

\$~18

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 12th December, 2018

+ CRL.M.C. 1924/2015 and Crl. M.A. 6872/2015

SHARDA NAYAK

..... Petitioner

Through: Mr. Maninder Singh and Ms.
Aekta Vats, Advocates

versus

STATE GOVT OF NCT OF DELHI & ANR Respondents

Through: Mr. Kewal Singh Ahuja, APP for
the State

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. On the criminal complaint (CC 17/13), instituted on 21.02.2013, by the second respondent (complainant), the Metropolitan Magistrate after holding a preliminary inquiry found, by his order dated 20.06.2014, sufficient grounds to proceed against the petitioner (accused) summoning her for the offence under Section 500 of the Indian Penal Code, 1860 (IPC), the gravamen of the accusations against her in this regard being based on the contents of an e-mail that she had statedly sent to one Mr. Pramod Grover on 20.12.2012 at 07:44:55 hrs (+0530).

2. The petitioner, feeling aggrieved, approached this court under Section 482 of the Code of Criminal Procedure, 1973 (Cr. PC) to seek quashing of the afore said criminal process on the submissions that it is abuse of the process of law setting out certain background facts concerning the affairs of Delhi Public School Society (“DPS Society”) of which she was the Chairperson at the relevant point of time, the complainant being the Principal of one of the schools run by the DPS Society at Faridabad, he statedly being under suspension at that point of time and Pramod Grover, the addressee of the communication, being a Member of the DPS society.

3. By order dated 19.05.2015, notice was issued on the petition. The State / first respondent appeared at the first instance but the controversy having arisen out of a private complaint, it has not filed any reply. The second respondent (complainant) was duly served and entered appearance on 26.04.2016 through counsel. He was granted time to file reply. But, inspite of time being extended for the purpose, he has chosen not to file any reply. By order dated 11.01.2016, the petitioner was granted interim relief to the effect of exemption from personal appearance before the trial court, the said order having continued till date, it being extended from time to time.

4. The second respondent (the complainant), stopped participating in these proceedings with effect from 27.01.2017. There has been no appearance on his behalf for the last seven consecutive dates, same being the position even today. In these circumstances, it has to be assumed that the background facts leading to the complaint being filed

as set out in the petition, *albeit* from the perspective of the petitioner, are not disputed by him.

5. A copy of the criminal complaint in which the impugned order was passed gives the background of the said complaint being instituted with reference to his alleged false implication at the behest of Delhi Public School, Faridabad in a criminal case arising out of FIR no.438/2006 instituted by one Adarsh Kumari. It is stated that the FIR was quashed by the Punjab and Haryana High Court by its order dated 23.03.2010, such order having been upheld by the Supreme Court, the special leave petitions of both the contesting parties therein having been dismissed. The complaint nevertheless would also add that the complainant was suspended on 29.03.2007 and a charge-sheet (presumably for disciplinary action) was issued to him. He also added that he has brought a challenge to the said disciplinary proceedings, which petition at the time of approaching the Magistrate with the criminal complaint, was pending adjudication before the Supreme Court.

6. It is his grievance in the complaint that certain persons named by him were behind the false cases that were instituted against him, one of them having taken over the control of the school managing committee and having addressed certain communication to the Chairman of DPS Society on 04.07.2006. However, the said letter is not the foundation of the criminal complaint case against the petitioner nor was it produced during pre-summoning inquiry before the Magistrate.

7. He referred to the above-mentioned e-mail, though not describing it fully in the averments, referring it loosely as e-mails written to Mr. Pramod Grover, taking exception to the petitioner having questioned the utilization of money by him for defending himself and leveling allegation of he having indulged in bribing people to prolong the litigation.

8. The trial court record has been called for and it would show that during the pre-summoning inquiry, the complainant examined himself (as CW1) and brought on record, a copy of the aforementioned e-mail (Ex. CW1/A) which had been statedly made available to him by the addressee (Pramod Grover), the latter having asked him to explain his conduct in its view. He would also state that Mr. Pankaj Yadav (CW2) the only other witness examined in the pre-summoning inquiry, had also read over the said e-mail, which had been sent by the petitioner to Pramod Grover, he being present at the time at the residence of Mr. Pramod Grover. CW-2, on his part, affirmed before the Magistrate that he had visited the residence of Mr. Pramod Grover on 01.01.2013 to greet him on the New Year day and, during discussion, he “*came across*” the said e-mail.

