

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.2095 OF 2016

ORDER:

Petitioner/accused No.1 in C.C.No.530 of 2015 filed this criminal revision case is filed under Sections 397 & 401 Cr.P.C, questioning the propriety, regularity and legality of the order dated 02.11.2015 in C.F.No.698 of 2015 passed by the I Metropolitan Magistrate, Vijayawada.

The second respondent lodged a private complaint before the I Metropolitan Magistrate, Vijayawada, for the offences punishable under Sections 500, 506 and 120-B I.P.C, after recording the statement of the second respondent/complainant and one Rayapati Kotaiah i.e. husband of the second respondent, after following necessary procedure, took cognizance of the case against the petitioner and others to proceed further. Challenging the order passed in C.F.No.698 of 2015 dated 02.11.2015, the present criminal revision case is filed on various grounds, mainly contending that the legal correspondence between the petitioner and the second respondent would not amount to publication of defamatory statement and it is only between the petitioner and the second respondent and through their respective counsels representing them and such legal correspondence would not constitute an offence punishable under Section 500 I.P.C

It is the case that the second respondent is married to one Rayapati Kotaiah and during their wedlock they were blessed with one male child named as Rayapati Venkata Siva Ram Chand and

one female child named as Rayapati Vijaya Sree i.e. the petitioner herein/accused. The petitioner issued a legal notice dated 12.11.2014 to her family members demanding partition of the property and for allotment of 1/3rd share to the petitioner. The second respondent gave a reply on 24.11.2014 and rejoinder to notice dated 05.12.2014 was issued by the petitioner alleging that Rayapati Venkata Siva Ram Chand is not son of the second respondent. It is stated that the second respondent had humiliated the petitioner right from her childhood in comparison in Rayapati Venkata Siva Ram Chand, who is the so called son of the second respondent. It is further alleged that the petitioner in her rejoinder demanded the second respondent/complainant and her family members to undergo D.N.A. test, which is defamatory statement; that the petitioner is trying to grab the family properties of the complainant and to defame the reputation of the family in the society, she issued notices making defamatory allegations against the complainant and her family members. Thereupon, the complainant and her family members questioned the petitioner about the allegations alleged and complained on 23.01.2005 against the petitioner at Penamaluru Police Station, which was registered as Cr.No.26 of 2015 for the offences punishable under Sections 420, 506 r/w 34 I.P.C.

The main contention of the petitioner is that the allegations that the petitioner has made defamatory statement against the second respondent and her son Rayapati Venkata Siva Ram Chand with a malafide intention to grab the property of Rayapati Venkata Siva Ram Chand and the contents of rejoinder are defamatory and

unfounded and they are made to defame Rayapati Venkata Siva Ram Chand in public to ruin the career and future of the second respondent; and her family members are incorrect and baseless. Admittedly, the rejoinder notice dated 05.12.2014 was addressed to the second respondent/complainant while ascertaining that the notice scheduled property shall be divided into three equal shares, as per notice sent by counsel Muppa Rajasekhar who called upon the complainant and her son Rayapati Venkata Siva Ram Chand to undergo D.N.A test voluntarily. The rejoinder of notice is purely personal to the husband of the second respondent and her son Rayapati Venkata Siva Ram Chand and not a publication and therefore, the contents of such rejoinder would not attract an offence punishable under Section 500 I.P.C.

It is alleged that even assuming that the allegations in the rejoinder notice are wrong, the claim of the complainant that she was defamed is without any legal basis and the content which is spoken or written should have the tendency to harm the reputation of the person against whom such words are spoken or intended to be read, should be made or published which would infer that the same should be publicised, and only when such words are spoken or written and the members of the general public know about the same, an act of defamation can be made out. In the instant case, rejoinder notice is issued by the petitioner's counsel to the second respondent's husband and Rayapati Venkata Siva Ram Chand by any stretch of imagination and it cannot be said that the act of addressing notice containing alleged defamatory statement to the second respondent be treated as publication. Therefore, taking

cognizance of the offence by the I Metropolitan Magistrate, Vijayawada is erroneous and illegal and prayed to set-aside the same by exercising power under Sections 397 & 401 Cr.P.C.

The second respondent filed counter alleging that the second respondent is the wife of one Rayapati Kotaiah and during their wedlock, they were blessed with one male child named as Rayapati Venkata Siva Ram Chand and one female child named as Rayapati Vijaya Sree i.e. the petitioner herein/accused. The petitioner herein got married with her maternal uncle Sri Kilaru Vijaya Prasad and after divorce, she married one Sri Naramsetty Venkata Sudhakar, resident of Vijayawada and after divorce, she again married to Sri P. Maheswar Reddy, resident of Hyderabad. It is further averred in the counter that the second respondent and her husband were the government employees, retired as teachers of Zilla Parishad of Krishna District and with the said earnings, they purchased properties in various places. At the time of marriage of the petitioner, it is stated that the second respondent and her husband have given self acquired money, gold and properties as stridhana, out of love and affection. The second respondent stated in the counter that, her son Rayapati Venkata Siva Ram Chand went to U.S.A for further studies and after completion of Masters Degree, he secured job, he also became an earning member and out of the said earnings, he purchased house plots in Vijayawada. In view of bifurcation of the State, the prices of house plots which the second respondent and her family members have purchased have escalated and having noticed the same, the petitioner with an evil mind, started harassing and demanding the second respondent

