHA DEVANI, J.]

parmar*