9. The prime grievance of the petitioner is that the facts and documents were selectively presented before the Metropolitan Magistrate, withholding certain crucial ones which, if borne in mind, would have shown to the court of cognizance, the reality which was different and distinct from the one projected by the criminal complaint. It is pointed out that FIR no.438/06 was not the only

criminal case registered against the complainant, there being another FIR no.142/2011 dated 02.05.2011 registered by police station Old Faridabad, for offences punishable under Sections 420 and 406 IPC. It is stated that the investigation of the said FIR having been completed, a criminal case is pending trial against the complainant in the competent court.

10. It is also the submission of the petitioner that the e-mail to which exception is taken was not initiated on her own, she having only responded to an e-mail earlier sent by Mr. Pramod Grover to her on 17.12.2012 and further that she had sent a reply to the said e-mail at 21:48:59 (+0530) on 20.12.2012 followed by another e-mail sent by Mr. Pramod Grover at 19:21 hours on 20.12.2012, the impugned e-mail having been sent thereafter in response. It is stated that the exchange of e-mails between her and Mr. Pramod Grover had continued even after the incriminating e-mail, his reply e-mail being of 06:22 hours on 20.12.2012 followed by another e-mail sent by her. It is the grievance of the petitioner, and a justifiable one, that presenting one e-mail in isolation out of a series of e-mails which had been exchanged was selective and designed to create a wrong impression as to the background. The copies of the e-mails which preceded the incriminating one and also those which followed it have been placed on record by the petitioner to show the conversation in its proper perspective. It is her submission that attribute of "bribery" is with reference to the criminal case which had been pending against the complainant at that point of time.

11. The petitioner points out that Mr. Pramod Grover, the addressee of the e-mail in question was himself a Member of the DPS Society and since he had raised certain issues about the litigation concerning the complainant in which more than Rs.2 Crore had been spent on litigation, wastefully in his view, she as the Chairperson of the DPS Society was bound to reply to his concerns and, thus, the e-mail sent by her was a privileged communication. It is also pointed out that the e-mail was sent on the personal ID (pramodgrover@hotmail.com) of Mr. Pramod Grover, he having not been authorized by her to share the same with any third person and the communication being a privileged one there has been no publication of the incriminating material by her.

12. It is noted from the testimony of the complainant (CW1) and the other witness (CW2), that the incriminating e-mail was shown to the said persons by Pramod Grover. Pramod Grover himself has not been examined in the pre-summoning inquiry to explain the justification for he doing so, particularly in the presence of a third person.

13. The petitioner relies, *inter alia*, on decision of a division bench of the High Court of Calcutta in case reported as *In re: Asit Kumar Dasgupta, C.M.M., 1997 SCC OnLine Cal 198*, which arose out of proceedings relating to Contempt of Courts Act, 1971 wherein the issue of publication had been raised. The division bench observed thus :-

“40. Publication as contemplated in section 2(c) of the Act, and as would thus be understood in the context in which it has come to be mentioned, with relation to the attributes of the acts constituting

contempt, should in my opinion be given the meaning as is likely to be used in common parlance and in the ordinary course of things. Publication, as would thus be understood would come about if someone charged with contempt publishes the contemptuous words, that is to say publishes then in the sense that is widely accepted as publication in common law. He can be deemed to be guilty of contempt only if the offending words attributed to him are published by him, that is to say if he conveys the offending words to the public at large or even to a limited class of the people. Not only the intention to publish, but the actual act of publication is a necessary concomitant of the essence of publication. Publication may be private or public, in the sense in which its uses may be attributable in relation to the contempt charge, as is specified in section 2(c) of the Act. Whether publicly, or privately, publication of the offending statement has to be made in such a manner so as not to restrict its communication to an individual alone, through a method or by adopting such means which would prevent or preclude any one else from being made aware of the same. The means of communication of the offending statement have to be such, so open that others, the members of the public or even a limited class of persons, have access to the offending statement. If they have the means to know that the offending statement has been made, the publication undoubtedly would come about and the act of publication may be complete. But if there is no publication, that is to say if the offending statement is neither meant for being circulated to the members of public nor are they aware of the same or in other words if the offending statement is meant exclusively to be conveyed to a single individual through a channel which is not available to anyone else, classically as in the present case through a telephone line, the person cannot be

charged with committing contempt within the meaning of section 2(c) of the Act. Publication can be effected or brought about only if the offending statement is circulated for being read or being known by the public at large. The publication may also be effected or brought about by speaking the offending statement in such a manner as to convey the same to the members of the public, say through electronic media or even a normal public address system. Whether by speaking out, or by printing it, or even by writing it in any other manner, if the matter is meant for the consumption of the public at large, or if a situation has been created whereby the public at large has access to the matter, undoubtedly it may amount to publication. But, if the offending statement is made to an individual in a situation, or under a circumstance whereby no one else, except the maker of the statement and its listener, has any opportunity or chance to hear what is being talked about, the conversation shall be amount to any publication at all.”

