

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 179 OF 2014**

Rajendra Kumar Shahani aged
49 years Occupation: Business,
Having address at
2nd floor, Gurdassmal Mansion,
National Liabrary Road, Bandra(West),
Mumbai 400 050

**...Revision Applicant
...Org. Complainant**

Versus

1. State of Maharashtra
2. M.L. Ranjit of Mumbai
Age 70 years, Occ. Practising Advocate
and Solicitor having office at 305,
Gundecha Chambers, N.M. Road,
Fort, Mumbai – 400023 **...(Org. Accused No. 3)**
3. Shanta Hasmatrai Mirchandani **...(Org. Accused No. 1)**
4. Lachmi Hasmatrai Mirchandani
Both Adult residing at 134,
Hashu Nivas, 28th Road,
T.P.S. III, Bandra (West), **...(Org. Accused No. 2)**
Mumbai, 400 050. **...Respondents**

Mr. Robin Jaisinghani I/b Jacinta D'Silva for Applicant.

Sr. Counsel Mr. Arif Y Bookwala a/w Mr. Filji Frederick a/w
M/s. Prateeti Thakur I/b Ff and Associates for Respondent No. 2.

Ms. R.M. Gadhavi APP for State.

CORAM : PRAKASH. D. NAIK, J.

Date of reserving the Judgment : 20th February, 2018.

Date of pronouncing the Judgment : 13th April, 2018.

JUDGMENT:

1. Heard both the sides. In accordance with earlier order and with consent of both the parties, Application was heard for final disposal.

2. The applicant has invoked the revisional jurisdiction of this Court under Sections 397 and 401 of Criminal Procedure Code, 1973. The applicant challenges the impugned order dated 11th October, 2013 passed by the learned Additional Sessions Judge, Greater Bombay in Criminal Revision Application No. 913 of 2012. The said Revision Application was allowed and the order of issuance of process passed by the learned Additional Chief Metropolitan Magistrate, 8th Court, Esplanade at Mumbai in C.C.No. 0800735/SS/2012 against the Respondent No. 2 was set aside.

3. The Revision applicant herein is the original complainant in the aforesaid complaint. The said complaint was filed alleging offence under Section 500 of I.P.C. against the Respondent No. 1 to 3.

4. The brief facts as alleged in the complaint are as follows:-

(a) The complainant is the son of Arjun Gurdassingh Shahani. The building Gurdasmal Mansion belonged to Ruki Gurdassmal Mirchandani who was the sister of complainant's father Arjun G. Shahani. The complainant is the nephew of Ruki G. Mirchandani who expired on 20th March, 1993. After Ruki's death, the complainant has been looking after and running the guest house business.

(b) The Accused Nos. 1 and 2 are the daughters of one late Hasmatrai Mirchandani, who was the brother of Gurdassmal Mirchandani, the husband of Ruki G. Mirchandani. Gurdassmal Mirchandani expired on 1st February, 1965. Accused Nos. 1 and 2 filed a petition in the Bombay High Court for revocation of probate granted in favour of the complainant by the Bombay High Court in which the Accused made false and defamatory allegations against the complainant intending to harm and/or knowing and/or having reason to believe that such imputations will harm the reputation of the complainant.

(c) Accused No. 3 (Respondent No. 2) is the advocate of Accused No. 1 and 2 who has filed the aforesaid petition on behalf

of Accused Nos. 1 and 2. Accused No. 3 is the proprietor of Ranjit and Co. He has acted with express malice in making false and defamatory statements and allegations contained in the petition filed in the Bombay High Court against the complainant. In the petition, it was stated that, the petition has been drawn by "Ranjit and Co." Accused Nos. 1 and 2 have conspired with Accused No. 3 to defame the complainant.

(d) Ruki G. Mirchandani expired on 20th March, 1993 leaving behind her Last Will and Testament dated 7th December, 1988. The complainant was informed by Police that Post-mortem was conducted and the report indicates that, Ruki might not have died natural death. Last rites and all rituals were performed. Complainant was arrested and granted bail, but no chargesheet was filed against him. The said will was registered with the Sub-Registrar of Assurances at Bandra, Mumbai. By the said Last Will and Testament, the complainant was appointed as the sole executor and the building Gurdassmal Mansion and the plot of land on which the building stands was bequeathed to the complainant and Ruki G. Mirchandani's other nephew Pradeep Manek Shahani in equal shares.

(e) The complainant filed a Testamentary Petition in the Bombay High Court and obtained a Probate of Last Will and Testament of Ruki G. Mirchandani. Public notices about filing of the Petition for Probate were issued in the newspapers. One Mahesh Mirchandani and Nanik Mirchandani, the real brothers of Accused Nos. 1 and 2, filed their Caveat in the said Probate Petition. Similarly, Caveats were also filed by Shanta M. Joukani, Chandrakanta Agarwal and Anita Advani claiming to be the daughters of Ruki's sisters. In pursuant to that, the said Testamentary Petition was converted into a Suit. The Caveats filed by Shanta M. Joukani, Chandrakanta Agarwal and Anita Advani were discharged by the High Court in an appeal preferred by the complainant. The Court also discharged the Caveats filed by Mahesh and Nanik Mirchandani.

(f) On or about 4th August, 2011, the Accused filed a petition for revocation of the probate granted to the complainant on the basis of false and defamatory statement against the complainant. The said Petition was numbered as Miscellaneous Petition No. 87 of 2011. Paragraph 6, 9, 11 and 12 to 16 of the said Probate Petition contain the following false and defamatory statements and allegations

which reads thus:-

“6. The Petitioners submit that the Probate Exhibit “B” hereto issued by this Hon'ble Court is liable to be revoked on the following grounds:

a) that the proceedings to obtain grant were defective in substance and the grant was obtained fraudulently by the Respondent by making false statements and concealing from this Hon'ble Court something material to the case in as much as that the Respondent did not disclose to this Hon'ble Court the details as well as names and addresses of the heirs and legal representatives of the deceased including that of the petitioners nor any of the Petitioners was served with the notice of filing of the said Petition and/or citation and therefore the entire proceedings were defective and stood vitiated:

b) that the grant was obtained by means of untrue allegations by a fact essential in point of law to justify the grant and said allegations were made deliberately to ensure that the Petitioners did not receive any notice of filing of the said Petition or citation as the Petitioners would have contested the same in as much as that the said alleged Will is forged and the deceased was seriously ill and she could not have made the said Will in proper state of mind.”

