

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.271 OF 2019

Dr. Mrs. Perola Menon]
Residing at 1101, OLPS,]
Mari Nagar, Mahim (W),]
Mumbai – 400016].... Applicant

Versus

1] State of Maharashtra]
]]
2] Dr. Cawsi Naterwalla]
Partner of M/s. Status Enterprises]
Having his Registered Office at]
13, Daial Mahal, Dalamal Park,]
Cuffe Parade, Mumbai – 400 005]..... Respondents.

Mr. Santosh Ganpatrao Pawar for the Applicant.
Mr. Vinod Chate, APP for the Respondent/State.
Mr. Amol Doijode for Respondent No.2.

CORAM : S. S. SHINDE J.
DATE : 16th August 2019

JUDGMENT :

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 By this Criminal Application the Applicant challenges the order dated 01/01/2019 passed by the learned Additional Sessions Judge, City Civil and Sessions Court, for Greater Bombay in Criminal Revision Application

No.233 of 2018 thereby confirming the order dated 06/11/2017 of the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai. By order dated 06/11/2017, the learned Magistrate issued process against accused Nos.1 and 2 for the offence punishable under Section 500 read with Section 34 of the Indian Penal Code. The said order has been challenged by the Applicant herein, who is the original Accused No.2, by way of a Revision before the Sessions Court. The Sessions Court rejected the said Revision Application, and confirmed the order of issuance of process passed by the learned Magistrate.

3 According to the complainant he is a partner of M/s. Status Enterprises. Accused No.1 is the husband of Accused No.2 i.e. the Applicant herein. The Applicant herein i.e. the original Accused No.2 is a dentist and was practicing with one Nicholson Dental Clinic. The firm of the complainant is the authorized distributor in India of Dental Equipment manufactured by Midmark Corporation. The Midmark Dental Equipment was purchased by Ms. Farida Nicholson wherein the Applicant/Accused No.2 was working as dentist. The said Farida Nicholson decided to close down the clinic and gifted all the equipment to the Applicant. Ms. Farida Nicholson requested the complainant to shift the equipment to a storage site in Colaba. The complainant has given costing of transportation of Rs.25,000/- but there was no deal with accused Nos. 1 and 2 for shifting of equipment. After the owner of Nicholson clinic

communicated the quotation to accused No.2 to which she was not ready to pay the amount mentioned in the quotation. On that count the husband of the Applicant Mr. Rajeev Menon, who is the original accused No.1, made a defamatory statement on facebook page of Midmark Corporation.

4 It is averred by the Applicant that the Applicant was informed by the complainant that additionally a sum of Rs.15,000/- would have to be paid for installing the chair at her new clinic at Churchagate, which she had agreed to. It is further averred that a day prior to installing the chair, the service engineer of the complainant informed the applicant that the charges have doubled to Rs.30,000/- without giving any suitable explanation for the same. Because of this, the husband of the applicant i.e. accused No.1 informed the said Midmark Corporation, allegedly addressed to the said Corporation, about what he believed to be unethical conduct on the part of Respondent No.2/Complainant. It is in the said chat, certain statements were alleged to be defamatory.

5 Thereafter Respondent No.2 Complainant sent a legal notice to the husband of the applicant on 06/08/2015 alleging certain defamatory statements being made against him and in turn demanding an apology and a sum of Rupees One Crore as compensation towards damages for suffering loss of reputation. The said legal notice has been replied to and the allegations

made in the said legal notice were refused. Thereafter rejoinder notice was sent by the complainant, to which the husband of the applicant through his advocate sent a reply letter. Thereafter a complaint was filed by Respondent No.2/Complainant against the Applicant and her husband before the learned Magistrate being Case No.1342/SS of 2016 for the offences punishable under Sections 499, 500, 501 and 502 r/w 34 of the Indian Penal Code.