14. While dealing with the issue of “publication” vis-à-vis the offence of defamation, defined in Section 499 IPC, this court in *S.T.P Singh Vs. Tarsem Singh & Ors.*, 2018 SCC Online Del 9978, decided on 03.07.2018, had held thus : -

“9. It is clear from a bare reading of the above extracted provision that it is not only essential that the impugned imputation harming the reputation of the person in question must be alleged to have been “made” or “published” but also that it must be shown, amongst others, to have directly or indirectly, inter alia, lowered the moral or intellectual character of the said person “in the estimation of others”.

10. The petitioner places reliance on the view taken by a learned single Judge of this court in *Sanjay Mishra Vs. Govt. of NCT of Delhi and Anr.* in Crl. M.C. 3350/2008, decided on 23.03.2012 where in the context of criminal complaint under Section 500 IPC, it was observed that “publication” has a meaning wider in the context of criminal action in contrast to the civil law and would include “a communication to the person defamed alone” and that “the prosecution for defamation in criminal cases can be brought although the only publication is to the person defamed as it is very likely to provoke a breach between the persons involved”.

11. With due deference, this court finds the above view expressed by the learned single Judge in the case cited at bar to be *per incuriam*. The principle that the offence of defamation is committed only when there is a communication to a third party is well settled. [See *Abdul Aziz vs. Maulana Syed Muhammad Arab Saheb*, AIR 1935 Cal 736 : 159 IC 727: 37 Cr LJ 133; *Khima Nand and Anr. vs. Emperor*, 1937 ALJ 128 : 169 IC 622 : 38 CrLJ 806; *Sohanlal Daga vs. Sreechand Daga*, AIR 1941 Cal. 247; *Kundamal vs. Emperor*, AIR 1943 Sind 196 : 45 Cr LJ 105 : 209 IC 234; *Lachhman vs. Pyarchand*, AIR 1956 Raj 169 : 1959 Raj LW 222; *Amar Singh vs. K.S. Badalia*, (1965) 2 Cr. LJ 693; *Challa Subarayalu v. Darbha Ramakrishna Rao*, (1968) 2 And LT 101].

12. The key words in the main clause wherein the offence of defamation is defined by Section 499 IPC are “makes or publishes” the “imputation” encompassing insinuation with the propensity “to harm” the “reputation” of the person against whom the same is directed. For the present discussion, the said clause has to be read in light of the explanations appended thereto particularly the

fourth explanation which excludes from the purview of the criminal offence the imputations with such insinuation as to the character of the affected person unless it is designed to adversely affect the reputation “in the estimation of others”.

13. *It is necessary to focus on the expression “publishes”. The word “publish” is defined by Chambers, 20th Century Dictionary to connote :*

“to make public; to divulge; to announce; to proclaim; to send forth to the public; to put forth and offer for sale orig. any article, new books, newspapers, etc. to put in circulation.”

14. *Halsbury Laws of England (Third Edition) explains that :*

“publication consists in making known the defamatory statement after it has been reduced into some permanent form”

15. *The authoritative commentary on Law of Defamation and Malicious Prosecution (second edition) authored by H.P. Gupta explains the word “publish” as under :-*

“1. To make known or announce publicly; promulgate; proclaim. (2). To print and issue (a book, magazine, map, etc.) to the public. (3) Law to communicate (a defamation) to a third person (4). To print and issue the work of; to publish Hemingway (5). To engage in the business of publishing books, magazines, newspapers, etc. (6) To have one’s work printed and issued.”

16. *Pertinent to note in the context of use of words “in the estimation of others”, the commentary*

on Indian Penal Code by Ratan Lal (2002) in relation to the offence of defamation begins with the general comment that:

“the essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed.”

17. V. Mittar in his commentary on Law of Defamation & Malicious Prosecution (Twelfth Edition) expounds on the subject with reference to fourth explanation thus :-

“And further since in Explanation 4, appended to the section, it is laid down that no imputation is said to harm a person’s reputation unless it lowers him in the estimation of others, it follows that there can be no publication unless it reaches at least a third person, in whose estimation the reputation of the person defamed could possibly suffer.”