“9. The Petitioners state that on perusal of the alleged Will of the deceased dated 7th December, 1988, the same is not the valid Will as the same has not been signed by the deceased nor were all the Attesting Witnesses present together when the said alleged Will was allegedly executed”

“11. The Petitioners state that it appears that Dr. Jayaprakash Hebbar was not present when the deceased and the two Attesting Witnesses signed the alleged will though in the Affidavit of Mr. Akram H. Khan, Advocate, it

is stated that he alongwith Shri Shreenivas Tripathi and Dr. Jayaprakash Hebbar were all present at the residence of the deceased and that they did then and there see the said deceased set and subscribed her signature on the alleged Will.

12. The Petitioners state that a few months prior to the death of the deceased, there were constant quarrels between the deceased and the Respondent as the deceased came to know that he was probably having an affair with a married woman having a child also, and that she was residing in a slum area. The said incident greatly shocked the deceased who had declared to the Respondent that she would never give any legacy to him as one of the beneficiaries if he married any such lady much below her status in life. The said incident had been conveyed by the deceased to her sister in whom the deceased confided all her problems and who could also look to her sister for advice. The deceased was very particular about the family reputation and wanted the Respondent to marry a girl from a decent family of her status.

13. The Petitioners state that nobody was informed about the murder of the deceased on 19th March, 1993. In fact, the Respondent performed all the funeral rites of the deceased with indecent hurry that too not in accordance with norms and traditions of the Hindus, and nobody as called to pay their last respect to the deceased. The said fact came to know through said Mr. Pradeep Manek Shahani, on the night of 20th March, 1993 only after all the funeral rites were over. The next date, when family members of the deceased visited, the Respondent stated that no one was allowed and everything was sealed as the Police was interrogating and it was found that nothing was sealed and the Police made the family members sit and the Respondent had all the keys to the cupboard etc.

14. The Petitioners state that thereafter the Respondent was also arrested by the police and the Petitioners were told that the Respondent was subsequently released on bail and in fact a Case No. 165 of 1993 was

registered by the Bandra Police Station against the Respondent and there was a case filed in Court being case No. 851 of 1994.

15. In the circumstances, the Petitioners submit that the Respondent who obtained the said alleged Will or Probate by fraud and by suppressing material fact and not disclosing the true facts including that the Petitioner were heirs and legal representatives of the deceased and were not served with citation, and therefore the said Probate is liable to be revoked and this Hon'ble Court will be pleased to revoke the same.

16. The Petitioners state that as stated hereinabove, the alleged Will is obviously forged and there are suspicious circumstances surrounding the execution of the alleged Will particularly the murder of the deceased and this is a clear attempt on the part of the Respondent to usurp and grab all the properties of the deceased which in the Petitioners' respectful submission ought not be permitted by this Hon'ble Court."

(g) The statements and allegations in the Revocation Petition were defamatory and have lowered the moral and intellectual character of the complainant. The said Petition was signed by Accused Nos. 1 and 2 and also by Accused No. 3. The Accused No. 3 who is an advocate and solicitor, was aware that his clients were intending to file the Revocation Petition 18 years after the death of late Ruki Mirchandani and that during the said period, they did not claim any right in the estate of late Ruki. The Accused No. 3, in an effort to make out some sort of challenge to the Will, has copied almost verbatim allegations which were made in the affidavit-in

-support of the Caveat filed by Shanta M. Joukani and others. The following paragraphs of the said affidavit-in-support of the Caveat were lifted almost verbatim after making certain changes, which reads thus :-

“10. THAT pursuant to the information available, I say that the deceased did not die under normal circumstances and a natural death but was suffocated to death in mysterious circumstances on or about the 19th day of March, 1993 at the residence of the deceased at marina Guest House, Gurdassmal Mansion, Opposite National Library Road Bandra (West), Bombay 400 050.

11. THAT on perusal of the alleged Will of the deceased dated 7th December, 1988, I say that the same is not the valid Will as the same has not been signed by the deceased nor were all the Attesting Witnesses present together when the said alleged Will was executed.

12. THAT the deceased at the time when the alleged Will was executed, was ill in health and could not read properly due to contaract in her eyes and had very weak eye-sight and could hardly read without a magnifying glass.

13. THAT it appears that Dr. Jayaprakash Hebbar was not present when the deceased and the two Attesting Witnesses signed the alleged Will though in the Affidavit of Mr. Akram H. Khan Advocate, it is stated that he alongwith Shri Shreenivas Tripathi and Dr. Jayaprakash Hebbar were all present at the residence of the deceased and that they did then and there see the said deceased set and subscribe her signature to the alleged Testamentary Writing.

17. THAT a few months prior to her death, there were constant quarrels between the deceased and the Petitioner as the deceased came to know that he was having an affair with a married woman having a child also and that he was residing in a slum area with her. The said incident greatly shocked the deceased who had declared to the Petitioner that she would revoke the specific legacy given to him as one of the beneficiaries if he married any such lady much below her status in life. The said incident had been conveyed by the deceased to my mother being her only sister and in whom the deceased confided all her problems and who could also look to my mother for advice. The deceased was very particular about the family reputation and wanted the Petitioner to marry a girl from a decent family of her status.”

“19. THAT neither I nor my mother nor other members of the family were informed about the murder of the deceased on 19th March, 1993. In fact, the Respondent performed all the funeral rites of the deceased and my mother was not even informed about the death of her sister nor called to pay her last respect to the deceased. The members of our family only came to know about the death of the deceased through Mr. Pradeep Manek Shahani, on the night of 20th March, 1993 only after all the funeral rites were over. The next date, when we went to visit, the Petitioner said that no one is allowed, everything is sealed as the Police was interrogating. On our insistence, we forced our way and the Inspector asked the Petitioner to make us sit in the house and to our surprise, nothing was sealed and the Petitioner had all the keys to the cupboard etc.”

(h) It is alleged that the Accused No. 3 has not acted in good faith. In an attempt to make out a false case for his client, the Accused No. 3 has ventured beyond his duties as an advocate and has with ulterior motives made false and defamatory allegations

against the complainant in a wild, irresponsible and reckless manner. The Accused No. 3 has made false and defamatory allegations and published the same with malafide and express malice and intending and/or knowing and/or having reason to believe that the allegations made in the petitions are bound to harm the reputation of the complainant. It is further alleged that the Accused No. 3 also refused to divulge the information with regards to his residential address and other details.

5. The learned Magistrate recorded the verification statement of the complainant. By order dated 3rd September 2012, the learned Magistrate was pleased to issue process against the Accused for the offences punishable under Section 500 of IPC. While issuing process the learned Magistrate has taken into consideration the fact that the Accused Nos. 1 and 2 had filed a petition for Revocation of Probate which contained defamatory statements against the complainant. The said petition was signed by the Accused and drawn up by Accused No. 3. The learned Magistrate also relied upon some decisions of the Court and was satisfied that there is a reasonable ground to proceed against the Accused for the said offence.