and her family members to give additional share in the existing property, in addition to property already been given. As the second respondent and her husband refused the said demand, the petitioner developed grudge against them, giving complaints one after the other with malafide intention to extract money and property from the second respondent and her husband. Bearing grudge against the second respondent and her husband, as the petitioner started propagating among their relatives that Rayapati Venkata Siva Ram Chand is not born to the second petitioner and her husband Rayapati Kotaiah. One such incident is sending notice of rejoinder by making defamatory statement with regard to son of the second respondent. It is stated that the petitioner has earlier filed O.S.No.48 of 2015 and the same is pending before the III Additional District Judge, Vijayawada. Therefore, the allegations made in the notice of rejoinder are *ex facie* defamatory and it is an offence punishable under Section 500 I.P.C against the petitioner along with the offences punishable under Sections 506 and 120-B I.P.C.

During hearing, learned counsel for the petitioner Sri B. Vijaysen Reddy contended that the allegations made in the notice and rejoinder would not amount to publication of any defamatory statement with an intent to disrepute the second respondent/complainant and her family members, since the notice is between the petitioner and the second respondent, sent through her counsel and such notice would not amount to publication of defamatory statement. Even otherwise, such correspondence

would not constitute an offence punishable under Section 500 I.P.C.

In support of his contentions, learned counsel for the petitioner relied on judgment of Allahabad High Court in **Queen-Empress v. Taki Husain**¹, unreported judgment of Madras High Court in **Geetha v. A.K. Dhamodharan**² and judgment of this Court in **G. Janardhana Reddy v. A. Narayana Reddy**³ to contend that the statements made in the legal notice would not constitute an offence punishable under Section 500 I.P.C and taking cognizance against the petitioner by the I Metropolitan Magistrate, Vijayawada is erroneous.

Learned counsel for the petitioner further contended that the petitioner is entitled to claim absolute privilege, since the statement made in judicial proceedings are absolutely privileged statements and thereby, taking cognizance by the I Metropolitan Magistrate, Vijayawada is erroneous on the face of it and the order dated 02.11.2015 in C.F.No.698 of 2015 passed by the I Metropolitan Magistrate, Vijayawada is liable to be set-aside.

Per contra, learned counsel for the second respondent Sri Krupachand Gogineni contended that the issue of notice through counsel for the petitioner against the second respondent, making defamatory allegations which disrepute her would amount to publication and they would attract an offence punishable under Section 500 I.P.C. Learned counsel for the respondent also contended that the questioning the chastity of mother by the

¹ (1884) ILR 7 All 205

² Crl.R.C.No.784 of 2009 dated 28.06.2011

³ 2010((1))ALT(Cri)214

daughter is a matter of serious concern and the second respondent submitted that she being an old lady aged 70 years and retired from government service, is suffering mental torture and humiliation at the hands of the petitioner. It is also contended that, the petitioner started propagating that Rayapati Venkata Siva Ram Chand is not the son born due to conjugal life between the second respondent and her husband Rayapati Kotaiah, among the relatives. Such act would fall within the ambit of publication and making such false statement to disrepute the character of the second respondent would constitute an offence punishable under Section 500 I.P.C and prayed to dismiss the petition.

Learned counsel placed reliance on the judgments of the Apex Court in **Jeffrey J. Diermeier and another v. State of West Bengal and another**⁴, **M.N. Damani v. S.K. Sinha and others**⁵ and judgments of this Court in **Dr. R. Mahalakshmi v. Nirmala Reddy and another**⁶, **Vantipalli Veera Venkata Satya Harischandra Prasad v. Surapuraju Ramesh and another**⁷, **I. Venkateswarlu v. State and another**⁸, **Ajit E. Arhana, Head Finance M/s Bharati Mobile Limited, Begumpet, Hyderabad v. K.V. Pavan Kumar and another**⁹, **Rajdeep Sardesai v. State of Andhra Pradesh and others**¹⁰, **M. Siva Rama Murthy and another v. K.S.N. Babu and another**¹¹.

⁴ (2010) 6 Supreme Court Cases 243

⁵ 2001 (2) ALT (Crl.) 63 (SC)

⁶ 2014 (2) ALD (Crl.) 231

⁷ 2012 (2) ALT (Crl.) 121 (A.P.)

⁸ 2013 (2) ALD (Crl.) 687 (AP)

⁹ 2005 (1) ALT (Crl.) 369 (A.P.)

¹⁰ 2015 (2) ALD (Crl.) 337 (SC)

¹¹ 2000 (1) ALT (Crl.) 494 (A.P.)

Considering rival contentions, perusing the material available on record, the points that arose for consideration are:

- 1. Whether issue of rejoinder to legal notice and making defamatory statements against the second respondent by this petitioner amounts to publication?**
- 2. Whether the I Metropolitan Magistrate, Vijayawada, applied his/her mind to the offence and taking cognizance for the offences punishable under Sections 500, 506 and 120-B I.P.C against the petitioner is illegal. If not, is it liable to be set-aside?"**

P O I N T:

The petitioner and the second respondent are the daughter and mother and there are several disputes between them with regard to the property and a civil suit is also pending as on today. Before filing the civil suit for partition and other reliefs, there was legal correspondence through their counsel between the petitioner and the second respondent. The petitioner issued a legal notice initially on 12.11.2014, for which a reply was got issued by the second respondent and her family members, through her counsel Muppa Rajasekhar on 24.11.2014 making certain allegations, denying the right to claim partition. Till issue of reply by the second respondent and others, no serious allegations were made by the petitioner against the second respondent, but in the rejoinder dated 05.12.2014, a reply notice was sent to the second respondent and others where the petitioner made serious allegations which are

necessary for deciding the real controversy between the parties and they are extracted hereunder:

1. That my client has different opinion about No.3 of your being the son of No.1 of you. My client was eye witness to certain facts and evidences to make her strongly believe that No.3 of you is not son of No.1 of you. This belief is further supported by the prejudiced treatment she met from No.2 of you in the matters of education, matrimony, property and other matters.
2. My client states that No.2 of you deprived/cheated/neglected my client, and humiliated her physically and mentally on many occasions since childhood. No.2 of you always demonstrated partiality towards your son despite the fact that my client was also born to No.2 of you.
3. In spite of the above, my client had restrained herself from opening these subjects in public in the interest of family with a hope that No.2 of you will change with passing times. It is sad that even at this juncture you are not willing to respect my client and her rights in the family.
4. Therefore, my client hereby calls upon all of you to partition the notice schedule properties into THREE equal shares as per the notice sent by Muppa Rajasekhar, Advocate to settle the matter amicably OR No.1 and 3 of you to volunteer for DNA test, within 10 days from the receipt of this notice by you.

Else my client has no option except to proceed legally to initiate DNA test to prove who is the legal heir of No.1 of you and also initiate suitable Criminal and Civil Remedies in this regards against all of you.”

Offended by the serious allegations questioning the paternity of Rayapati Venkata Siva Ram Chand, as it affects her character, the second respondent filed a private complaint before the I Metropolitan Magistrate, Vijayawada. The allegations in paragraphs 1 to 4 extracted above are serious in nature and such allegations, if published, would amount to defamation.

Before deciding the points formulated for consideration, it is apposite to advert to the definition of defamation.

Section 499 of I.P.C. defines offence of defamation and it is as follows:

“499. Defamation:- Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person

intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1:- It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2:- It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3:- An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4:- No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."

Halsburys Laws of England, Fourth Edition, Vol. 28, defines 'defamatory statement' as under:

"A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling trade or business."

While speaking about reputation, William Hazlitt observed *that a man's reputation is not in his own keeping, but lies at the mercy of the profligacy of others. Calumny requires no proof. The throwing out of malicious imputations against any character leaves a stain, which no after-refutation can wipe out. To create an unfavourable impression, it is not necessary that certain things should be true, but that they have been said. The imagination is of so delicate a texture that even words wound it.*

The word "defamation", general term for words spoken (slander) or written (libel) to the prejudice of a person's character,

in such way as to support an action by such person against the speaker or writer.

Thus, any statement published if affects reputation of any person, it would amount to defamation (libel).

Defamation may be contained either slander or libel.

In common law the origins of defamation lie in the torts of “slander” (harmful statement in a transient form, especially speech), each of which gives a common law right of action. Defamation is the general terms used internationally, libel is in written form. Libel and slander both require publication. The fundamental distinction between libel and slander lies solely in the form in which the defamatory matter is published. If the offending material is published in some fleeting form, as by spoken words of sounds, sign language, gestures or the like, then it is slander.

Libel is defined as defamation by written or printed words, pictures, or in any form other than by spoken words or gestures. Thus, criminal defamation may contain either “libel” or “slander”.

In the present case, the petitioner sent a rejoinder dated 05.12.2014 to the reply notice dated 24.11.2014. In the said rejoinder, serious allegations were made and the notice was addressed to the second respondent-Rayapati Sowbhagya Lakshmi, her husband-Rayapati Kotaiah and her son- Rayapati Venkata Siva Ram Chand, who are none other than the parents and brother of the petitioner. The rejoinder notice was not even sent to the counsel-Muppa Rajasekhar who issued reply on 24.11.2014. But, curiously, the second respondent alone filed

private complaint and her statement was recorded by the I Metropolitan Magistrate, Vijayawada, at the time of taking cognizance of the offence. In her statement, the second respondent specifically asserted that as per legal notice-Ex.P-1, A-1 to A-5 defamed the second respondent and Photostat copies of the legal notices are distributed among the public who are related to her at Poranki. Thus, the second respondent was defamed in the society.

In the copy of the complaint filed along with the petition, the second respondent asserted in paragraphs 6, 7 & 8 as follows:

“vi. The complainant hereby challenging the allegations made against her and her family members. From the date of issuance of the Rejoinder Notice dated 05.12.2014 by raising baseless allegations against the complainant and her family members, which are defamatory, the relatives, colleagues, friends, neighbours of the complainant are asking about the said allegations raised by the accused, for which the complainant and her family members are suffering a lot. The complainant and her family members feel reputation and fame as their only property.

vii. It is respectfully submitted that there is no truth in the allegations made by the accused without having the basis for the allegations. The accused invented the said allegations only for grabbing the share of the son of the complainant namely Rayapati Venkata Siva Ram Chand in the joint family properties.

viii. The notice allegations of the accused caused damage to the complainant reputation and fame both at her residence locality, society and at the working place.”

