

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.5025 OF 2017

Tomy Mathew Vadakkancheril	Petitioner
versus	
The State of Maharashtra and another	Respondents

WITH
INTERIM APPLICATION NO.497 OF 2022

Vinod Nateson	Applicant
versus	
The State of Maharashtra and another	Respondents

Mr.Navaneetha Krishnan i/by Biju Jacob, Advocate for Petitioner.

Mr.Vinod Nateson, Respondent no.2 in WP and Applicant in IA.

Mr.S.R.Agarkar, APP, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 21st September 2022

PC :

1. Petitioner has challenged proceedings in Criminal Case No.1498/SS/2015 pending before the Court of learned Metropolitan Magistrate, 17th Court, Borivali, Mumbai.

2. Respondent no.2 is the original complainant. In his complaint, it is alleged that complainant runs advertising and brand consultancy named Mayan Consultants. The services rendered by the complainant include advertising, marketing, advisories, market research assignments, documentation and editing services, content

creation for digital media, PR and event management consultancies, training and lecture assignments etc. The complainant had worked with multinational advertising agencies and earned recognition. The accused runs a private limited company registered under the provisions of Companies Act, 1956, at Calicut, Kerala. It is engaged in marketing of agricultural produce in domestic and overseas markets. The accused invited the complainant to visit office at Calicut on 6th March 2014 to take up an assignment to market in Kerala products being procured and packaged by the accused. After a meeting and presentation by the complainant, the accused paid the complainant a sum of Rs.1,50,000/- towards his monthly installment against invoice of Rs.5,00,000/-. The complainant provided an agreement on the request of accused and forwarded it to the accused for approval. The accused sent a signed agreement to the complainant on 31st March 2014. The complainant accepted the agreement and returned to the accused on 1st April 2014. At the suggestion of complainant, the accused recruited Mr.Viren Kamdar, a Creative Director for the project. The designed prepared by complainant and Mr.Viren Kamdar were handed over to the accused on 16th April 2014. On 17th April 2014 the accused sent appreciation letter for the work presented by complainant and Mr.Viren Kamdar. On 21st April 2014 the accused expressed interest in truncating the agreement. The complainant agreed to the same, provided, the installment for the April was paid with one month notice pay as per agreement signed. The accused sent e-mail to the complainant, Viren Kamdar, Anup Nair and Lijjin Jacob Tom on 26th April 2014, which contained numerous misrepresentations, baseless allegations, aimed at tarnishing the fair name of complainant and the professional reputation and respect he enjoyed with the peers,

including his associate Mr.Viren Kamdar. The e-mail also contained an attempt at fabricating false evidence, by creating a work diary which omits any mention of the e-mail of 11th March 2014 sent by the complainant. The complainant filed a complaint with Police on 28th April 2014. Legal notice for civil and criminal litigation for defamation was sent by complainant to the accused on 5th May 2014, demanding retraction of the e-mail and an apology. The accused sent reply through his advocate declining the same and claiming that there was no publication. The complaint was filed to Calicut Police for breach of trust and cheating. The FIR was registered. E-mail sent by accused was published when he included Mr.Kamdar in the list of recipients. The e-mail clearly suggested mala fide intention and motive of defaming the complainant. It was also intended to make Mr.Kamdar to lose his trust and confidence in complainant.

3. Learned Magistrate vide order dated 4th February 2016 issued process against the accused u/s.500 of Indian Penal Code. The order indicate that learned Magistrate had perused the complaint and verification. The complainant was heard in person. The Court had gone through the documents filed on record. The e-mail sent by accused was perused which prima facie appears defamatory. Process was issued for the offence u/s.500 of IPC.

4. Learned advocate for Petitioner submitted that complaint does not make out offence of defamation, as defined u/s.499 of IPC. There was no publication of alleged defamatory version. Section 202 of Code of Criminal Procedure was not complied. The complainant has not cited any witness. The complaint is filed against company but the company is not made an accused. The Trial Court has no

jurisdiction to entertain the complaint. The complaint is false. Learned Magistrate has mechanically issued process. The complainant had taken multiple actions on termination of contract. The FIR dated 6th May 2014 bearing No.494 of 2014 was registered at the instance of complainant. The complainant has admitted that at the time of receipt of material, he was residing at Pongumoddu at Trivendrum. The legal notice sent by the complainant also confirms the said fact. Mr.Kamdar was party to what was happening between the parties. Hence the communication cannot be treated as imputation. The complaint was registered u/s.66A of Information and Technology Act by Police on the complaint of respondent no.2 for the same cause of action. The impugned complaint was filed. The e-mail only refers to the conduct of complainant. Respondent no.2 has filed several complaints.

