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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.617 OF 2005**

Shaikh Husen Kasam	... Appellant
Vs.	
The State of Maharashtra & Ors.	... Respondents

Mr. B. D. Joshi with Mr. Virendra Pethe for the Appellant.
Ms. S. S. Kaushik APP for Respondent No.1-State.
Mr. Chaitanya Pendse with Mr. Murlidhar Kale with Mr. Sachin Kadam
with Mr. Samir Suryawanshi for Respondent Nos.2 to 6.

CORAM : S. M. MODAK, J.

DATED : 12TH DECEMBER 2022.

JUDGMENT :

1. Heard learned Advocate Mr. B.D. Joshi for the Appellant, learned APP Ms. Kaushik for Respondent No.1-State and learned Advocate Mr. Pendse for Respondent Nos.2 to 6.

2. The only issue involved in this Appeal is whether the Court of Judicial Magistrate, First Class, Ghodegaon, Pune, has rightly appreciated the evidence and whether he was right in giving benefit of exception No.(2) to section 499 of the Indian Penal Code to five accused persons, who were Respondent herein.

3. The present Appellant filed complaint for the offence punishable under section 500 read with 109 of the Indian Penal Code. It is on the basis of imputation about character of the complainant. It was alleged

that the complainant was having illicit relationship with one lady Smt. Sadhana Junnarkar. These allegations were made by accused nos.1 to 4 in their individual letters dated 15/11/2000 addressed to accused no.5. It had led to filing of private complaint before the Judicial Magistrate First Class, Ambegaon, Pune. Earlier to that by legal notice, the complainant has also cautioned accused no.5 about possible legal action. So also he has approached the police but no action was taken and that's why private complaint is filed.

4. The process was issued and all accused have denied committing any offence. The allegation was that accused no. 1 to 4 wrote these letters on the instigation of accused no.5.

5. Accused No.5 is the President of one Ambegaon Taluka Vidhya Vikas Mandal, Ghodegaon, District Pune. The complainant is working as a Peon whereas the lady Smt. Sadhana Junnarkar is working as a teacher. Earlier to these letters dated 15/11/2000, there were three letters sent by certain villagers and one Mukta Devi Utkarsh Mandal addressed to accused no.5. They are dated 2/9/2000, 4/9/2000 and 5/9/2000. In those letters, the signatories have suggested about some relationship in between the complainant on one hand and the teacher Smt.Junnarkar on the other hand. On this background when the trial was held, apart from himself, the complainant examined 5 witnesses. Accused Nos.1 to 4 have denied that they have made any defamatory allegations whereas accused no.5 has contended about receipt of letters from certain villagers and initiation of departmental inquiry against the complaint and dismissal of the complainant in that inquiry.

6. In addition to oral evidence, the complainant also relied upon certain documentary evidence. It is surprising to note that learned Magistrate has referred to letters dated Exhibit-68 to 71 in the judgment, though they are not proved during evidence. Even I have perused roznama with assistance of learned Advocates. It is surprising to note that these letters even were not referred in roznama. Learned Magistrate has committed mistake and lost sight of basic principles of the Indian Evidence Act that any document can be considered in evidence, only when it is proved in the manner laid down as per the Indian Evidence Act.

7. Learned Advocate Shri Pendse is right in his submission that merely exhibiting the document does not mean that it is proved. He relied upon the judgment reported in *Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam Alias Satteyya and Others (1972) 4 SCC 562* and more specifically para 15. But this Court will have to look into the issue whether the judgment requires interference merely because the documents which were considered in the judgment, were not proved.

8. According to learned Advocate Mr. Joshi these documents also consist of some part of departmental inquiry at Exhibit-72, and according to him in fact though he was dismissed by the Management on the basis of inquiry report, the said order was set aside by the School Tribunal and now the matter is pending before this Court at the instance of the Sanstha. According to learned Advocate Shri Pendse, those findings can not be considered by this Court as Exhibit-72 is not proved, and the issues involved in both proceedings are

different.

9. It is true that when there is judgment of acquittal, presumption of innocence is reinforced. The Appellate Court can interfere only when the findings are perverse, that is to say, arrived at by not considering particular evidence or considered evidence without following the provisions of law.

10. It is import to note that foundation of this case is letters written on 15/11/2000 written by accused nos.1 to 4 addressed to accused no.5. Fortunately or unfortunately these letters were not proved during evidence. Learned Advocate Shri Joshi submitted that while conducting trial, the complainant faced with number of difficulties and one of the reason was clout of these Respondents. He submitted that with great difficulty he could secure assistance of an Advocate. He also pointed out to me certain lapses by the learned Magistrate, one of them is not considering the application filed by the complainant thereby asking for comparison of signatures appearing on the proved documents and other documents.

11. The said application is referred in roznama as Exhibit-67. It is true that roznama does not says about passing of any order on it. Thereafter next week i.e. 1st September 2003, learned Magistrate pronounced the judgment. Be that it may, it needs to be seen whether the complainant has discharged the burden and learned Magistrate has appreciated evidence properly. Apart from letters dated 15/11/2000 the complainant relied upon the following two sets of letters :

(i) Exhibit 57, 58 and 59.

They are letters addressed by villagers and by President of Muknadevi Utkarsha Mandal to the President, Ambegaon Taluka Vidhya Vikas Mandal, Ghodegaon, District Pune. As stated above, the signatories have suggested about certain illicit relationship between the complainant and said teacher Junnarkar.