6 As stated herein above the learned Magistrate, after perusing the complaint, verification statement, and the material on record, came to a conclusion that the complainant has made out a prima facie case to take cognizance of offence against accused Nos. 1 and 2 for offence under Section 500 of the Indian Penal Code, and deemed it appropriate to issue process against the applicant and her husband for the offences punishable under Section 500 of the Indian Penal Code. The learned Magistrate was of the view that the statements made by the accused No.1 at the instance of accused No.2 apparently amounts to an defamation of the complainant. It is also observed by the Magistrate that in fact there was no deal of shifting of the equipment between the complainant and accused No.2. Being aggrieved by the said order of issuance of process, the Applicant preferred a Revision Application No.233 of 2018 before the Sessions Court. The learned Additional Sessions Judge, after considering the reasoning recorded by the learned Magistrate in his order, and after considering the verified statement of the complainant and the

contents of the emails, recorded a finding that the contents of the emails can be said to be per-se defamatory. The learned Additional Sessions Judge, therefore, did not deem it appropriate to interfere with the order of issuance of process passed by the learned Magistrate, and accordingly, rejected the Revision Application by order dated 01/01/2019, which is impugned in the present Criminal Application.

7 Heard the learned counsel for the parties. The learned counsel for the Applicant invites attention of this Court to the allegations made in the complaint and submits that the Applicant herein, who is accused No.2 in the complaint, has not sent the alleged emails and she is not having concerned with the commission of the crime. It is submitted that whatever act has been performed was performed by her husband i.e. accused No.1, and therefore, it cannot be said that prima facie case is made out against the Applicant. In support of the said submission the learned counsel for the Applicant sought to place reliance on the judgment of the Apex Court in the case of State of Orissa v/s. Arjun Das Agrawal and another¹ He therefore submits that the Criminal Application deserves consideration and may be allowed.

8 Per contra, the learned counsel for Respondent No.2 Complainant invites the attention of this Court to the various emails/comments/posts, copies of which have been placed on record, and submits that the said emails

1 1999 SCC (Cri) 1378.

and/or comments/posts contain defamatory and contemptuous statements against the complainant. He also submits that the word “We” used in the said emails/posts at several place would clearly indicates that the language used and the allegations made therein have been made by accused No.1 at the behest of accused No.2 i.e. the applicant. He submits the learned Magistrate has rightly issued the process against both the accused, and the learned Additional Sessions Judge is right in rejecting the revision application filed against the order of the learned Magistrate. He therefore submits that the Criminal Application does not deserve consideration and may be rejected.

9 To counter the submission of the learned counsel for the Applicant that the emails, which according to the complainant are defamatory, have been sent by the husband of the applicant, and the applicant is nothing to the same, and therefore, the defamation case is not applicable to her, and therefore, she may be discharged, the learned counsel appearing for Respondent No.2 Complainant invites attention of this Court to the message on facebook, which is on page No.39 of the present Criminal Application, reference of which has been made by the complainant in his complaint. According to complainant, the language used and the statements made in the said message on the facebook page on 21st May 2015 at 2.30 pm by accused No.1 with the consent and cooperation of accused No.2 i.e. the Applicant herein are defamatory in nature. The learned counsel for Respondent No.2

Complainant also invites this Court attention to the second comment posted by the accused No.1 on the very same day i.e. 21st May 2015 at 2.57 pm, which according to the complainant, is consisted of completely false, defamatory and contemptuous statements against the complainant. The learned counsel for Respondent No.2 Complainant submitted that accused No.1 has also sent emails thereby making defamatory statements against the complainant.

The learned counsel for Respondent No.2 - complainant also invites attention of this Court to the email dated 23rd May 2015 at 4.10 pm sent by accused No.1 i.e. the husband of applicant. The learned counsel for the Complainant laid much more emphasis on the word “we” used in the said email, which according to him, is used for both accused No.1 as well as accused No.2 i.e. the Applicant herein. To substantiate his contention that, alleged emails have been sent and message has been posted on facebook by accused No.1 at the behest of the Applicant, the learned counsel for Respondent No.2/complainant also invites attention of this Court to the reply letter to the rejoinder notice dated 25/11/2015 of the Complainant and in particular the language used therein.

10 With the able assistance of the learned counsel for the parties, I have perused the pleadings in the Criminal Application, the grounds taken

therein and annexures thereto. I have also perused the averments made in the complaint, the verification statement of the complainant so also the reply and rejoinder filed by the respective parties.

11 The matter revolves around the language used and the statements made in the messages/comment posted on the facebook, and the emails sent by the husband of the Applicant, which according to the Complainant, consisted of completely false, defamatory and contemptuous statements against the complainant and the same were posted/sent with the consent of and/or at the behest of the Applicant, It is therefore necessary to reproduce some of the comments/messages posted/sent for sake of ready reference.