5. Learned advocate for petitioner has relied upon decision of Hon'ble Supreme Court in the case of **Dayle De'souza Vs. Government of India**¹, the decision of Madras High Court in the case of **B.PBhaskar Vs. B.PShiva**² and decision in the case of **Vinod Natesan Vs. State of Kerala and others**³.

6. Respondent no.2 has appeared in person. It is submitted that Section 202 is complied. The complainant was examined. Process was issued. Learned Magistrate has assigned reasons for issuing process. The e-mail sent by accused contains assertions on the reputation of complainant. Defamatory averments are referred to in the complaint. Summons was issued by learned Magistrate on the basis of material on record. The defense of accused cannot be

1 Criminal Appeal arising out of SLP (Cri).No3913 of 2020, dated 29-10-2021

2 Criminal O.P.No.13683 of 2991, dated 22-12-1992

3 (2019)2-SCC-401

considered at this stage. Learned Magistrate has jurisdiction to entertain the complaint. Sections 182 and 192 of Cr.PC are required to be taken into consideration to determine jurisdiction of Trial Court. Pursuant to issuance of process, plea of accused was recorded. Examination in chief of the complainant was recorded. The complaint was due for recording cross examination of complainant at the instance of accused. The complainant has forwarded defamatory e-mail to several persons. There is evidence to show that there was publication of defamatory e-mail. By exercising powers under Section 482 of Cr.PC or Writ under Article 226 of the Constitution of India, the proceedings need not be quashed on the basis of disputed questions of facts. The accused was not appearing before Trial Court. Non bailable warrant was issued against him for not appearing before Trial Court. The petition may be dismissed.

7. The impugned complaint was filed on 4th April 2015. Verification of complaint was recorded. Learned Magistrate perused the complaint, verification and heard the complainant. Learned Magistrate also looked into the documents on record and noted that complainant had mainly relied on Exhibit-M. It was observed that said document relates to e-mail sent by accused to Mr.Viren Kamdar. The Court found that e-mail contains prima facie defamatory statement. Prima facie case exists against accused and hence process was issued. In the complaint filed by respondent no.2, there is clear assertion about defamatory e-mail and harm caused to the reputation of complainant. The complainant has categorically stated that accused sent the e-mail to complainant, Viren Kamdar, Anup Nair and Lijjin Jacob Tom, which contains misrepresentations, baseless

allegations aimed at tarnishing the fair name of complainant and professional reputation and respect he enjoyed with his peers, including his associates Mr.Kamdar. The e-mail contains an attempt at fabricating false evidence by creating a work diary which omits any mention of e-mail of 11th March 2014 sent by the complainant. The said e-mail dated 11th March 2014 referred to crucial recommendations made by complainant and agreed to by the employee of accused. I have also perused the e-mail dated 26th April 2014. This is not the stage to give finding that offence u/s.500 of IPC is not made out. Learned Magistrate has expressed on the basis of documents that prima facie case is made out for issuance of process. It cannot be said that Trial Court had no jurisdiction to entertain the complaint or that there is non compliance to Section 202 of Cr.PC. One of the assertion in the subject e-mail is accused has paid Rs.2,50,000/- to wriggle out of complainant what was at the end fit only for their dust bin. But the complainant has continued to harbour illusions of grandeur about his con game skills. The allegations were attributed to accused. Not making company as accused would not vitiate the proceedings.

8. The decisions relied upon by petitioner were delivered in the facts of those cases. It is settled law that debatable issues or the grounds based on disputed questions of facts, cannot be considered for quashing the proceedings. In the present case, plea of the accused was recorded on 1st August 2019. Examination in chief of the complainant was recorded and affidavit of evidence of complainant was filed on 19th October 2019. In the evidence the complainant had deposed about the defamatory version appearing in the e-mail. The case was due for cross examination of complainant

at the instance of accused. It is not possible to discard the evidence of complainant. It is difficult to hold that there was no publication of defamatory e-mail. No case is made out to quash and set aside the impugned proceedings.

9. Hence, I pass following order :

ORDER

- (i) Criminal Writ Petition No.5025 of 2017 is rejected and disposed off accordingly;
- (ii) Interim Application No.497 of 2022 is disposed off.

(PRAKASH D. NAIK, J.)

MST