6. The Respondent No. 2 challenged the order issuing process before the Sessions Court at Bombay by preferring Criminal Revision Application No. 913 of 2012. The said application was allowed vide order dated 11th October, 2013 and the order of process issued against the Respondent No. 2 was set aside. Being aggrieved by the said order dated 11th October, 2013 the present Applicant has preferred this Revision Application.

7. Mr. Jaisinghani, the learned Counsel for the applicant advanced the submissions challenging the impugned order, which can be summarized as follows;

- I) The learned Sessions Judge has committed an error in setting aside the order of process issued against Respondent No. 2.
- II) The learned Magistrate has issued the process on the basis of the averments in the complaint, the verification of the documents placed before the Court and was of the *prima facie* opinion that complainant has made out reasonable ground to proceed against the accused for the offence punishable under Section 500 of I.P.C.
- III) The Sessions Court has traveled beyond the scope of Section 397 of Cr.P.C. while setting aside the impugned order of process.
- IV) In the complaint, sufficient circumstances were set out to

show that *prima facie* case is made out against the Respondent No. 2, who had drafted/filed/published the petition on behalf of Respondent Nos. 3 and 4 and has acted with express malice.

V) The learned Sessions Judge has erred in holding that the Respondent No. 2 was an advocate and it was essential on the part of the complainant to prove “Express Malice” even prior to issuance of process. The Court failed to appreciate that the evidence could be led by the complainant only after the process was issued and that the accused appeared before the Court to face the prosecution.

VI) The petition for Revocation of Probate was admittedly drafted, filed and published by Respondent No. 2. The allegations contained in the affidavit in support of the Caveat filed by the deceased testators, sisters, daughters have been reproduced verbatim by the Accused. The contents of the Revocation Petition were intended to cause harm to the reputation of the complainant.

VII) The Respondent No. 2 had made the publication knowing that the contents of the Revocation Petition were false. The addition of the word “probably” in the Revocation Petition establishes beyond the manner of doubt that the accused were aware and conscious of the fact that the statement made therein by using the word “probably” were completely false. The word

“probably” unequivocally establishes the want of good faith and the express malice on the part of the Respondent No. 2.

VIII) The expression “Express Malice” means bad faith or the lack of good faith, which has to be established by the complainant in a complaint for defamation. In the present case, the bad faith of Respondent No. 2 is writ large on the face of record. He has acted with express malice.

IX) In a prosecution for defamation, a member of the Bar does not enjoy full privilege. The advocate who makes defamatory statements has no protection than a layman to bring the case under Exception 9 to Section 499. The burden of proof would be upon him.

X) The defence under Exception 9 to Section 499 I.P.C. which was raised and considered by the Sessions Court could be considered at the time of trial. The good faith which is contemplated under the said Exception is required to be proved in evidence during the trial and such a defence cannot be considered at this stage.

XI) The offence of defamation would be made out whenever the insinuation is intended to cause harm to the reputation or the person making it has reason to believe that such imputation will

harm the reputation of such person.

8. The learned Counsel for the applicant has placed reliance upon the following decisions;

Subramanian Swamy V. Union of India¹ ; M. C. Verghese Vs. T. J. Ponnan and Anr.² ; Filomeno Pereira Vs. Joao Lourenco Fernandes and Ors.³ ; Thangavelu Chettiar Vs. Ponnammal⁴ ; Mahendra Raghunathdas Gupta Vs. Vishvanath Bhikaji Mogul and Ors.⁵ ; Dr. Jatish Chandra Ghosh Vs. Hari Sadan Mukharjee and Ors.⁶ ; Miss. Kamalini Manmade Vs. Union of India⁷ ; Navin Parekh Vs. Madhubala S. Sharma and Ors.⁸ ; Smt. Nagawwa Vs. Veerana Shivalingappa.⁹ ; M. K. Prabhakaran and Anr. Vs. T.E. Gangadharan and Anr. 2006.¹⁰ ; S. K. Sundaram : IN RE.¹¹ ; Amar Chand Agarwalla Vs. Shanti Bose and Anr. Etc.¹² ; M. Y. Shareef and Anr. Vs. Hon'ble Judges of the Nagpur High Court and Ors.¹³ ; C.N. Rudramurthy Vs. K. Barkathulla Khan and Ors.¹⁴ ; and Tulsidas

Amanmal Karani Vs. B. F. Billimoria.¹⁵

1 (2016) 7 SCC 221

2 1969 (1) SCC 37

3 1981 Cri. L.J. 117

4 AIR 1966 Madras page 363

5 (1997) 5 SCC 329

6 1961 AIR 613 SCR (3) 486

7 1965 BLR Vol.69 page 512

8 1992 Mh. L.J. page 1409

9 AIR 1976 SC 1497

10 2006 Cr. L.J. 1872

11 (2001) 2 SCC page 171

12 (1973) 4 SCC 10

13 AIR 1955 SC 19

14 C.N. Rudramurthy Vs. K. Barkathulla Khan and Ors.

15 1932 BLR Vol. 34 page 910 (DB)

9. Per contra, Mr. Arif Bookwala, the learned Senior Advocate appearing for the Respondent No. 2 submitted that prosecution of the said Respondent amounts to an abuse of process of law. The Complaint does not make out the offence of defamation against the Respondent No. 2. The Sessions Court has passed a well reasoned order setting aside the order issuing process which does not warrant interference. It is further submitted that the Respondent No. 2, is a practicing solicitor for the last more than 50 years in this Court and during the course of his professional activities, he must have drafted and defended several cases on the instructions of his clients. Any pleading or affidavit that a solicitor or a Counsel drafts and/or settles is purely on the instructions of the client. It is his client, who verifies the truth of the contents of the pleading. The concerned advocate merely signs at the bottom of the pleading for the purpose of identifying the client. It is submitted that the revocation petition in the present case was filed on the original side of the High Court under the provisions of Section 263 of Indian Succession Act, 1925. It is submitted that the averments made in the complaint were misleading. In paragraph 9 of the complaint, it is alleged that on or about 4th August, 2011 Accused Nos. 1 to 3 filed a Petition for Revocation of the Probate granted to the complainant which contains false and defamatory statements and allegations against the complainant. Similarly, in paragraph 11 of the complaint, it is alleged that