“ Facebook message posted on 21st May 2015 at 2.39 pm by the accused No.1 :-

An absolute disappointing and disgusting service by your distributor in Mumbai. I would not recommend your dental chair. In fact I would discourage the growing dental industry and aspirant dentist to buy Midmark chair for there practice in India because of an absolute disgusting and substandard cheat of an distributor you have apportioned in Mumbai but the name of Netrawalla. His monopolistic attitude and make way while the sun shine approach deters any dentist to procure your brand. How can you have just one distributor in India, this violates the monopolistic approach. I had invested in your expensive dental chair and the kind of service your distributor provides he absolutely pathetic. In fact I am planing to sell the chair and invest in another company chair who provides better service and not such an high handed approach by your distributor in Mumbai, Mr. Netrawala. Dear dental

professional in Mumbai and India kindly think twice before investing in Midmark chairs in India.”

“Comment posted by accused No.1 on 21st May 2015 at 2.57 pm:-

Dr. Netrawal, I have a Midmark Chair, but your distributor is charging an exorbitant rate just to install your chair... this is after agreeing to a particular price then he arbitrarily increased in by 100% with an attitude of take it or leave it. I am forced to use some choice. Do you have any other distributor who would assist us other than the unethical rogue of a guy in Netrawala.”

“e-mail dated 23rd May 2015 at 4.10 pm :

Unfortunately we still don't have any response from your distributor in Mumbai and the experience to purchase new Midmark chairs would always be an extremely frustrating experience since you India distributor doesn't believe in fair trade and service practice.

As mentioned we have acquired your chair and the obstinate high handed approach he displays is frustrating”

Perusal of the language used and statements made in the aforesaid email/comment one can say that the said email/comment though sent by accused No.1, but on behalf of the Applicant. It is pertinent to mention at this stage that in the aforesaid email the word “we” is used. It means it is not only applicable to the accused No.1 i.e. husband, but is applicable to other person i.e. the applicant.

12 At this stage it would be apposite to make a reference to the reply notice dated 12/02/2016 sent by Advocate of the accused Sujata Melekar to the advocate of complainant's solicitor Vigil Juris. In the first paragraph itself the said Advocate Sujata Melekar, has mentioned that, she is concerned for her clients Mr. Rajeev Menon (i.e. husband of applicant) and Ms. Perola Menon (the applicant). It means the said reply has been sent on behalf of both the accused. It is required to be noted that the copy of the said reply was forwarded by the said Advocate Sujata Melekar to both the husband of the applicant and the applicant. It is therefore crystal clear that mentioning the word "we" and/or forwarding the copy of the reply to the applicant as well as her husband would indicate that the allegations have been made by accused No.1 at the behest of the applicant. The applicant is a dentist. The chair was purchased for her new clinic. Looking to the language used in the emails by accused No.1 i.e. husband, it cannot be used without the consent of the applicant. According to the learned counsel for the complainant, the allegation that accused No.1 had acted at the behest of the applicant, did not denied by the accused and therefore there is an admission on the part of applicant.

13 Admittedly the applicant is not the author of the emails, however, on perusal of the language used therein it can be said that the said emails have not been addressed in singular form but the same are in plural forms. Making reference of both the applicant as well as her husband in the reply

notice dated 12/02/2016 by advocate Sujata Melekar would indicate that the said notice has been sent on behalf of both. In clause (j) of the said reply notice dated 12/02/2016 the said advocate Sujata Melekar has specifically mentioned that “hence, the complaint made by my client on behalf of his wife Dr. Perola Menon falls within a customer service complaint”.

14 The reliance placed on the judgment of the Apex Court in *Arjun Das Agrawal's* case (supra) by the learned counsel for the Applicant is misplaced.

15 Whether the language used or the statements made in the alleged messages/comments in the emails/facebook are defamatory/contemptuous would be decided at the time of trial by the concerned Court after appreciating the evidence produced by the parties.

16 There is prima facie satisfaction recorded by both the Courts below against both the accused as regards issuance of process. No fault can be found with the findings recorded by the Courts below. There is no infirmity in the orders passed by the Courts below. In the light of aforesaid discussion and considering the allegations made in the complaint, the material placed on record, and the reasoning assigned by both the Courts below, no case is made out to cause interference in the order of issuance of process. The Criminal

Application stands rejected. Rule stands discharged.

17 Needless to state that the observations made herein above are prima facie in nature and confined to the adjudication of the present Criminal Application.

[S.S. SHINDE, J.]