(ii) The letters at Exhibit-41, 43, 45 and 47 has same date i.e. 24th February 2001, and also on the envelopes at Exhibit-42, 44, 46 and 48.

12. According to the complainant, letters addressed by villagers do suggest about illicit relationship. Learned Advocate Shri Joshi fairly admitted that these letters do not contain signature of accused persons. Whereas the letters at Exhibit-41, 43, 45 and 47 were addressed to accused no.5 by other accused persons. These letters were referred by the complainant in its chief examination. By these letters, the signatories have informed the President, Ambegaon Taluka Vidhya Vikas Mandal that "statement given by them on 15/11/2000 was given under duress and in fact they have not given that statement". The statement referred in these exhibited documents is dated 15/11/2000 containing defamatory matter and which is not proved during evidence.

13. According to learned Advocate Shri Pendse, no doubt these letters were addressed to the President, Ambegaon Taluka Vidhya

Vikas Mandal, and copies were sent to the complainant and no doubt envelopes bearing name of the complainant are produced, it does mean that contents of these letters are proved. For that purpose the complainant need to examine signatories or ought to have said that he knows the hand writing and signatures of the signatories to these letters.

14. Apart from these documentary evidence, the complainant has examined 5 witnesses. One is Sadhana Junnarkar. She has categorically denied the allegations about relationship with the complainant. On 7th June 2000, she has resigned from the post. We do not know the reason. It is true that her evidence does not throw any light about who has made defamatory allegations in those letters. At the most, evidence can throw light about truthfulness of allegations. I am not making any observation on it.

15. The witness Dashrath Dagadu Joshi was examined in order to prove that he has signed one letter without knowing the contents. Even he has not seen any love affair between the complainant and the lady. It is true that during his evidence he has not referred to any of the letter which was signed by him without knowing the contents.

16. The witness Prabhakar Wakchaure even has denied of any resolution or application by Mukta Devi Utkarsh Mandal. One Balasaheb Bhaskar was examined in order show absence of any misbehaviour of the complainant. Lastly, one Ramdas Kale, who is Head Master of the school was examined. He has forwarded the complaint made by villagers to the Directors and who conducted

inquiry and dismissed the complainant from service.

17. According to learned Advocate Shri Joshi, there is variance in between stand of accused persons. On one hand they have made defamatory allegations in the letters dated 15/11/2000 whereas on the other hand they have denied making any statement on 15/11/2000 and to that effect they have addressed letters on 24th February 2001. In addition to that according to him when statements were recorded under section 313 of the Code of Criminal Procedure of accused nos.1 to 4 have denied having made any defamatory allegations.

18. According to learned Advocate Shri Pendse, even if evidence of all these witnesses are accepted without admitting it, it no where suggest that written defamatory allegations were made by accused nos.1 to 4.

19. It is true that burden to prove ingredients of the offence is on the complainant. I have perused the impugned judgment. The learned Magistrate discarded evidence of all these witnesses. According to him, they do not show that the letters were written at instigation of accused no.5. Finally, he gave benefit of exception no.(2) to section 499 of the Indian Penal Code. Learned Advocate Shri Joshi is right in his submission that in paragraph 21 of the judgment, trial court wrongly observed "*the complainant has failed to establish chain of circumstances*". He is right in his submission that the case of defamation does not rest upon circumstantial evidence but it rests upon oral utterances or written allegations and in this case there are

written allegations and if they are proved to be made by the complainant, learned Magistrate ought to have convicted the Respondent-accused.

20. After reading evidence and going through judgment, I do not find that conclusion drawn by the trial Court is wrong. There are certain lapses on the part of learned Magistrate. As stated above, he has referred to Exhibit-68 to 72, even they were not proved. In fact, these letters (Exhibit-68 to 71) are foundation of the case and whatever may be reasons, it is true that they have not been proved during evidence. It is true that the complainant has relied upon those letters alleged to have been written by accused nos.1 to 4 and addressed to accused no.5. As per Evidence Act to prove such letters the complainant could have called for original letters from accused no.5. It is important to note that in statement under section 313 of the Code of Criminal Procedure accused no.5 has stated about initial inquiry on the basis of letters written by villagers, it is also true that the complainant could have resorted to section 65 and 66 of the Indian Evidence Act. But in that case also the complainant was under bounden duty to show how he got copies of letters dated 15/11/2000.

21. The fact remains and that is these letters were not proved during evidence. At the most it can only be said that accused no.5 has received complaint about illicit relationship in between the complainant and Junnarkar by certain villagers. It can very well be said that accused no.5 has also initiated inquiry but further link is not established by the complainant i.e. to say connection in between these accused and letters dated 15/11/2000. So if it is so, it is difficult to

convict the accused persons as ingredients of section 499 of the Indian Penal Code are not proved. In fact, it can also be said that when communication of accused nos.1 to 5 is not proved, the question of considering evidence of accused whether it falls under any of exception, even does not arise.

22. For the above discussion, I do not feel that conclusion drawn by the trial Court can be faulted with. Even though there are certain lapses I do not think that they are of such nature wherein findings can be set aside. So I find no merit in the Appeal and it is dismissed.

(S. M. MODAK, J.)