the said petition which has been filed in the Bombay High Court has been signed by Accused Nos. 1 and 2 and also by Accused No. 3. In paragraph 12, it is stated that it will be evident from the reading of the Revocation Petition that Accused No. 3, in an effort to make out some sort of challenge to the Will, has copied almost verbatim certain allegations which were made in the affidavit in support of the Caveat filed by Shanta M. Joukani, Chandrakanta Agarwal and Anita Advani with reference to the aforesaid averments made in the complaint. The learned Counsel for the Respondent No. 2 submitted that the averments were false and malafide. Respondent No. 2 has not signed the petition. He is neither the Petitioner nor does he know any of the Respondents/Accused. He has acted purely on the basis of the instructions given to him by his clients being Respondent Nos. 3 and 4. Respondent No. 2 is not the author of the alleged defamatory statement. The said averments which were reproduced by Respondent Nos. 3 and 4 were already existing and published by deponents of the earlier affidavit dated 8th September, 1993 filed in support of Caveat in Testamentary Petition No. 222 of 1993. It is further submitted that the Petition as well as verification clause of Revocation Petition is signed by Respondent Nos. 3 and 4 and not by Respondent No. 2. The averments made in the complaint, which purportedly cause defamation of the complainant, were verified by Respondent Nos. 3 or 4. The complainant did not choose to file

any complaint against the deponents in the affidavit dated 8th September 1993. The complaint is filed against the Respondent No. 2 being a practicing solicitor with a view to pressurize him to withdraw from the matter. It is submitted that Revocation Petition was filed on 4th August, 2011 to revoke probate dated 27th October, 2005. The Respondent No. 3 was granted liberty to amend the Petition filed in this Court on 4th October, 2011. The Revocation Petition was admitted by the High Court in March, 2012 and the impugned complaint was filed on 4th May, 2012. The sequence of the aforesaid events clearly reflects that the complaint is an afterthought and filed with an intention to frustrate the Revocation Petition. The learned Magistrate has issued the process under the belief that the petition was signed by the Respondent No. 2. It is submitted that the learned Sessions Judge has considered the position in law and has set aside the order of process. If the case of the complainant is accepted then a situation would arise where no advocate or solicitor will be able to draft any pleading or affidavit on the instructions of the client out of fright being leveled as a person making defamatory statement.

10. The learned Counsel for the Respondent No. 2 also relied upon the some of the decisions cited by the Counsel for the applicant and the decision of the Madras High Court in the case of *K. Pannai Sethuraman*

Vs. A.R. Sethupathy¹⁶

11. I have perused the contents of the revision application and its annexures as well as compilation of documents placed on record by the learned Counsel for the applicant. The question which falls for consideration is, whether the solicitor who drafted the Revocation Petition and lodged the same on behalf of his clients can be prosecuted for an offence of defamation on the basis of the averments reflected in the Revocation Petition. The complaint was filed by the applicant against the Respondent Nos. 2 to 4. The Respondent No. 2 was arraigned as Accused No. 3 in the said complaint. The learned Magistrate recorded the verification statement and issued the process against all the accused for the offence punishable under Section 500 of I.P.C. Perusal of the said order indicates that the learned Magistrate has taken into consideration the complaint, verification statement and documents. The order issuing process shows that the Court has considered the fact that the Accused Nos. 1 and 2 filed the petition for Revocation of Probate which contains false and defamatory statement against the complainant. The petition contains false and defamatory statements, which are incorporated in paragraph 9 of the complaint. The complainant has alleged that the petition has been signed by accused and drawn by Accused No. 3. The Accused have made

¹⁶ (2008) Cri.L.J.3155

and published the Revocation Petition containing false and defamatory statements intending to and/or knowing and/or having reason to believe that the statements and allegations are bound to harm the reputation of the complainant. The learned Magistrate, therefore, relying upon decisions cited by Advocate for complainant and the facts in complaint verification and documents, issued the process on the ground that there is reasonable ground to proceed against the Accused for the said offence.

12. The Revocation Petition is a part of the compilation filed in this proceeding. On going through the said petition, it is apparent fact that the Petition was filed by Shanta Mirchandani and Lachmi Mirchandani, Respondent Nos. 3 and 4. The complainant was Respondent in the said Petition. At the bottom of the said Petition, it appears that the Petition was signed by the Respondent Nos. 3 and 4 as Petitioners and by the Respondent No. 2 as an advocate for Petitioners. It is also reflected that the petition is drawn by M/s. Ranjit & Co. It would be pertinent to note that the verification clause of the said Petition clearly indicated that the Petition is affirmed by Respondent No. 3 herein by stating that, "I, Shanta Mirchandani, Petitioner No. 1 above, do hereby solemnly declare that what is stated in paragraphs 1 to 5, 8, 10, 11, 12 and 14 of the Petition is true to the best of my own knowledge and what is stated in Paragraphs 6, 7, 9, 13

and 15 to 30 is stated on information and belief and I believe the same to be true.”

13. The petition was declared before the Notary on 4th August, 2011. It is therefore crystal clear that the Petitioner is not the author of the averments made in the Revocation Petition. Respondent No. 2 has drawn the petition and has signed the same as the advocate for the Petitioners. The complainant therein has drawn inferences by attributing malice to Respondent No. 2. It cannot be said that the Respondent No. 2 has traveled beyond the scope of his advocacy. He has provided legal assistance as a professional to the Petitioners therein. It would be an abuse of process of law to prosecute him for the offence of defamation. Another glaring fact which requires to be mentioned is that in the entire Revocation Petition, while making the averments in the Petition in every paragraph, it has been stated that the averments were made by the Petitioners as the paragraph begins with the words “Petitioners state that”. By any stretch of imagination, it cannot be said that the Respondent No. 2 in any manner has made the averments. It would not be out of place to mention that the advocate or solicitor is discharging his professional duties, while representing his clients in the Court and unless he crosses the boundary of his professional duty, he cannot be attributed with any malafides of acting

in connivance with his clients. The submissions advanced by learned Counsel for the Respondent No. 2 deserve to be accepted as any pleading or affidavit that the advocate or solicitor drafts and/or settles is purely on the instructions of his client. In the present case, as noted above, the Petition is verified by the Respondent No.3. It is filed by Respondent Nos.3 and 4. The Respondent No. 2 has acted as a solicitor, who drafted the Petition and lodged the same on behalf of the said petitioners who had verified the contents of the Revocation Petition.

