REMEDY AGAINST SUMMONING ORDER U/S. 204 CRIMINAL PROCEDURE CODE, 1973

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It has been a matter of immense legal debate whether a Court of Magistrate has the authority or the power to review or recall his order for summoning the accused under Section 204 of the Code of the Criminal Procedure (hereinafter referred to as the Cr.P.C.). The complexity of the matter is further accentuated by the question; whether a revision lies against such an order of summoning.

In the light of the decision of the Hon'ble Apex Court in the case of **Adalat Prasad vs. Rooplal Jindal & Others; AIR 2004 SC 4674**, it has been interpreted by different courts that the only remedy against summoning order u/s 204 Cr.P.C. for the accused is to invoke the inherent power of the High Court u/s. 482 Cr.P.C. In the said case the Hon'ble Apex Court has, while negating the power of review of a summoning order by the Magistrate, held that, *"Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code."*

The above mentioned case law has been followed by the Hon'ble Supreme Court in the case of **Subramanium Sethuraman vs State of Maharashtra & Anr; AIR 2004 SC 4711**. In this case, while upholding the ratio of Adalat Prasad's case (supra), the Court held

"As observed by us in Adalat Prasad's case the only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy under Section 482 of the Code and not by way of an application to recall the summons or to seek discharge which is not contemplated in the trial of a summons case."

The Adalat Prasad's case (supra) has been recently followed by the Hon'ble Apex Court in **Dhariwal Tobaco Products Ltd. & Ors. Vs. State of Maharashtra & Anr.; 2009(64)ACC 962**. In this case

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the Apex Court held that, *"... in our considered opinion it is wholly preposterous to hold that Adalaat Prasad (supra), so far as it related to invoking the inherent jurisdiction of the High Court is concerned, did not lay down good law."*

From the above case laws it has been comprehended by the courts that only remedy for the accused against summoning order is to invoke the inherent power of the High Court u/s. 482 Cr.P.C. and that the above case laws barred the revision of the summoning order u/s. 397 Cr.P.C..

In respect of the said legal dilemma, the first question that arises for our discussion is whether revision u/s. 397 Cr.P.C. of summoning order u/s. 204 Cr.P.C. is barred?

The revisional power of the High Court and that of a Sessions Court has been prescribed in Section 397 Cr.P.C., which is reproduced as under:

> **397. Calling for records to exercise powers of revision:- (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, -recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.**
>
> **Explanation.-All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.**
>
> **(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.**

> **(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.**

From above provision it is clear that revision power of the court is barred only for an interlocutory order.

Now the question that arises is whether a summoning order is an interlocutory order?

The word '*interlocutory order*' has been nowhere defined in Cr.P.C. the only place where the word '*interlocutory order*' has been mentioned is Subsection 2 of Section 397 Cr.P.C. which provides that *"the powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding."*

As the word '*interlocutory order*' has not been defined in Cr.P.C., we have to take shelter of different dictionaries and judicial pronouncement for ascertaining the meaning of this terms.

According to the **Concise Oxford Dictionary**, 'interlocutory' means '*Pronounced during course of a legal action.*'

In **Halsbury's Laws of England, 3rd Edition, Vol. 22**, interlocutory order is described as follows in para 744 under Section 1608.

> **1608. Interlocutory judgment or order :-** *An order which does not deal with the final rights of the parties, but either (1) is made before judgment and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declaration of right already given in the final judgment are to be worked out, is termed 'interlocutory'. An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.*

In the **Corpus Juris Secundum,** Vol. 24, it has been observed as follows under Section 1643 at page 241:

While the question as to what constitutes a final judgment is a subject of much discussion, for the purposes of an appeal it has been said that a judgment is final where it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. Any judgment on which a person is liable to be and is in fact imprisoned is a final decision from which an appeal may be taken. According to some authorities, final judgment in a criminal case is the sentence of the Court. However, so long as anything remains to be done there can be no final order.

In Vol. 47 of the **Corpus Juris Secundum** at page 85, describes the term 'interlocutory' as follows:

Interlocutory. Not final, provisional, temporary. The term is opposed to 'definitive' and has been contrasted with 'final'.

In **Wharton's Concise Law Dictionary**, Fifteenth Edition, 2011 at page no. 548 'interlocutory order' has been described as an order which is made or given during the progress of an action, but which does not finally dispose of the rights of the parties.

In addition to above analysis, it will be more helpful for us to ascertain the meaning of the term "interlocutory order" given in different pronouncement.

In **Central Bank of India v. Gokal Chand; AIR 1967 SC 799** the Supreme Court has pointed out that "interlocutory orders are merely procedural and do not affect the rights or liabilities of the parties in the pending proceeding and that they are merely steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding."