Further, the complaint is totally silent as to the distribution of said Photostat copies of legal notices among the relatives to disrepute and defame the second respondent and her family members in the public. But, for the first time, the second respondent stated that the petitioner distributed the Photostat copies of the legal notices among the relatives at Poranki, which is not based on any iota of evidence. Even the names of the relatives who enquired the second respondent about the allegations

contained in the rejoinder notice dated 05.12.2014 to the reply notice dated 24.11.2014 were not disclosed. Therefore, there is absolutely no allegation and material about distribution of the Photostat copies of legal notice dated 12.11.2014. In the absence of distribution of copies of legal notice dated 12.11.2014, sending rejoinder notice dated 05.12.2014 to the second respondent, her husband and son would constitute a publication is a question to be decided.

In **Gopinathan vs. Ramakrishnan**¹², the Kerala High Court held that, the act of any one who brings to the notice of another the libellous matter can be taken as publication. Therefore, a publication is to be construed in the contextual meaning to constitute an offence punishable under Section 500 I.P.C.

The word 'defamation', general term for words spoken (slander) or written (libel) to the prejudice of a person's character, in such case as to support an action by such person against the speaker or writer. The term 'publication' is not specifically in Section 499 I.P.C.

In **SNM Abdi vs. Prafulla Kr. Mahanta and Ors.**¹³, the Gauhati High Court held that the law regarding defamation is already settled. The law is that in order to be defamatory a publication must tend to lower the plaintiff in the opinion of men whose standard of opinion the Court can properly recognise, or tend to induce them to entertain an ill opinion of him. However, the plaintiff need not show a tendency of the imputation to

¹² 2002 (1) Cur Cri R 26 (Ker.)

¹³ AIR 2002 Gau 75 at 76

prejudice him in the eye of every one in the community or all of his associates, but it is suffice to establish that the publication tends to lower him in the estimation of a substantial, respectable group, even though they are minority of the total community or of the plaintiffs associates. The law relating to defamation is a limitation upon the Constitutional guarantee of freedom of speech and of the press, and the vagaries and complex structure of such law, as it exists today, is to a large extent a direct result of the friction between them, as a restriction on untrammelled freedom of expression, and the highly cherished rights of freedom of speech and of the press. In any view of the matter, in the present facts of the case, the petitioner did not publish defamatory statement, except sending rejoinder to the reply notice to the legal notice sent by the second respondent and others, through her counsel. Therefore, it is difficult to conclude that, issue of notice would constitute a publication.

To constitute libel, there must be a publication. What is publication is not clarified anywhere in the Penal Code. However, similar questions came up before various High Courts.

Learned counsel for the petitioner would draw attention of this Court to the judgment in **Geetha²** case, **B.P. Bhaskar v. B.P. Shiva¹⁴** and **Ashok Kumar v. Radha Kishan Vij and others¹⁵**.

In the facts of **Geetha²** case, the revision Petitioner and the Respondent are husband and wife. The Respondent/husband herein has filed H.M.O.P. No. 56/2008 for divorce on the ground of

¹⁴ 1993 CrL.L.J 2685

¹⁵ 1983 Cri.L.J. 48

adultery and cruelty under Sections 13(1)(i) and 13(1)(i)(a) of Hindu Marriage Act and the copy of the petition was marked as Ex.P1. The Respondent/husband also filed a suit in O.S. No. 59/2008 for declaration of title and the copy of the plaint was marked as Ex.P2. Before preferring private complaint, the Petitioner/accused issued Ex.P3 notice to the Respondent/husband and the postal acknowledgement card was marked as Ex.P4. The revision Petitioner examined herself as P.W.1 and in her evidence, she stated that without any evidence, her husband pleaded that she is leading adulterous life with one Anju alias Prakash, who is none other than friend of her elder son. Since the Respondent/husband filed a suit with false and perverse allegations by making derogatory statements against the Petitioner/accused, she preferred private complaint. The Court examined the complaint with reference to definition of defamation under Section 499 I.P.C and the explanations contained therein. The High Court of Madras had laid emphasis on the fifth exception to Section 499 I.P.C which deals with Merits of case decided in Court or conduct of witnesses and other concerned and it is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal which has been decided by a Court of Justice, or respecting the conduct of any person as a party witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Based on the fifth exception, the Madras High Court concluded that the petitioner failed to make out a *prima facie* case for taking cognizance for the offences punishable under Sections

499, 500, 501 and 502 I.P.C and dismissed the criminal revision case.

In **B.P. Bhaskar**¹⁴ case, the accused was stated to have incorporated certain scurrilous imputations against the complainant in the notice issued by him. The notice so issued by the accused, it is said, had also been circulated to the friends and relations of the complainant. Consequently, it is said, the good name and fame enjoyed by the complainant was brought down and he was despised and neglected in many social functions by his close relatives and friends circle. But, the Madras High Court, by placing reliance on the judgment of the Kerala High Court in **P.R. Ramakrishnan v. Subbaramma Sastrigal**¹⁶ held that the sending of a communication to an advocate on behalf of his client is virtually a communication made to the client himself, as such there is no publication of the imputation concerning the client. The judgment of **B.P. Bhaskar**¹⁴ case is directly on the issue.

