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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 24.11.2011*
Judgment delivered on:29.11.2011

+ **CM(M) 1452/2009 & CM No.18027/2009**

DR.BIMLA BORA Petitioner
Through: Dr.R.Venkataramani, Senior
Advocate with Mr.Surender
Kumar Gupta, Advocate.

versus

DR.SHAMBHUJI Respondent
Through: Respondent in person.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. Order impugned before this Court is the order dated 28.10.2009 vide which the application filed by the defendant under Order 7 Rule 11 of the Code of Civil Procedure (hereinafter referred to as the Code) seeking rejection of the plaint had been declined.

2. Record shows that the present suit is a suit for damages on account of libel and slander; sum of Rs.50,000/- has been claimed.

Plaintiff is a doctor by profession. Defendant is stated to a medical officer working at the CGHS Dispensary; at the relevant time the plaintiff was in charge of the CGHS Dispensary at Vivek Vihar. It has been averred that the defendant was undergoing a departmental penalty pursuant to which she had been relegated as a junior to the plaintiff which was not liked by her. On 11.5.1992 by an office order the plaintiff was directed to deal with the confidential reports (CRs) of various staff members which included the defendant also. Defendant did not like this arrangement and she adopted illegal and unfair means to scandalize this issue. In the plaint three different instances/occasions of defamation have been alleged by the plaintiff.

(i) On 11.8.1992 defendant had written a letter in the open Dak to the Additional Director, CGHS East Zone containing the following words:

"Very recently a photostat copy of the September 8-22, 1983 issue of 'onlooker' with the old story about H.M.D. Shahdara was circulated in my dispensary. Lastly copies of the same article were circulated to various dispensaries through C.R. Section of Nirman Bhawan with clear intention to defame me, engineered by him in all

probability.”” I am afraid that if given a chance the above named doctor will surely write adverse remarks in my CR to spoil my future career.....”.

Further averment being that the plaintiff by this letter intended to show that the defendant was a dishonest CMO.

(ii) On 7.9.1992 and 08.9.1992 written complaints were addressed by the defendant to the SHO, police station Vivek Vihar wherein false and malicious writings were made against the plaintiff. A part of the English translated extract of the complaint of 08.9.1992 has been reproduced in the plaint and reads as under:

“That the plaintiff (Dr.Shambhuji) had threatened in the dispensary to assault the defendant physically and had also threatened to kidnap her children.”

Further averment in the plaint being that the plaintiff by way of this complaint has been indicted as a man of criminal background which has caused much pain and humiliation to the plaintiff. The plaintiff also had to undergo investigation which has been conducted by the Sub-Inspector of the concerned police station after this complaint has been lodged with him.

(iii) In para 14 of the plaint, it has been averred that the defendant in the course of meetings with his friend and relatives has maligned the plaintiff telling them that he has murdered his first wife and also has a son from his first wife; he has also told the relatives of the plaintiff to report this matter to his in-laws; this has gravely injured his reputation and caused pain and humiliation to him.

On these three contentions the present plaint was filed.

3. Defendant in his written statement has raised a preliminary objection about the maintainability of the suit pursuant to which a preliminary issue had been framed which reads as under:

“Whether the plaint does not disclose cause of action?OPD

4. This preliminary issue had been answered in favour of the plaintiff and against the defendant by the impugned order. The application under order VII Rule 11 of the Code filed by the defendant had been rejected. This is the grievance of the petitioner.

5. Vehement arguments have been addressed by the learned counsel for the petitioner. Contention is that the first two allegations as made in the plaint and noted supra as (i) and (ii) are absolutely privileged and the question of malice or the said communications being the basis for a claim for defamation is not

maintainable. Reliance has been placed upon AIR 1999 SC 1028 Rajendra Kumar Sitaram Pande & Ors. Vs. Uttam and Anr. to substantiate his submission that where a complaint is made by a person to his superior officer (which in this case was the complaint dated 11.8.1992); such a complaint would not make out a case for defamation. Reliance has also been placed upon judgments reported in AIR 1939 Calcutta 477 Madhab Chandra Ghose Vs. Nirod Chandra; AIR 1975 Karnataka 162 V. Narayana Bhat Vs. E.Subhanna Bhat; AIR 1962 Patna 229 Bira Gareri Vs. Dulhin Somaria; AIR 1939 169 Rajasthan Lachhman Vs. Pyarchand to support a submission that the contents of the defamation alleged in (ii), which are complaints dated 7.9.1982 and 8.9.1982 made to the police officer, are also absolutely privileged and cannot be the subject matter of a defamatory statement. Submission being that there is no codified law for a civil liability in a claim for damages and as such the English common law based on the principles of justice, equity and good conscience are to be made applicable; statements made by a person in his complaint to a police officer is an absolute privilege and as such the contents of these complaints which have formed the second basis of the defamatory suit against the defendant falling in this category, no cause of action has been made out in

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the plaint on this ground as well. Attention has also been drawn to the text of Halsbury's Laws of India as also Gatley Libel and Slander; contention being that statements made to a Public Authority as to the misconduct of another are absolute privilege.