In **Dhola v. State 1975 Cri LJ 1274 (Raj),** considering the import of the expression 'interlocutory order', Beri C.J. observed as follows after reviewing relevant authorities:

> *"On the basis of the aforesaid survey, it is reasonable to say that an interlocutory order is one which is passed at some intermediate stage of a proceeding generally to*

advance the cause of justice for the final determination of the rights between the parties."

In **Mohan Lal Magan Lal Thacker vs State Of Gujarat;1968 AIR 733,** the Court pointed out that, *"In some of the English decisions where this question arose (whether an order is interlocutory order or not.), one or the other of the following four tests was applied.*

1. *Was the order made upon an application such that a decision in favour of either party would determine the main dispute?*
2. *Was it made upon an application upon which the main dispute could have been decided?*
3. *Does the order as made determine the dispute?*
4. *If the order in question is reversed, would the action have to go on?"*

In the above case the Court held that, "An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals."

In the case of **V. C. Shukla vs State Through C.B.I.; 1980 AIR 962**, the Court held that, "The term 'interlocutory order' used in section 397(2) of the Code relates to various stages of the trial, namely inquiry, trial or any other proceeding. The object seems to be to cut down the delays in stages through which a criminal case passes before it culminates in an acquittal, discharge or conviction. Having regard to the very large ambit and range of the Code, the expression interlocutory order would have to be given a broad meaning so as to achieve the object of the Code without disturbing or interfering with the fairness of the trial."

In the above case the Court further pointed out that, "The term interlocutory is to be understood and taken to mean the converse of the term 'final order'. The essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issue sought but is not a final decision or judgment on the matter under issue. An intermediate order is one which is made between the commencement of an action and the entry of the judgment."

In the case of **Parmeshwari Devi vs. State And Anr; 1977 AIR 403** the Apex Court held that- "The Code does not define an

interlocutory order, but it obviously is an intermediate order, made during the preliminary stages of an enquiry or trial."

In the case of **Amar Nath & Ors. vs. State of Haryana 1978(1) SCR 222,** the Hon'ble Supreme Court has held that the expression 'interlocutory order' in Section 397(2) has been used in a restricted sense and not in a broad or artistic sense and merely denotes orders of purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the right of the parties cannot be said to be an 'interlocutory order'.

In the case of **K.K. Patel and Anr. vs. State of Gujarat and Anr.; 2000(41)ACC 351(SC)** it is observed that in deciding whether an order challenged is interlocutory or not, the sole test is not whether such order was passed during the interim stage but the feasible test is whether by upholding the objection raised by a party, it would result in culminating the proceedings.

In **Bhaskar Industries Ltd. v. Bhiwani Denim and Apparels Ltd. and Anr. reported in 2002 (1) Mh.L.J. 81**, the Supreme Court has observed that- Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at an interlocutory stage. The Supreme Court further lay down that the safe test is that if the contention of the petitioner who moves the superior Court in revision, as against the order under challenge, is upheld, would the criminal proceedings as a whole culminate? If they would, then the order is not an interlocutory order in spite of the fact that it was passed during any interlocutory stage.

From the above discussion it can be summarized that an interlocutory order is an order passed in any intermediate stage of a case which does not conclusively decide the case and if that order is unchallenged in the higher court it will culminate the proceeding.

Now the next point to be considered by us is whether a summoning order is an interlocutory order and if yes, whether revision of the same u/s. 397 Cr.P.C. is barred? In this regard long before today in the case of **Amar Nath & Ors. vs. State of Haryana 1978(1) SCR 222**, Supreme Court has held that, "The impugned order of the Judicial Magistrate (for summoning the accused) could not be said to be an interlocutory order and does not fall within the mischief of s. 397(2) and, therefore, a revision

against this order was fully competent under s. 397(1) or under s. 482 of the Code because the scope of both the sections in a matter of this kind is more or less the same."

In the case of **Madhu Limaye vs. The State of Maharashtra; AIR 1978 SC 47**, the Supreme Court considered the very issue whether the revision against the order taking cognizance or issuing process or framing charge was maintainable. The Supreme Court observed in para 10 that the order of the Court taking cognizance or issuing process is not an interlocutory order.

In **Rajendra Kumar Sitaram Pande & Ors vs Uttam & Another :(1999) CrLJ 1620(SC)** also the Court pronounced that, "This being the position of law, it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and, therefore, the bar under sub-section (2) of Section 397 would apply."