14. The complainant has reproduced certain paragraphs from the Revocation Petition to contend that the imputations therein are defamatory. According to complainant the said statements clearly harm the reputation of the complainant. The said assertion gives an impression that the complainant is a dishonest man, who has perpetrated frauds on the Accused Nos. 1 and 2 as well as on the Court. It also indicates according to complainant that the complainant is involved in forgery of documents and has used the said documents to some properties belonging to others and that he can go to the extent of killing persons to grab the property. Impression is also created allegedly, that the complainant is an immoral person who commits adultery. These averments have lowered down the moral and intellectual character of the complainant. The complainant also

contends that the Accused No. 3 (Respondent No. 2) was aware that his clients Accused Nos. 1 and 2 were intending to file a Petition more than 18 years after the death of late Ruki, and that during the said period, they did not claim any right in the estate of late Ruki. The Accused No. 3 in an effort to substantiate the challenge to the Will has copied almost verbatim the allegations which were made in the affidavit in support of Caveat filed by Shanta Joukani and others. However, the inferences drawn by the complainant attributing the act of causing defamation to the Respondent No. 2 are based on the surmises which are unsupported by any evidence. As stated above, the averments in the petition were made by Respondent Nos. 3 and 4 and not by the Respondent No. 2, who acted as a solicitor. It cannot be assumed that the Respondent No. 2 has copied the allegations made in the affidavit in support of the Caveat since the contents of the petition were made at the instance of the petitioners therein. The complainant has roped in Respondent No. 2 in the complaint by alleging that he has acted with express malice in making false and defamatory statements and allegations contained in the petition. Except making bald averments, there is nothing on record to corroborate the said assertion. The complainant has also alleged that the Respondent No. 2 has used the word probably, whilst stating that prior to the death of the deceased, there were constant quarrels between the deceased and the complainant as the

deceased came to know that he was probably having an affair with the married women having a child and that she was residing in a slum area. The learned Counsel for the complainant was trying to canvass that the Accused were not sure whether the complainant was having such an affair and has deliberately used the word probably with malice. It is observed hereinabove that the averments made in the Revocation Petition in no manner are attributed to the Respondent No. 2 and in any case, it is the figment of imagination of the complainant as to manner in which the word probably is being interpreted to attribute malice to Respondent No. 2. It is pertinent to note that, the said proceedings are still pending in the Court. The declaration/verification is drawn by the petitioners in the said Petition. The Respondent No. 2 has signed the Petition as an advocate as required under the law and without such identification, the Petition cannot entertained by the registry. The complainant has however, given an impression that the Respondent No. 2 himself is a signatory to the Petition, and has equated him with the Respondent Nos. 3 and 4, who had filed the said Petition. It appears that the trial Court is also influenced by the fact that the Revocation Petition is signed by the Respondent No. 2, while passing the order issuing process. The learned Sessions Judge has not committed an error, while allowing the revision application preferred by the Respondent No. 2. The Revisional Court has ample powers to exercise

the revisional jurisdiction under Section 397 of Cr.P.C. and to set aside the order of process. The Sessions Court has analyzed the factual aspects of the matter and has considered the rival contentions while passing the impugned order. The Sessions Court has also appreciated the penal provision and judicial pronouncements placed for consideration by the parties. After hearing both the parties, the learned Sessions Judge has passed the impugned order by giving reasons in support of the said order. The learned Judge has taken note of the alleged defamatory statements made in the Revocation Petition and the averments reproduced from the affidavit filed by Respondent No. 3 and others which, according to the complainant, has resulted in defamation as envisaged under Section 499 of I.P.C. While reproducing the said averments, the learned Judge has observed that, it is not the case of the complainant that in earlier petition filed by him for grant of probate, the Respondent No. 2 had appeared and filed the affidavit and therefore it is difficult to accept that he has reproduced the allegations made in the said affidavit in Revocation Petition on his own. It is further observed that it is not the case of the complainant that the Respondent no. 2 was knowing him prior to drafting of Revocation Petition. After going through the entire complaint of the material available on record, it can be said that the Respondent no. 2 was not having personal knowledge about the filing of the earlier affidavit or about the character of

the complainant and hence, it will have to be accepted that whatever allegations made in the revocation petition were made on the basis of the instructions of the Respondent Nos. 3 and 4. The learned Judge has also considered the question as to whether the Respondent No. 2/Solicitor can be held liable for making such statement even if it is accepted that they are defamatory. Reference was made to the decision in the case of ***Tulsidas Amanmal Karani (Supra)***. The learned Judge after analyzing the observation made in the said decision, observed that even at the stage of issuance of process, the complainant has to prove express malice on the part of the concerned advocate against whom the order of issuance of process is sought. The learned Judge also referred to the decision in the case of ***Navin Parekh (Supra)*** and has observed that unless and until express malice is proved by the complainant against the advocate, he cannot be held liable for the offence of defamation. It was concluded by the Sessions Court that, the complainant has failed to prove express malice on the part of accused or an advocate and hence, the Court has to presume that applicant acted in good faith; and no action can be initiated against him in view of Exception 9 to Section 499 of I.P.C.

15. The word “prove” may mean that the fact has to be proved during the trial. However, even to hold prima facie that there was an express

malice, there has to be cogent material on record to infer express malice and the Accused cannot be subjected to prosecution only on the bald statements made by the complainant, alleging that there was express malice in making false and defamatory statements by Accused No. 3. Upon reading the entire complaint, it cannot be said that the Respondent No. 2 is having any personal malice against the complainant. It would be pertinent to note that when the earlier affidavit is filed in which similar allegations have been made against the complainant, he did not choose to file any complaint against those who initially made such allegations. It has to be noted that the said affidavit was filed by Respondent Nos.3, 4 and others.

16. In the recent decision of the Supreme Court, in the case of ***Subramanian Swamy (Supra)*** the constitutional validity of Section 499 of I.P.C. was questioned. The learned Counsel for the applicant pointed out the observations of the Court in Paragraph 187, 188 and 189 of the said decision. It is observed by the Apex Court that while dealing with the Eighth Exception and Ninth Exception appended to Section 499 of I.P.C., it would be necessary for the accused to prove good faith for the protection of interest of person making it or of any other person or for public good. It is also observed that good faith requires care and caution and prudence in the background of context and circumstances. In the case of ***M.C. Verghese***

(*Supra*), it has been ruled that a person making libellous statements in his complaint filed in the Court is not absolutely protected in a criminal proceedings for defamation for under Eighth Exception and illustration to Section 499 of I.P.C.. The statements are privileges only when they are made in good faith. In the decision of the Full Bench of Madras High Court in the case of *Tiruvengada Mudali Vs. Thirupurasundari*, the aforesaid observations were made by Full Bench. The learned Counsel for the Applicant also relied upon the decision in the case of *S.K. Sundaram (Supra)* on the issue of publication and pointed out the observations of the Court that by appending copy of telegram to the complaint, it has resulted in publication.

17. In the case of *Tulsidas Amanmal Karani (Supra)*, this Court has considered the scope of exception 9 to Section 499 of I.P.C. The learned Counsel for the applicant submitted that the Sessions Court has erred in relying upon the said decision in favour of accused. It is submitted that the law pertaining to the prosecution for defamation has been codified in the form of Sections 499 and 500 of I.P.C., it is but proper that the advocate who is sought to be prosecuted criminally for such defamatory words spoken or uttered during the conduct of a trial should be required to bring his case within exception 9 to Section 499.

