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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: February 03, 2011

Date of Order: February 23, 2011

+ Crl. MC No. 269/2010

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Rajesh Bhalla

...Petitioner

23.02.2011

Versus

Rieva Bhalla Nee Rieva Roshan

...Respondent

Counsels:

Mr. Yogesh Saxena for petitioner.
None for respondent.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. This petition under Section 482 Cr.P.C has been preferred by the petitioner against an order dated 30th July, 2008 passed by learned Additional Sessions Judge, Delhi setting aside the order of learned MM dated 1st May, 2007 and directing that the petitioner/ accused be summoned under Section 499, 500 IPC and he be proceeded as per law.

2. A perusal of the present petition would show that the learned Sessions Judge had not served any notice to the petitioner and observed that since the complaint was dismissed even before summoning of the petitioner, thus there was no need to issue notice. However, learned Sessions Judge made following observations in his order:

“17. In the present case what we find, ‘The petitioner in her plaint certified copy of which was proved on record as Ex.CW-1/F, inter alia, claimed that in view of the marriage between the parties the accused had gifted the flat to her and in this regard she inter alia relied upon various photographs and letter dated 06.09.2002 Ex.CW-1/D and the other dated 11.09.2002 Ex. CW-1/E. The accused in his aforesaid complaint case certified copy of which was proved as Ex.CW1/2 inter alia admitted in paragraph 2 thereof that he remained in custody from February, 2002 to October, 2005. So both the said letters Ex.CW1/D dated 06.09.2002 and Ex. CW1/E dated 11.09.2002 were written by him to the petitioner while he was in jail. These letters were addressed to the petitioner and mention her address as Flat No.288, 3rd Floor, Vasant Apartment, New Delhi-110020. This is also the flat in question. In these letters the accused clearly stated that the said flat was her i.e. of the petitioner. Even in his aforesaid written statement certified copy of which is Ex. CW1/N, the accused admitted the execution of the said letters but stated that the petitioner got these written from him, by blackmailing her. As regards, the photographs filed by her in support of her averments in the plaint Ex.CW1/F showing both of them in the comfortable and cozy company of each other, the accused stated that the said photographs had been taken by the petitioner with the object to blackmail him and extort money from him. So, in my view, the said photographs and the letters, prima facie show that there were warm and very close personal relations between them and they also cohabited together in the flat. Further, the said letters Ex.CW1/D and Ex.CW1/E also show that the flat was given by the accused to the petitioner as per his own admission as contained therein. Indisputably these facts were in the knowledge of the accused when he alleged in the aforesaid written statement that the object of the petitioner was to blackmail and extort money from him and also leveled accusations against her mentioned in paragraph 6 hereinbefore. So, there was clearly lack of good faith on his part. It appears that he was actuated by malice.

18. As held in the case of Sewak Ram's 1981 Cri.L.J 894, good faith is a question of fact and a matter for evidence.

19. The said defamatory statements mentioned in paragraph 6 hereinbefore were not made by the accused honestly. They were made with an oblique motive. The said allegations are perse defamatory and were made with the intention to defame the petitioner or with the knowledge that the said allegations would harm her reputation particularly when the petitioner in her sworn testimony before learned trial court inter alia deposed that, apart from that, the accused had spread these allegations in common friends and let her down in the eyes of others. Further according to the petitioner, because of complaints made by the accused, he tried to prejudice the mind of the Court and also because of the said complaints, the locality people, stopped inviting her in public functions.

20. At best, the accused could take benefit of exception 9 appended to Section 499 IPC. Hon'ble Supreme Court while dealing with the said provision of law in the case of Harbhajan Singh vs. State AIR 1966 SC 97 has held as follows:

"It is true that under Section 105 of the Evidence Act, if an accused person claims the benefit of exceptions, the burden of proving his plea that his case falls under the Exception is on the accused. But the question which often arises and has been frequently considered by judicial decisions is whether the nature and extent of the onus of proof placed on an accused person who claims the benefit of an exception is exactly the same as the nature and extent of the onus placed on the prosecution in a criminal case; and there is consensus of judicial opinion in favour of the view that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test, which can be applied to an accused

person who seeks to prove substantially his claim that his case falls under an exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds "in proving a preponderance of probability". As soon as the preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus. It must be remembered that basically, the original onus never shifts and the prosecution has at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt. If it can be shown that the appellant has led evidence to show that he acted in good faith and by the test of probabilities that evidence proves his case, he will be entitled to claim the benefit of Exception Nine. What the ninth Exception requires an accused person to prove is that he made the statement in good faith...."

3. A perusal of above observations would show that that the learned Sessions Judge in fact adjudicated the entire case itself without even hearing the petitioner herein. It is settled law that nobody can be condemned unheard. If the learned Sessions Judge had to consider the revision petition worth admitting and had to hear the revision on merits, it was incumbent upon the learned Sessions Judge to issue notice of the petition to the respondent. The petitioner herein in this case has definitely been prejudiced because of the order of learned Sessions Judge. Reliance has been placed by the counsel for the petitioner on *Rameshan P.O. and others v Rakesh Kumar Yadav and another* (2009) 13 SCC 546 wherein the Supreme Court in similar circumstances, set aside the order of High Court and remanded back the matter.

4. In view of above, the petition is allowed to the extent that the matter is remanded back to the learned Sessions Judge for hearing the petitioner herein and passing an order after hearing the petitioner. Until the order is passed by learned Sessions Judge on merits after hearing the petitioner herein, the proceedings before the learned MM shall remain stayed. Parties to appear before the learned Sessions Judge on 10th March,

2011.

5. The petition stands disposed of in terms of above order.

February 23, 2011
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SHIV NARAYAN DHINGRA, J