(emphasis supplied)

18. Following the view taken by the full bench decision of the Privy Council in *Queen Empress Vs. Taki Husain*, 7A 205 (FB) -4A.W.N. (1884) 340, Allahabad High Court in a very early decision reported as *Khima Nand and Anr. vs. Emperor*, 1936 SCC Online All 307: 1937 CrL LJ 806 held thus :-

“The only rule is that there can be no offence of defamation unless the defamatory statement is published or communicated to

a third party, that is, to a party other than the person defamed...

(emphasis supplied)

19. In a very well researched judgment on the subject rendered by Patna High Court in case reported as *Sardar Amar Singh Vs. K.S. Badalia*, 1964 SCC OnLine Pat 186 : (1965) 2 Cri LJ 693, it was held thus :-

*“One of the ingredients of the offence of defamation is that there should be making or publication of any imputation concerning any person. Such imputation may be words either spoken or written. The defamatory matter has to be published. In other words, it has to be communicated to a person other than the person defamed. The word ‘makes’ in S. 499 refers to the originator of the defamatory matter. I can usefully refer here to Volume III, 6th edition of Dr. Sir Hari Singh Gour's Penal Law of India, page 2340 where the learned author has noted that the word “makes” in S. 499 has been used in its etymological sense as connoting “to make public” or to make known to people in general. Publication implies communication to at least one person other than the person defamed. In other words, communication must be to a third party, that is, to a party other than the person defamed (vide *Khima Nand v. Emperor*, 38 Cri LJ 806 (All)...”*

(emphasis supplied)

20. Similar questions had arisen before the High Court of Andhra Pradesh in case reported as *Challa Subbarayudi Vs. Darbha Ramakrishna Rao*, 1967

SCC Online AP 137 : (1968) 2 ALT 101 and the following view was taken :-

“13. Publication is the communication of the words or doing the defamatory act in the presence of at least one other person than the person defamed. Communication to the plaintiff himself would not be enough because defamation is an injury to one's reputation and reputation is what other people think of man, and not his own opinion of himself. Publication of the defamatory act or statement therefore is an essential element for the constitution of defamation.”

(emphasis supplied)

21. In the context of similar criminal complaint under Section 500 IPC, the Kerala High Court in the matter reported as *P.R. Ramakrishnan Vs. Subbaramma Sastrigal and Anr.*, 1986 SCC Online Ker 309 : AIR 1988 Ker 18 : 1988 Cri. LJ 124 took the following view :

“....To attract the definition of the offence of defamation as contained in S. 499 of the I.P.C., the imputation should have been made or published “whoever makes or publishes any imputation” are the relevant words employed in the section. The word “makes” is intended to supplement the sense of “publishes.” Those words conjunctively connote “to make public.” It is settled proposition that there is no publication if the libeller merely communicates his libel to the person defamed.” *(emphasis supplied)*

22. *Similar questions arose before the Madras High Court in the case of Smt. Dr. Nagarathinam vs. M. Kalirajan, 2001 SCC Online Mad 355 : 2001 Cri LJ 3007. Drawing strength from the observation of the Supreme Court in Bilal Ahmed Kaloo vs. State of Andhra Pradesh, (1997) 7 SCC 431 : (1997 Cri LJ 4091), albeit in the context of offence under Section 505 IPC, to the effect that the words “makes or publishes any imputation” should be interpreted as “words supplementing to each other”, and that a maker of imputation without publication is not liable to be punished under that section”, the Madras High Court held that “the publication with intention of harming the reputation of the person concerned to make others to know the imputation is the most important ingredient to make out an offence under S. 500 IPC” and further that “there will be no publication, if the complainant alone is informed of the defamatory words”, and also that “a communication to the defamed himself will not be a publication.”*

23. *In view of the above, this court holds that in absence of allegations or evidence showing that the defamatory material was published to an individual other than the person defamed, a case for criminal action for the offence of defamation cannot be maintained.”*

15. It is clear from the material on record that the petitioner never intended the *privileged* communication to be published to a third person. She was only responding in answer to a query raised by an e-mail, she being obliged on account of her position in the DPS society to do so.

16. In above view, the impugned order cannot be sustained. It is set aside. The petition is allowed. The proceedings against the petitioner

in the aforementioned criminal case are hereby quashed. This disposes of the pending application as well.

R.K.GAUBA, J.

DECEMBER 12, 2018/yg