Similar question came up for consideration in **Ram S.S. Parihar v. Suniti Bhadauria and others**¹⁷, where a private complaint was filed for the offence punishable under Section 500 I.P.C and a process was issued by the Magistrate after taking the cognizance of the offence punishable under Section 500 I.P.C. When the matter reached the Additional Sessions Judge by way of revision, the Additional District Judge set-aside the order of issuing process by the Magistrate against the accused for the offence punishable under Section 500 I.P.C. Aggrieved by the

¹⁶ AIR 1988 Ker 18

¹⁷ II (2007) DMC 567

order, revision was filed before the Bombay High Court. In the facts of the judgment, a notice was issued and to that, a reply was issued consisting of defamatory statement which is a libellous statement and the complainant claims that he is a businessman of repute and based on so called defamatory statement in the reply notice, the complainant filed a complaint for the offence punishable under Section 500 I.P.C, on the ground that reputation was badly effected on account of defamatory statement in the reply notice. But the respondent contended that issue of reply would not constitute a publication and in the absence of any publication, it would not amount to libellous statement containing defamatory allegations and thereby, the petitioner is not liable to be proceeded for the offence punishable under Section 500 I.P.C. The Bombay High Court in paragraphs 13 & 14 of the judgment, held as follows:

13. Next, as far as this incident is concerned, on behalf of the accused, it is contended that there was no publication, even if it is considered that para 17 of notice dated 24.7.2004 contained defamatory statements since the said letter was sent by the Advocates of the parents of A1 /Smt. Suniti to the Advocate of the complainant. It is further submitted that in case Advocate Mr. Shrikant Nayak, on behalf of the complainant, chose to show the said letter to his junior or his office staff, A2/Shri Ravi and A3/Smt. Reena cannot be blamed for the same. On behalf of the accused, reliance has been placed on P.R. Ratnakrishnan v. S. Sastrigal and Anr. [AIR1988Ker18] , and also on [B.P. Bhaskar v. B.P. Shiva], wherein the decision in the first case has been followed.

14. As already stated, the said letter dated 24.7.2004 was sent as a reply to the notice dated 28.6.2004 sent on behalf of the complainant demanding from the parents of A1/Smt. Suniti the said sum of Rs. 3,91,253/- and the reply dated 24.7.2004 was sent on behalf of the said parents A2/Shri Ravi and A3/Smt. Reena by their Advocates. In my view, the said letter dated 24.7.2004, assuming it contained defamatory statements of the complainant was sent by the parents of A1/Smt. Suniti to the complainant himself, through their respective lawyers. There was no third person involved. In the first case of P.R. Ramakrishnan v. S. Sastrigal and Anr. (supra), it has been stated that sending of a communication to an Advocate on behalf of his client is

virtually a communication made to the client himself and as such there is no publication of the imputation concerning the client. It may also be stated that in this case it was also held that a dictation given by a lawyer to his clerk and the transcription made by him of a per se libellous matter cannot amount to publication. The same view was followed in the second case of B.P. Bhaskar v. B.P. Shiva (supra), by the Madras High Court stating that the receipt of a notice by the complainant by itself is not sufficient to amount in law as "publication" and as such there was no cause for launching of the prosecution as no publication ensued. It may be noted that for Sections 499/500 to be attracted there must be making or publication of any imputation concerning any person by words either spoken or intended to be read, or by signs or by visible representations intending to harm, or knowing or having reason to believe that such imputation may harm the reputation of such person. In other words, for the offence of defamation to be completed there must be making or publication of an imputation concerning any person and the making or publication must be with intent to harm or knowing or having reason to believe that such imputation may harm the reputation of such person. The complainant tried to get out of this situation by making a further allegation that when he went to meet the Advocate, his Advocate as well as his office staff started questioning him about the contents of the said notice and it was expressed by all of them that it was a heinous act on the part of the complainant and that the Junior Advocate, the staff of Advocate concerned appeared to have nursed a feeling of distress for the complainant, but the complainant failed to translate the said allegations in his statement on oath and all that he stated was that he was detained before Advocate S. Nayak, his family members and his staff and though he had requested Advocate S. Nayak to give a notice of defamation to the accused, he declined to do so. In fact, nothing prevented the complainant, to have examined either Advocate Nayak or for that matter his Junior Advocate or any member of his staff to substantiate what the complainant alleged in the complaint and unless the said allegations were translated into statement on oath there was no question of the learned J.M.F.C. having issued process against the accused and much less against Al/Smt. Suniti as far as the first incident was concerned."

(emphasis supplied)

Similarly, in **C.H. Kadar and another v. Munnillakkath Valappil Fousia**¹⁸, while deciding an identical question regarding issue of notice containing defamatory statements held that when complaint filed alleging defamation through lawyer's notice and allegations in notice are sent through lawyer to complainant's lawyer be treated as allegations made to complainant herself, then

¹⁸ 1990 Cri.L.J 2356

the notice sent through lawyer does not diminish complainant's reputation in public. The Kerala High Court by placing reliance on **P.R. Ramakrishnan**¹⁶ case and **Rev.Fr.Bernad v. Ramachandran Pillai**¹⁹, concluded that the allegation made in a reply notice sent to the counsel who issued a notice on behalf of the complainant would not constitute publication and thereby, it would not amount to defamation.