18. Mr. Bookwala however, pointed out the factual aspects in the case of Tulsidas Karani. The Accused, who was present in the Court during the hearing of case, stated that one Bharmal who is an insolvent is put up by the attorney Mr. Tulsidas who is also an insolvent. Mr. Tulsidas Karani was not present in Court. Mr. Billimoria who uttered these words declined to withdraw the said statement. On the next day, letter was sent to Advocate Billimoria to withdraw the allegations. He stated that he has not made the statement that Bharmal was put up by Mr. Tulsidas and the statement regarding insolvency was made on instructions. In pursuance to that Tulsidas who was the solicitor filed a complaint of defamation against Mr. Billimoria. The learned Magistrate conducted an enquiry and refused to issue process. In the facts and circumstances of the said case the Court observed that the statement is defamatory and the question that arises, whether case is covered by Exception to Section 499. The Court further observed that a member of the Bar in this country has no absolute privilege. Strictly speaking an advocate who makes a defamatory statement in the conduct of a case has no wider protection than a layman and he has to bring his case within the terms of exception 9 to Section 499, and under Section 105 of the Indian Evidence Act, the burden of proof would normally be upon him. It was also observed that in practice the Courts have held on grounds of public policy that an advocate is entitled to

special protection, and that if an advocate is called in question in respect of defamatory statement made by him in the course of his duties as an advocate, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice. The Court then concluded that, the findings of facts in that case are that, the statement attributing insolvency to Mr.Tulsidas was made by Mr.Billimoria on instructions received from his clients and that there was no malice on his part. The Court refused to interfere in the order dismissing complaint. It is thus clear that in the said proceedings the advocate had made the statement which was defamatory in nature, while conducting the proceedings in the Court but took a stand that it was made on instructions from client. The ratio of the case in sum and substance is, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice. It would be pertinent to note that the case is hand stands on a better footing as the Petition was filed by the Respondent Nos.3 and 4.

19. In the case of *Dr. Jatish Chandra Ghosh (Supra)*, the appellant's claim of absolute privilege as a member of Legislative Assembly was rejected and the prosecution was launched against him under Section 500 of I.P.C. In paragraph 8 of the said decision it was observed that the legal

position is undisputed that unless the appellant can make out an absolute privilege, in his own favour, in respect of publication which is the subject-matter of the charge in that case the prosecution against him cannot be quashed. It was further observed that the Accused therein has no such absolute privilege, and he must take his trial and enter upon his defence. The Court was considering whether there is absolute privilege in favour of member of the legislature, in respect of a publication of questions which were disallowed in Assembly. The complainant was functioning as Sub Divisional Magistrate against whom scandalous imputations were made intending them to be read by members of public and that the imputations were false and unfounded and had been made with the definite intention of harming or with the knowledge of having reason to believe that they would harm the reputation of complainant. The decision is not at all applicable in the present case.

20. In the case of *Miss. Kamalini Manmade (Supra)* this Court in a Civil Suit for damages for libel had occasion to deal with the issue regarding the privileges conferred on the lawyers. It was held that English Common Law rule pertaining to absolute privilege enjoyed by Advocates and others to words spoken or uttered during the course of Judicial Proceedings is applicable in India to Civil Suits. In the facts of that case the

Court observed that having regard to the fact that the alleged defamatory statements were made on an occasion which was absolutely privileged, the Suit to recover damages for the slander would not be maintainable. The Court, however, distinguished the criminal prosecution and referred to case of *Tulsidas Karani (supra)*. The said decision is not applicable in the present case as the Respondent No.2 did not claim any absolute privilege. The learned Counsel for the applicant also relied upon the decision in the case of *M.Y. Shareef (Supra)*, whilst dealing with a case against the contempt of advocates held that there was considerable misconception amongst certain sections of the bar when an advocate was acting in accordance with instructions of his clients he was discharging his legitimate duty to his client even when he signs an application or pleading which contains matter scandalizing the Court. It was further held that such a misconception was to be rooted out with clear and emphatic pronouncement and it should widely be made known that Counsel who signs applications or pleadings containing matters scandalizing the Court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefore are themselves guilty of contempt of Court. In the light of the observations in the said decision, the learned Counsel for the applicant submitted that the Supreme Court has clearly laid down that an advocate cannot get away with signing and filing pleadings which contain matters

scandalizing the Court or containing obviously defamatory allegations against persons by contending that he did so on the instructions of his client. The said decision was delivered in a different context and is not applicable in the present case. The appeal was arising out of contempt proceedings against two senior members of the Nagpur bar and one of their client. An application for transfer of the case from one Bench to another Bench of the High Court was made on the ground that the observations and references with the Supreme Court by the judges created a bona fide belief in the applicants mind that they are prejudiced against him and had made up their minds and indicated that he shall have to go in appeal to the Supreme Court. The references to the Supreme Court were absolutely unnecessary and left no doubt in the applicants mind that he would not receive justice at the hands of the Hon'ble Judges. The said application was signed by the Applicant as well as the two appellants as a Counsel for the applicant. The said application was rejected in due course. The Court thereafter issued notice to show cause why they should not be committed for contempt for scandalizing the Court with a view to perverting the due course of justice by making statements in the transfer application impeaching the impartiality of the Judges. In the aforesaid circumstances the Hon'ble Supreme Court made the aforesaid observations. It was also observed that it is the duty of the advocate to advise his client for

refraining from making allegations of this nature in such applications. It was also observed that when the fact is recognized that the members of the Bar have not fully realized the implications of their signing such applications and are firmly under the belief that their conduct in doing so is in accordance with professional ethics, it has to be held that the act of the said two appellants was done under a mistaken view of their rights and duties, and in such cases even a qualified apology may well be considered by a Court. The learned Counsel for the applicant in support of his submissions that the advocate acts as an agent on behalf of his clients, relied upon the decision of the Supreme Court in the case of ***Mahendra Gupta (Supra)*** the said decision is also not applicable to the facts of this case. In the said case the Court was dealing with an issue in relation to the payment of rent of tenant to the landlord. The advocate had sent the notice on behalf of his client (landlord) and the tenant was in dilemma as to whom the rent is to be paid and forwarded the rent to the advocate in pursuant to receipt of the notice. In these circumstances the landlord contended that there was no payment of rent from the tenant and the rent which has been forwarded to the advocate does not qualify the legal requirement. In these circumstances the Court has observed that the advocate had forwarded a notice and thereby obviously acted as an agent on behalf of his clients. In the case of ***Thangavelu Chettiar (Supra)*** the