In the case of **S.K. Bhatt v. State of U.P., 2005 AIR SCW 1435,** the order of the High Court setting aside the order of the Sessions Court and remanding the matter back to the Sessions Court for deciding the revision on merits was challenged. The High Court had held that decision of the Sessions Court observing that order issuing summons is an interlocutory order and therefore, revision was barred, was incorrect and the order was set aside by the High Court and the matter was remanded back for deciding the revision on merits. Thus, from this decision also it is clear that the order issuing summons or process against the accused is not an interlocutory order and revision against the same is maintainable.

Recently in **Dhariwal Tobaco Products Ltd. & Ors. Vs. State of Maharashtra & Anr.; 2009(64)ACC 962**, the Apex Court again held that, "Indisputably issuance of summons is not an interlocutory order within the meaning of Section 397 of the Code."

From the above discussion it is crystal clear that issuance of process against accused u/s. 204 Cr.P.C. is not interlocutory order within the meaning of s. 397 Cr.P.C. and consequently revision of the same is maintainable.

Now the crux of our discussion is whether by the judgment of the Supreme Court in Adalat Prasad's case (supra) onwards the remedy against summoning order available u/s. 397 Cr.P.C. has been barred?

For better understanding of the point it is necessary for us to scrutinize the Adalat Prasad's case (supra) and other cases on the same point as pointed in this discussion earlier.

It is well known that in the Adalat Prasad's case (supra), the Hon'ble Apex Court has overruled its own decision on the same point in **K.M. Mathew vs. State of Kerala and Anr;1992 AIR 2206**. So it will augur well for the discussion to analyze the decision of the Hon'ble Supreme Court in K.M. Mathew's case (supra).

In the K.M. Mathew's case, the Magistrate had issued summons to accused upon the complaint of complainant. The accused upon service entered appearance and pleaded not guilty. Before the evidence was recorded, accused requested the Magistrate to drop the proceedings against him upon some grounds. After hearing the parties the Magistrate accepted the plea of the accused and dropped the proceedings against him. The complainant took up the matter to the High Court in revision. The High Court allowed the revision and set aside the order of the Magistrate. Accused moved before the Supreme Court, which validated that a Magistrate can review his order of summoning, if the complaint, on the very face of it, does not disclose any offence by the accused and for this no specific provision was required for the Magistrate to drop the proceedings or rescind the process.

In Adalat Prasad's Case (supra) a complainant filed a complaint against the accused persons. Taking cognizance of the said complaint, the Magistrate summoned the accused by issuing process under section 204 of the Code of Criminal Procedure. Being aggrieved by the said order of issuance of process, the accused moved the High Court and the High Court in the said petition directed the petitioners therein to move the trial court against the order of summoning. Pursuant to the said order of the High Court the accused herein filed an application purported to be under section 203 Cr.P.C. and the learned trial Judge after hearing the parties recalled the said summons relying upon the law laid down by the Apex Court in K.M. Mathew v. State of Kerala and Anr. (supra).The said order of the Magistrate recalling the summons originally issued by him was challenged before the High Court on the ground that the Magistrate had no jurisdiction to recall a summons issued under section 204 of the Code. The High Court by the impugned order has allowed the revision petition

holding that while the trial court was justified in taking cognizance of the offence it erred in recalling the consequential summons issued because the said court did not have the power to review its own order.

In this way the question which came up for consideration before the Supreme Court in Adalat Prasad's case was whether the view of the Supreme Court in K.M. Mathew v. State of Kerala and Anr. (supra), holding that if the Magistrate had issued process, he could also recall such an order, was a correct view or not. **It was the only question which fell for consideration. It is to be noted that it was the only question argued, deliberated and decided by the Supreme Court**. In this case Supreme Court while overruling the law laid down by the Court in K.M. Mathew v. State of Kerala and Anr. (supra), held that, "It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code."

A similar situation arose again in the case of **Subramanium Sethuraman vs State of Maharashtra & Anr; AIR 2004 SC 4711**. The complainant had filed a complaint against the accused and after following the procedure laid down in Chapter XV and XVI of the Code of Criminal Procedure, 1973, the trial court issued summons to the named accused in the complaint. On receipt of the complaint, the accused challenged the same before the very same Magistrate on the ground that the Magistrate could not have taken cognizance of the offence because of the defect of some legal provision. Therefore, accused sought for its discharge. The said application came to be rejected. Thereafter, the second application for discharge was filed by the accused on the very same ground which was allowed by the Magistrate following the judgment of the Hon'ble Supreme Court in the case of K.M. Mathew vs. State of Kerala & Anr. (supra). Aggrieved by the said order of discharge made by the Magistrate, the complainant challenged the same by way of a revision petition before