Yet, another circumstance came up for consideration before the Supreme Court in **M.C. Verghese v. T.J. Poonan and another**²⁰. In the facts of the above judgment, the respondent wrote three letters to his wife containing defamatory notes against appellant-father-in-law. The appellant filed complaint in Court of District Magistrate and District Magistrate discharged the respondent on grounds that communication by husband to wife do not amount to 'publication' in law. The High Court stated that writing of defamatory matter contained in said three letters were not 'publication' in law and no charge under Section 500 be made out and discharged respondent . The appellant preferred revision before the Apex Court and claimed three letters to be admissible in evidence under Section 122. The Supreme Court observed prima facie case was set up in complaint made by respondent and that letters available for being tendered in evidence. Apex Court stated that Section 122 prohibits married person to disclose any communication made to him or her during marriage by his or her spouse except with consent of spouse and nowhere said Section

¹⁹ 1986 KLT 1240

²⁰ AIR 1970 SC 1876

prohibits admissibility of evidence in any other manner and held that, bar of inadmissibility to be adjudged in light of whether marriage subsisting or not at date of communication through letters and remanded the matter back, by setting-aside the order of the High Court. This principle was considered in **C.H. Kadar and another¹⁸** case, but the facts are totally different.

Learned counsel for the petitioner while contending that, sending legal notice containing defamatory statements would not amount to publication by placing reliance on **Queen-Empress¹** case, wherein, the Full Bench of Allahabad High Court decided an identical issue and laid down certain requirements to constitute an offence punishable under Section 500 I.P.C and held that sending of the letter was not "making" or "publishing" an imputation within the meaning of Section 499 I.P.C. Here, in the present case, a rejoinder to the reply notice was issued containing defamatory allegations and in such case, the rejoinder sent to the second respondent and family members would not amount to publication or making attributions malafidely which reduced the esteem of the second respondent in the eye of the society. If, these principles laid down by various High Courts are applied to the present facts of the case, the allegations made in the rejoinder to reply addressed to the second respondent, her husband and her son would not constitute publication to conclude that the petitioner made publication to defame the second respondent in the eye of society which harshly effected her reputation.

Learned counsel for the second respondent mainly contended that the allegations made in the rejoinder to reply notice

would amount to defamation, as it reached the counsel whom the second respondent engaged in the suit, since the legal correspondence is the basis for the claim. No doubt, certainly, the notice is required to be placed in the hands of counsel engaged by the second respondent, but he is a representative of the second respondent and thereby, it would not amount to publication to attract the offence punishable under Section 500 I.P.C.

Therefore, issue of rejoinder to the reply notice would not amount to publication or making imputation publicly, for the reason that, it is only a communication between the petitioner and her mother i.e. the second respondent, her father and brother who are closely related to one another by blood. If, the second respondent or her family members themselves published it, the petitioner cannot be made responsible for such publication of defamatory statement. Therefore, in the absence of proof of publication of defamatory material, touching the character of the second respondent, the paternity of Rayapati Venkata Siva Ram Chand is illegal.

Learned counsel for the second respondent mainly contended that making imputations in the legal notice would constitute an offence and he placed reliance on the judgment of this Court in **Dr. R. Mahalakshmi**⁶ case, where, the single Judge of this Court held that when an allegation is made in the counter, making imputations against one of the parties, if they are defamatory, the person who suffered harm on account of such defamatory statement can file a complaint for the offence punishable under Section 500 I.P.C. Further, the Court held that

the defamatory allegations made in the counter, written statement or evidence would tantamount to publication and attract an offence punishable under Section 500 I.P.C, pleader's clerk and the staff of the Court, particularly the bench clerk may go through such imputations, consisting of defamatory statements.

In **Jeffrey J. Diermeier and another**⁴ case, the Supreme Court dealt with the exceptions to Section 499 I.P.C and disagreed with the contention of the petitioner's counsel and dismissed the petition filed before the Court. At present, this Court is not concerned with the privileges.

Absolute and qualified privilege to the statements made in judicial proceedings, since, such privilege is not available in a criminal proceedings, in view of the law declared by the Apex Court in **Basir-ul-huq and Ors. vs. The State of West Bengal**²¹ and the Supreme Court made it clear that, As regards the charge under section 500, Indian Penal Code, it seems fairly both on principle and authority that where the allegations made in a false report disclose two distinct offences, one against the public servant and the other against a private individual, that other is not debarred by the provisions of section 195 from seeking redress for the offence committed against him. Section 499, Indian Penal Code, which mentions the ingredients of the offence of defamation gives within defined limits immunity to persons making depositions in court, but it is now well settled that that immunity is a qualified one and is not absolute as it is in English law.

²¹ 1953 Cri.L.J 1232

In **Narayana Ayyar vs G. Veerappa Pillai**²², after exhaustive survey of long line of judgments, the Madras High Court was of the view that the consensus of opinion in the various High Courts in India has converged on the conclusion that the question of absolute privilege to a witness does not arise in view of Section 499 I.P.C which relates to a criminal prosecution.

In **Satis Chandra Ckakraarti vs Ram Dayal De**²³, the High Court of Allahabad consisting of five Judges, held as follows:

“22. Our conclusions then may be summarized as follows:

(1) If a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined by reference to the provisions of Section 499, Indian Penal Code. Under the Letters Patent, the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; the Court cannot engraft thereupon exceptions derived from the Common Law of England or based on grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in Section 499, Indian Penal Code.

(2) If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject, must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code.”