Madras High Court has held that the defamatory material was contained in a plaint filed in Court and filing of such plaint amounted to publication. Learned counsel submitted that even in the present case, it is not in dispute that the Revocation Petition was filed by the Respondent No. 2, who has not only drafted the defamatory material but has published the same. The Respondent No. 2 is not only the maker of the defamatory material but even the publisher of the same and can be proceeded against in a criminal prosecution for defamation. In the said decision the Petitioner was convicted under Section 500 of I.P.C. for describing the complainant as concubine of PW 2. The Petitioner had adverted to Exception 9 to Section 499 of I.P.C. The said plea was not raised before trial Court and thus, it was observed that in the absence of plea it is open to the Court to presume the absence of such circumstances. The Court observed that the evidence on record could not establish the plea of good faith to invoke the benefit of exception 9. It was observed that there can be no doubt that the Petitioner therein has unnecessarily made a defamation in a Suit for recovery of money and it shows lack of good faith. Similarly, on the point of the publication the learned Counsel for the applicant relied upon the decision of the Kerala High Court in the case of *M.K. Prabhakaran (Supra)*, a petition for quashing of a criminal complaint under Section 500 of I.P.C. was dismissed and it was observed that, once a statement has been filed in

a Court of law, that statement can be taken as published and if such a statement amounts to *per se* defamatory, it is the duty of the accused to establish that they are justified in making such a statement under Exception 9 to Section 499 of I.P.C. The statements in the revocation petition were made by the Petitioners therein and the Respondent No. 2 had acted as an advocate. In the light of observations made herein above, it cannot be said that the Respondent No. 2 is responsible for publication of the alleged defamatory statements when he is not the author of the said imputations.

21. The Counsel has also tried to distinguish the decision in the case of *Filomeno Pereira (Supra)* and *Navin Parekh (Supra)* which were relied upon by the Respondent No. 2 in support of the Revision Application before the Sessions Court. In the case of *Filomeno Pereira*, the affidavit to oppose injunction was drafted by advocate for his client, who was Defendant, under his instructions. The Complaint was filed against the advocate for defamation. In the affidavit, the Plaintiff was called as Idiot. It was observed by the Court that even if it was the lawyer who has drafted the affidavits, there can be no offence against him. The lawyer owes a duty to his client and he must carry out faithfully his client's instructions. The learned Counsel for the applicant however tried to contend that the Court

had quashed the proceedings, as there was nothing stated in the complaint regarding the connection of the advocate with the affidavit filed in the Court which contained the defamatory material and there was absolutely no material to indicate malafides on the part of the advocate. However, the Court has reiterated the position in law that when wild and baseless allegations are made in the pleadings, an advocate who has drafted and/or signed and/or filed such document can be prosecuted for defamation if it is shown prima facie that the advocate had not acted in good faith. It is true that the advocate has no absolute privilege and he can be subjected to action, if he did not act in good faith in discharge of his professional duties on behalf of his clients. It would be relevant to reproduce the observations made in paragraph 8 of the said decision.

“8. The learned counsel for the Petitioner (sic) has submitted before me that the petitioner has drafted the affidavits. Now, even assuming that it was the lawyer who has drafted the affidavits, there can be no offence against him. The lawyer owes a duty to his client and he must carry out faithfully his client's instructions. It is the lawyer's duty to plead allegations in the plaint or written statement or other pleadings, such as affidavits, on the instructions of the client. It is no doubt true that the counsel must perform his duties with discretion for example he should not plead what are obviously irrelevant, wild or baseless allegations. It should also be remembered that the lawyer is not the Judge and it is not for him to decide whether the allegations made by his client against the opponent are true or false. Except in exceptional circumstances, he is bound to act on the client's instructions. If serious and baseless allegations are made against the opponent a lawyer may make himself liable for prosecution but in that case it has to be clearly established that he acted in bad faith or maliciously. The lawyer can certainly rely on Exception 9 to S. 499

I.P.C. A Court may presume that a lawyer who has signed the pleadings has acted bona fide and without malice. Unless such presumption is made no lawyer can discharge his duties towards his clients. If a lawyer makes himself liable for prosecution every time he makes a serious allegation in a pleading under instructions of his clients, it would be impossible for him to carry on his duties. In this case there was nothing before the Magistrate except there two affidavits and some notices issued to the accused including the lawyer before the complaint was filed. There is absolutely no evidence of malice or mala fide on the part of the counsel. I, therefore, am of the opinion that no prima facie case of defamation has been made out. Thus, being so, the Court should not have issued summons against the petitioner. Prosecution of the petitioner would clearly be abuse of the process of the Court and would not be in the interest of justice.”

22. Thus, a Court may presume that a lawyer who has signed a pleading has acted bonafide and without malice and unless such presumption is made no lawyer can possibly discharge his duties towards his clients. Even in the present case, there is absolutely no evidence of malice or a malafide on the part of Respondent No. 2 and no *prima facie* case of defamation has been made out against him.

23. In another decision of this Court in the case of **Navin Parekh** the prosecution was between the advocates who were the petitioner and respondent therein. It was held that for giving notice containing statements allegedly amounting to defamation the lawyer is not liable to be prosecuted for defamation in respect of such statements in the absence of

malice having been alleged. Mr. Jaisinghani the learned Counsel for the applicant submitted that the aforesaid decision was arising out of letters addressed by an advocate on behalf of his client and there was nothing to suggest that the advocate in this particular case had not acted in good faith and/or had abused his privilege and that there was no publication since the letters were sent only to the complainant not to any third person. The Court reiterated the position in law that where it is shown prima facie that the advocate had not acted in good faith and had abused his privilege. Process can be issued against such an advocate in a complaint for defamation. Endeavor is being made by the Counsel for the applicant to distinguish the said decision and also to suggest that in any case, law relating to defamation even at the instance of the advocate was reiterated by the Court. Mr. Bookwala, has also strongly relied upon the observations made in the said decision. He pointed out the observations in paragraph 12 of the said decision wherein the arguments advanced by the Petitioner therein were summarized to determine as to whether accepting the prosecution case at face value, an offence can be spelt out in law and, consequently, whether on this material a conviction is possible, likely, unlikely or very remote. In paragraph 15 of the said decision of this Court has observed that, on the all important issue that is really the central focal point of the controversy, namely, the lawyer who admittedly functions as an

agent of his client and acts under instructions is entitled to special consideration in law. More particularly, when it was contended that good faith must be presumed in all such cases and, consequently, the ingredient of express malice must be demonstrated before a charge of defamation against a lawyer can be sustained. The Court relied upon several decisions including the decision in the case of *Tulsidas Karani, Filomena Pereira* and concluded that, the concerned advocate has not exceeded the bounds of refrains. He was required to convey what he did in discharge of his professional duties and in doing so he cannot be said to have breached the law. The statements in question were justified and there is not even a tint of any malice on the part of advocate. On the other hand the filing of the complaint was definitely motivated as was evident from the fact that complainant sent copies of it to the threat that criminal proceedings will be instituted if the payments demanded were not paid and that it is this threats that had been followed up in paragraph 24 of the said decision. It was observed that the Courts had classified certain categories of criminal litigations as being unfit for continuance and therefore liable to be quashed. To this class one needs to graft on one more, namely, those cases which as of necessity, must be terminated at the earliest point of time where lawyers get at each other. Even in the present case, the learned counsel for Respondent No.2 has never canvassed blanket immunity for

lawyers with libellous statement. The factual matrix of the aforesaid decision indicates that the lawyer sent letters on behalf of his client alleging that the complainant, who is a lawyer, had acted in highly unprofessional and unethical manner and acted in gross violation of the trust. The Court also made reference to decision of Division Bench of this Court in the case of **Purshottamdas Ranchhoddas**¹⁷. In that decision while dealing with prosecution against a lawyer under Section 499 of I.P.C., it was observed that,

“When a pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose.”