It is pointed out that the contents of para 14 of the plaint also show that the averments made in the plaint are general; these are no specifics in the plaint as to whom the defendant had made the defamatory statements qua the plaintiff; what was the content or the text of the said statements which in turn amounted to a defamation qua the plaintiff. It is pointed out that the provisions of Order VII Rule 11 of the Code get attracted to such kind of malicious suits which should be nipped in the bud itself. Reliance has been place upon the judgments reported in (2002)1 SCC 557 Saleem Bhasi Vs. State of Maharashtra; (2005) 4 SCC 315 Vithalbhai (P) Ltd. Vs. Union Bank of India; submission being that where the averments made in a plaint as in the present case make out no case of a cause of action in favour of the plaintiff; the court must exercise its power to reject the plaint. To advance this submission reliance has also been placed upon the judgment of the Apex court reported in (1977) 4 SCC 467 T.Arivandandam Vs. T.V.Satyapal & Anr. Contention being that where the reading

of the plaint manifestly shows that it is vexatious and meritless;

the court should exercise its power under Order VII Rule 11 of the Code; clever drafting which has otherwise created no cause of action must be dropped in the first hearing itself.

6. Arguments have been refuted. The respondent is appearing in person. His submission is that the question as to whether his averments in the plaint are instances of an absolute privilege or a qualified privilege is a defence which is sought to be set up by the defendant and the defence is not a matter which can be gone into at the time of dealing with an application under Order VII Rule 11 of the Code; averments made in the plaint alone being relevant.

7. Record has been perused.

8. The plaint has been detailed supra. There is no doubt to the proposition that the averment in the plaint alone have to be looked into while dealing with an application under Order VII Rule 11 of the Code. Present suit has been filed in May 1993. It is a suit for damages based on the averments as noted supra claiming damages in the sum of Rs.50,000/-. Written statement was filed in February 1995. Replication was filed in the year 2003; issues have been framed on 09.7.2009. They read as follows:

"1. Whether the plaint does not disclose cause of action?

OPD

2. Whether defendant has defamed the plaintiff? Opportunity

3. Whether plaintiff is entitled for damages, if so to what extent? OPP

4. Relief.”

9. Issue no.1 had been treated as a preliminary issue. There was admittedly no application under Order 7 Rule 11 of the Code. However Issue No.1 has been treated as a preliminary issue; which is also the language of Order VII Rule 11(a) of the Code.

10. The question which in fact had arisen before the trial court is as to whether the averments made in the plaint did not disclose a cause of action. The onus to discharge this issue was upon the defendant. The arguments have been aforementioned. The argument that the contents of (i) and (ii) (the alleged defamatory communication/statements made by the defendant against the plaintiff are) protected by an absolute privilege are indeed defences raised by the defendant which the court while dealing with an application under Order 7 rule 11 of the Code is precluded from going into. It is only the averments made in the plaint which have to be looked into.

11. There is no dispute to the proposition that privileges are of two kinds; it may be a case of an absolute privilege or it may be a case of a qualified privilege; whether the contents of the defamation alleged by the plaintiff in terms of his claim in para 1

and para 11 supra are covered by an absolute privilege or by a qualified privilege cannot straightway be decided or deciphered from a plain reading of the plaint; this would be mixed question of law and fact.

12. The law on defamation is not a codified law; the legal precedents cited by the learned counsel for the petitioner are all borrowed propositions from the criminal law which for the purposes of defamation and malicious prosecution has been codified under Sections 499 and 500 of the Indian Penal Code.

13. The averments made in the present plaint may or may not be cases of absolute privilege; it is also well settled that cause of action is always a bundle of facts; it is only after trial that it will be known whether they will qualify as one or the other. In these circumstances, it cannot be said that the plaint discloses no cause of action. In fact the judgments relied upon by the learned counsel for the petitioner show that an absolute privilege is not available unless the action is clearly identified for explaining such an absolute privilege; complaints or statements made to the police which are not a part of any judicial proceedings and particularly when the matters would go to court may thus not be governed by an absolute privilege; maximum that can be made available would

be a qualified privilege. These being defences; at the cost of
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repetition; could not have been looked into at this stage.

14. Impugned order in no manner suffers from any infirmity.

Dismissed.

INDERMEET KAUR, J

NOVEMBER 29, 2011

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