Thus, in view of authoritative pronouncements of Supreme Court and various other High Courts, a party to a judicial proceeding is prosecuted for defamation in respect of a statement

²² AIR 1951 Mad 34

²³ 59 Ind Cas 143

made therein on oath or otherwise, his liability must be determined by reference to the provisions of Section 499 I.P.C. That is what is statutorily enumerated in the nine exceptions mentioned in the above judgment and no absolute privilege can be claimed. Thus, in view of the law declared by various Courts referred supra, including the Supreme Court, the person who made defamatory statement in judicial proceedings may claim qualified privilege, but not an absolute privilege. Therefore, the privileges enumerated under English Law are always subject to exceptions contained under Section 499 I.P.C, based on qualified privilege to judicial proceedings, order of taking cognizance of the offence against the petitioner for the offence punishable under Section 500 I.P.C cannot be set-aside by exercising power under Section 397 & 401 Cr.P.C.

Learned counsel for the respondent also placed reliance on various other judgments of Apex Court and various other High Court, including the judgment in **Jeffrey J. Diermeier and another⁴** case. But, in **Jeffrey J. Diermeier and another⁴** case, the Apex Court dealt with exceptions and when a statement is allegedly made in public good, the same must proceeded to try the matter and decide only at the end of the trial. In the same judgment, the Court considered the publication made by CFAI for conducting certain programmes in a paper and a news publication was made by CFAI and also kept in the website. Therefore, the Court concluded that it is a publication of defamatory matter and the accused in calendar case punishable under Section 500 I.P.C may claim exceptions in such case, where the accused is entitled

to claim any minute is the one of the exception is to be decided only at the end of the trial.

In **M.N. Damani v. S.K. Sinha and others**²⁴ case, certain allegations were made as a defence in criminal complaint filed for the offence punishable under Section 138 of Negotiable Instruments Act and thereafter, based on those allegations a criminal complaint was filed for the offences punishable under Section 500 I.P.C. But, the Court held that when there is a prima facie material to issue process against the accused for the said offence, cognizance cannot be challenged and dismissed the petition. The same view was taken by this Court in **Vantipalli Veera Venkata Satya Harischandra Prasad**⁷ and **I. Venkateswarlu**⁸ cases.

In view of the law declared by the Apex Court and various High Courts in long line of judgments, the accused in any calendar case for the offence punishable under Section 500 I.P.C is entitled to claim all exceptions contained under Section 499 I.P.C or a qualified privilege, but he is not entitled to raise any defence.

In **G. Janardhana Reddy**³ case, the single Judge of this Court referred a judgment of Apex Court in **Rajendra Kumar, Sitaram Pande v. Uttam**²⁵, wherein the Apex Court quashed the proceedings relating to proceedings of such a case, by applying exception VIII of Section 499 of I.P.C. This judgment is decided in conflict with **Jeffrey J. Diermeier and another**⁴ case. But, I am unable to express any opinion with regard to the conflict directly.

²⁴ 2001 (2) ALT (Crl.) 63 (SC)

²⁵ AIR 1999 SC 1028

Thus, in view of the law discussed in the above decisions, it is clear that issue of notice or rejoinder to the reply notice to the parents and brother of the petitioner would not amount to publication of any imputations which harshly affects the character of the second respondent or paternity of her brother. But, the Court below took cognizance of the offence based on the allegations made in the complaint and document filed along with the complaint, more particularly, the legal correspondence between the petitioner and the second respondent and her family members, after recording statement of the complainant.

At the time of taking cognizance, the Magistrate is required to apply his/her mind to the allegations made in the complaint and material produced along with the complaint to find out whether any *prima facie* case is made out to issue process under Section 202 Cr.P.C.

Though the word 'cognizance' is not defined in the Code of Criminal Procedure, 'cognizable offence' is defined in Section 2 (c) of the Code, which reads as follows:-

"Cognizable offence means an offence for which, and 'cognizable case' means a case in which a police officer may, in accordance with the First schedule or under any other law for the time being in force, arrest without warrant", and Section 2(l) defines 'non-cognizable offence' as follows:-

"Non-Cognizable offence means an offence for which and 'non cognizable case' means a case in which a police officer has no authority to arrest without warrant."

Therefore, one must be clear about the application of the Code with reference to "taking cognizance" and distinction between "cognizable" and "non-cognizable" offences. Once cognizance is taken, process may have to be issued against the person, who is

alleged to have committed the offence. The common understanding of the term 'cognizance' is "taking judicial notice by a Court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter 'judicially'". Thus, legal sense of taking judicial notice by a court of law or a Magistrate is altogether different from the view and idea a layman has for it; however, a broad and general comprehension is 'judicial notice by a court of law on a crime which, according to such court, has been committed against the complainant, to take further action if facts and circumstances so warrant.

In **R.R.Chari v. State of U.P²⁶, Narayandas Bhagwandas Madhavdas Vs. West Bengal²⁷, D. Lakshminarayana Vs. V. Narayana²⁸, Bhagwant Singh Vs. Commissioner of Police²⁹, Kishun Sing and others Vs State of Bihar³⁰, State of W.B. and Another Vs. Mohd. Khalid³¹, Ponnal @ Kalaiyarasi Vs. Rajamanickam and 11 others³², G. Sagar Suri and another Vs. State of U.P³³, State of Karnataka and Another Vs. Pastor P. Raju³⁴**, the Courts consistently held that taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of offence.