the Sessions Court on the ground that the Magistrate had no power to review his earlier order because of the bar under Section 362 of the Cr.P.C. The Sessions Court accepted the contention of the complainant and allowed the revision petition without going into the merits of the legality of the other issues. Accused thereafter challenged the said order of the Sessions Judge by way of a criminal writ petition filed under Article 227 of the Constitution of India before the High Court of Judicature at Bombay. The High Court by its order rejected the said petition on the ground that once the Magistrate records the plea of the accused and the accused pleads not guilty then the Magistrate is bound to take all such evidence as may be produced in support of the prosecution and there is no provision under the Cr.P.C. enabling the Magistrate to recall the process and discharge the accused after recording the plea of the accused. The above said order of the High Court dismissing the criminal writ petition was challenged before the Supreme Court.

The question which fell for consideration before the Supreme Court (in Subramaniam Sethuraman's case) was whether the decision in the case of Adalat Prasad would require reconsideration as in the case of Adalat Prasad. The Court proceeded on the basis that the case was a summons case but in reality it was a warrant case covered by Chapter XIX of the Criminal Procedure Code. That was the question which arose for consideration. Again the issue for consideration before the Supreme Court was whether the "Magistrate" could recall the order issuing process in a summons case as well as warrant case and the Court upheld the law laid down by them in Adalat Prasad's case and further observed that law laid down by them in Adalat Prasad's case shall apply summons as well as in warrant case.

From the detailed discussion of the above two cases it is abundantly clear that Supreme Court has nowhere discussed the point that whether a revision could be preferred against the order of Magistrate issuing process? In both the above discussed cases, the Hon'ble Supreme Court only concentrated on the point that whether a Magistrate can revoke his order of summoning u/s. 204 Cr.P.C. and replied it in negative. In fact, in the case of Adalat Prasad, the Supreme Court has observed in para 18 that, ***"In view of our above conclusion, it is not necessary for us to go into the question whether order issuing a process amounts to an interim***

order or not." Thus, in the case of Adalat Prasad, the Supreme Court has not decided the issue whether a revision against such an order is maintainable or not as the said issue was not raised. In fact from the observations in para 18, it is clear that the Supreme Court has not gone into the question whether an order issuing process is an interlocutory order or not and hence, whether a revision against such an order is maintainable or not.

Further, the law laid down in the above two cases, namely Adalat Prasad's case and Subramanium Sethuraman's case, can be analyzed from another angle. It is clear that a judgment has two parts, with respect to its binding effect, namely, *ratio decidendi* and obiter dicta. It is the *ratio decidendi* which have the force of law only. It can be said to be the *ratio decidendi* of the judgment if the following requirements are met:

(a) The issue involved must be directly and substantially in issue in the case.

(b) The issue needs to be decided, and

(c) There are reasons given in the judgment while deciding the issue.

If the judgment in the case of Adalat Prasad is taken into consideration, it is seen that what was in issue was whether the "Magistrate" could recall the order issuing process. The ratio of the judgment would have to be applied to cases wherein, the Magistrate is called upon to recall process. The ratio would not apply to cases where the Sessions Court is called upon to exercise its revisional jurisdiction in cases where process has been issued by the Magistrate. Hence in this case it cannot be said that the Supreme Court has anyway barred the revision power of the courts against the order of issue of summons u/s 204 Cr.P.C..

In this regard it is pertinent to mention the case of **Commissioner of Income Tax v. Sun Engineering Works (P) Ltd.; 1992 Supp 1 SCR 732,** in which the Hon'ble Supreme Court has held that, "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the question which was before this Court. A

decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court to support their reasoning." Again in the case of **Madhav Rao Scindia v. Union of India**, the Hon'ble Supreme Court has held that, "It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment".

Hence from the above discussion it is clear that there is not any *ratio decidendi* in the judgment of Supreme Court in Adalat Prasad's case and Subramanium Sethuraman's case, which in anyway laid the law that revisional power of the courts against the order of issue of summons u/s. 204 Cr.P.C. is barred.

CONCLUSION:

From the above discussion we can deduce following points in nutshell:-

1. Order of Issuance of process u/s. 204 Cr.P.C. is not an interlocutory order.
2. Revision u/s. 397 Cr.P.C. is maintainable against an Order of Issuance of process u/s. 204 Cr.P.C.
3. Remedy against Order of Issuance of process u/s. 204 Cr.P.C. is also lies u/s.482 Cr.P.C.
4. A Magistrate cannot revoke his Order of Issuance of process u/s. 204 Cr.P.C.

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