The decision in the case of **C.N. Rudramurthy (Supra)** was placed on record at the instance of the advocate for the applicant to point out that in the light of any decision of Supreme Court on the same issue, judgments of the High Court stands impliedly over ruled.

24. The learned Counsel for the applicant has also relied upon the decision in the case of **Smt. Nagavva Vs. Viranna (Supra)** and **Amarchand Vs. Shanti Bose (Supra)**. The said decisions were cited with a

¹⁷ IX BLR 1287

view to support the submission that the scope of revision under Section 397 of Cr.p.c. is very limited. The learned Counsel harped upon observations of the Supreme Court in the case of Smt. Nagavva, more particularly paragraph 4, where it was observed that the scope of inquiry under Section 202 of Cr.p.c. is extremely limited only to ascertainment of the truth or falsehood of the allegations made in the complaint without advertng to any defence that the accused may have. It is true that at the stage of issuance of process the Court is required to form a *prima facie* opinion and is not expected to conduct detailed inquiry. It would be appropriate to incorporate the observations made by the Supreme Court in paragraph 5 of the said decision.

“5. Mr. Bhandare laid great stress on the words “the truth or falsehood of the complaint” and contended that in determining whether the complaint is false the Court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and established of a *prima facie* case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These

considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminate into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside.

- (1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;*
- (2) Where the allegations made in the complaint are potently absurd and inherently improbable so that no prudent person can ever read a conclusion that there is sufficient ground for proceeding against the accused;*
- (3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible and*
- (4) Where the complaint suffers from fundamental legal defects. Such as, Want of sanction, or absence of a complaint by legally competent authority and the like. The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.”*

25. Similarly, in the case of **Amar Chand Agarawalla (Supra)** the Supreme Court has observed that the prosecution can be quashed only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error of point of law and consequently, there has been a flagrant miscarriage of justice. On analyzing the factual matrix of the said case, it appears that, the Accused therein were prosecuted for the offence under various provisions of I.P.C. Process was issued against the Accused

large volume of oral and documentary evidence had already been let in and the trial had come almost to the closing stage and what remained was only to examine two more witnesses on the side of the prosecution, at that stage one of the Accused preferred Criminal Revision Application before the High Court quashing the charges and the entire proceedings. Similar Revision Application was also preferred by the other Accused. At this stage, High Court quashed charge as well as the entire proceedings that had taken place before the Magistrate. The Accused did not move the High Court at the earlier stage when they were summoned by the presidency Magistrate, nor approached the High Court when the charges were framed against them. In the circumstances, the Supreme Court set aside the order of the High Court. The Court therefore, observed that the inherent jurisdiction can be exercised to quash proceedings in a proper case either to prevent the abuse of process of any Court or otherwise to secure the ends of justice. Mr. Arif Bookwala has relied upon the decision in the case of *K. Pannai Sethuraman* delivered by Madras High Court (supra). The Accused who was an advocate had drafted the plaint in suit in discharge of his professional duties only on the basis of instructions given by the Plaintiff, that is his client. The Court observed that the Accused has acted only as per the instructions given by the Plaintiff. The words found in the plaint have been averred only on the basis of the

instructions given by the Plaintiff. The Accused has written the plaint as an advocate and he cannot be made responsible for the words uttered in the plaint. The Court had also referred to the decision of this Court in the case of *Filomeno Pereira*. It was also observed that, it is a settled principle of law that a lawyer conducting a case on behalf of his client enjoys certain privileges and latitudes and the presumption will be that he has acted in good faith unless, contrary is alleged or established. An advocate will come within the 9th Exception to Section 499 I.P.C. and it will be presumed that he acted in good faith and in the interest of the protection of his client.

26. Applying the ratio laid down in all the aforesaid decision, it is evident that the Respondent No. 2 ought not to have been prosecuted for the offence of defamation. He did not cross the boundary line of his professional duty. The petition was filed on the basis of instructions of his client which is apparent on the face of the record. Merely, because, the complainant has averred in the complaint that there was express malice, it cannot be said that *prima facie* case was made out against the Respondent No. 2. The Petition was verified by Respondent No.3. In each and every paragraph it has been specifically stated that "Petitioner submits". It is apparent that the entire averments found in the Petition have been made

on instructions of Petitioner. There is no malice and even otherwise he has acted in good faith and would be protected by Exception 9 to Section 499 of I.P.C. He cannot be subjected to face the ordeal of trial when prima facie case is not made out to prosecute him. There is no evidence of malice or malafide on the part of Respondent No.2. In the factual matrix and in the light of ratio laid down in several decisions, prosecution of Respondent No.2 would clearly be abuse of the process of the Court and it would not be in the interest of Justice. Time and again it is emphasized that, the trial Courts would be well advised to be cautious while entertaining complaints against legal practitioners. It is only where privileges have been abused, they shall be prosecuted. Although the point involved was very short, the Court was required to write laboured judgment, in view of quantity of submissions and precedents cited by parties. In the facts and circumstances in this case, and for all the reasons stated hereinabove, I do not find that the learned Sessions Judge has committed any error in passing the impugned order. Application is therefore, devoid of merits and deserves to be dismissed.

Hence, I pass the following order.

ORDER

1. Criminal Revision Application No.179 of 2014 is rejected.
2. No order as to costs.

(PRAKASH D. NAIK, J.)

At this stage, the learned counsel for the applicant submits that this is a fit case to certify under Article 134(1)(c) of the Constitution of India as a fit case for appeal to the Supreme Court. He submitted that the question of law is involved in this matter and there is no judgment of the Hon'ble Supreme Court of India, on the issue involved in this matter. I have taken into consideration several decisions of this Court while deciding the issue involved in this matter and this decision is based on settled principle of law and hence I do not think that this is a fit case to grant the prayer made by the learned counsel and hence the same is rejected.

(PRAKASH D. NAIK, J.)