²⁶ AIR 1951 SC 207

²⁷ AIR 1959 Supreme Court 1118 (V 46 C 150)

²⁸ AIR 1976 Supreme Court 1672

²⁹ AIR 1985 Supreme Court 1285

³⁰ (1993) 2 Supreme Court Cases 16

³¹ (1995) 1 Supreme Court Cases 684

³² 1998 (4) Crimes 543

³³ AIR 2000 Supreme Court 754

³⁴ (2006) 6 Supreme Court Cases 728

Thus, it means that the Magistrate has to apply his/her mind to the facts to find out any person suspected to be committed an offence. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190 (1). Therefore, application of mind by the Magistrate to the facts to find out whether suspected person committed an offence punishable under Indian Penal Code or any other law and if the Magistrate comes to conclusion that there is *prima facie* material to proceed against the petitioner for commission of the offence, then the Magistrate by taking cognizance of the offence of any of the accused, has to issue process under Section 202 I.P.C. That was exactly in the present case the Magistrate has done. At the time of taking cognizance, the Magistrate is not required to examine various issues like whether the imputations made in the facts or rejoinder to the reply notice would amount to publication or not. If, the Court *prima facie* found that there is material to proceed against the petitioner/accused issuing process cannot be found fault, the order passed by the Magistrate is not cryptic and it is a reasoned order.

In **Srinivasa Gopal v. Union Territory of Arunachal**³⁵, an identical question came up for consideration for taking cognizance, wherein the before the Supreme Court by relying on the judgment of **Tula Ram and others v. Kishore Singh**³⁶, explained the meaning of the words 'taking cognizance' and held that it means judicial application of mind of the Magistrate to the facts mentioned in the complaint with a view to taking further Action. A

³⁵ 1988 AIR SC 1729

³⁶ [1977] 4 SCC 459

reference was also made to the observation of the Supreme Court in **Bhagwant Singh v. Commissioner of Police and another**³⁷, wherein, it was held as follows:

"Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section (2)(i) of s. 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of s. 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses; (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of section 156. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced because the First Information Report lodged by him would have failed of its purpose, wholly or in part. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of s. 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process."

In any view of the matter, in view of the settled law declared by the Supreme Court and various High Courts referred supra, the meaning of the word 'taking cognizance' is applying mind by the Magistrate to the facts where the accused or person suspected has

³⁷ [1985] 3 S.C.R. 942

committed an offence *prima facie*. No doubt, issue of process after taking cognizance may seriously affect the accused.

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. (vide **M/s. Pepsi Foods Ltd. & Anr vs Special Judicial Magistrate & Ors**³⁸).

The Supreme Court in **Ramdev Food Products Private Limited v State of Gujarat**³⁹, while dealing with the powers of Section 156(3) of Cr.P.C held as follows:

³⁸ AIR 1998 SC 128

³⁹ (2015) 6 SCC 439

“Thus, we answer the first question by holding that the direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. Cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed".

In view of the principle laid down in the above judgment, it is clear that it is the prime duty of the Magistrate to apply its mind while passing such an order and the Court must be vigilant as to nature of allegations and not to issue direction without proper application of mind, after verifying the veracity of the allegations having regard to their nature thereof. Thus, it is mandatory to make such reference under Section 156(3) of Cr.P.C when the complainant must approach the Court with clean hands and then the Magistrate shall apply its mind to the facts and find out whether the cognizable case is made out. Then only, such power has to be exercised. Such mechanical reference of the matter to police under Section 156(3) Cr.P.C is an abuse of process of the Court.

The Apex Court in **M/s Pepsi Foods Ltd³⁸** case widened the scope of enquiry at the time of recording preliminary evidence for summoning of an accused and of the view that summoning of an accused in a criminal case is a serious matter. If, such wide power is conferred on the Magistrate, it is for the Magistrate to examine at the time of taking cognizance whether the allegations made in the notice and rejoinder to the reply notice would constitute publication of defamatory allegations and proceed further. If, the

Magistrate is satisfied that those allegations would fall within the meaning of publication, then the order passed by the Magistrate cannot be faulted, which is now under challenge. But the Magistrate did not apply his/her mind to the allegations made in the notice and rejoinder notice, which would amount to publication of defamatory content to constitute an offence punishable under Section 500 I.P.C and whether such offence would fall within the meaning of libel. In the absence of non-application of mind by the Magistrate in that angle, the order taking cognizance of the offence against the petitioner for the offence punishable under Section 500 I.P.C is illegal. It is not the case of the petitioner that she is claiming any exception to the statement as contained under exceptions 1 to 9 of Section 499 I.P.C. But, here, the basic contention is that the allegations made in the notice would not fall within the meaning of publication (libellous statement) and thereby, the rejoinder to the reply notice would not satisfy the requirements to constitute an offence punishable under Section 500 I.P.C. In such case, basing on the law declared by the Apex Court in **M/s Pepsi Foods Ltd³⁸** and **Ramdev Food Products Private Limited³⁹** cases, this Court can exercise power under Sections 397 & 401 Cr.P.C and set-aside the order, since the order under challenge is irregular and illegal. Hence, I find that the Magistrate committed an error in taking cognizance in issuing processing without applying his/her mind, since the Magistrate did not apply his/her mind whether the allegations made in the notice or rejoinder to the reply would amount to publication or not. Therefore, the order dated 02.11.2015 in C.F.No.698 of 2015

passed by the I Metropolitan Magistrate, Vijayawada, is liable to be set-aside.

In the result, the criminal revision case is allowed, setting aside the order dated 02.11.2015 in C.F.No.698 of 2015 passed by the I Metropolitan Magistrate, Vijayawada.

Consequently, miscellaneous applications pending if any, shall also stand closed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:01-11-2017

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