IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 786 OF 2018

1. Kusum Venkatesh Shet
2. Shobha Venkatesh Shet ...Applicants

Versus

1. Vithal R. Saudagar
2. The State of Maharashtra ...Respondents

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Ms. Kusum V. Shet, Applicant in person, Present.

Mr. Manohar Kandalkar i/by Mr. Chaitanya Kotnis Advocate for Respondent No.1.

Mr. Arfan Sait, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 10th AUGUST, 2022

PC :

1. The applicants have challenged the order dated 07.03.2018 passed by learned Additional Chief Metropolitan Magistrate, 38th Court at Ballard Pier, Mumbai in C.C. No.9258 of 2017 issuing process against the applicants for offence punishable under Section 500 read with 34 of the Indian Penal Code.

2. The allegations in the complaint are as follows:-

(i) The complainant is practicing advocate. The accused No.1 and 2 are residing in the building of the society where the complainant resides. The accused No.1 is “Tenant co-partner member” of flat No. 19 of Nishigandh Sahniwas Co-operative Housing Society Ltd., New MIG Colony, Bandra (E), Mumbai. The accused No.1 is the mother of accused No.2. The accused No.2 is residing along with accused No.1 in the said flat.

(ii) The accused No.2 is practicing advocate by profession and in that capacity she appears before the Courts of law. The accused No.2 in connivance with accused No.1 has made *per se* defamatory statements in order to harm complainant’s goodwill and to distort his image before the society at large.

(iii) The accused No.1 filed a dispute bearing No. 598 of 2005 before the Co-operative Court, Mumbai against Smt. Kalpana Umesh Kerkar and others. The society has been named as opponent No.3 in the said dispute. The said dispute was renumbered as CC/111/166 of 2010 and pending before III Co-operative Court, Mumbai.

(iv) The accused No.1 executed power of attorney in favour of accused No.2 and since then accused No.2 is conducting the said proceedings in person and in the capacity of power of attorney holder of accused No.1.

(v) The complainant is associated with various social organizations. He is a man of repute and have maintained dignity and decency throughout his life.

(vi) The accused No.1 and 2 are aware that from the year 2005 to 2014, the complainant was not concerned with the affairs of the society as the member of Managing Committee. The accused are also aware that the complainant was appointed by the Deputy Registrar, Co-operative Societies, MHADA suo motu, as one of the members of the erstwhile Board of the Administrator of the said society in the year 2014.

(vii) It is well within knowledge of all and everybody of the society that the complainant have performed his job as the member of the erstwhile board of the Administrator to the best of his ability and capacity and rendered best possible services within his limitations and powers. The complainant was elected as chairman by the members of the society in April 2016, since, his work was appreciated by the majority of the members society.

(viii) After holding post of chairman of the society, on the request of the other members of the Managing Committee, the complainant decided to attend the above mentioned disputes as an advocate pending before the concerned Court to assist the Co-operative Court to arrive at the just decision. The Managing Committee of the society did appoint the authorize the complainant to represent the society in the above matter by giving necessary instructions.

(ix) The society preferred Misc. Application No. 8 of 2015 (Exh-6) arising out of Revision Application No. 12 of 2015 in Dispute No. CC/III/166 of 2010 in which accused No.1 is the opponent. The accused No.2 filed reply dated 16.02.2016 in the capacity of constituted attorney of accused No.1 to the above said Miscellaneous Application and has affirmed the said reply in the capacity of constituted attorney of accused No.1.

(x) After perusing the copy of the said reply, the complainant realized that accused No.2 on behalf of accused No.1 made defamatory and derogatory imputations against the complainant and thereby caused harm to his reputation in the eyes of his client as well his fellow colleagues, members of the said society as well as the staff of the concerned Court, with sole intention to defame the complainant in the eyes of judicial authority, his colleagues, clients as well staff of the concerned Court.

(xi) In para 5 of the said reply, the accused No.2 on behalf of accused No.1 has baselessly averred that “I say that Mr. Vitthal Saudagar, Member of the Administrative body of the applicant society is a BIG FRAUD, who on behalf of applicant society is deliberately flouting all the Court’s mandatory orders as aforesaid, for reasons best known to him by making false statement on oath, in the present Misc. Application and in all the Court proceedings as this litigation has become an excellent source of income for him, to illegally pocket monies under the guise of legal expenses.

(xii) The aforesaid averment made by the accused No.2 on behalf of accused No.1 are *per se* defamatory and derogatory imputations which are bearing signature of accused No.2 as constituted attorney of accused No.1 which is under solemn affirmation. The accused No.1 and 2 have made the said imputations conjointly and in connivance with each other and with common intention knowing fully well that the said imputations would harm complainant's reputation and image would be defamed.

(xiii) The accused No.2 whilst addressing the Co-operative Court read out the contents of the said para when the complainant's fellow colleagues, Court staff and others were sitting in the said Court hall. Even at that time accused No.2 vehemently asserted the word/statements "Big Fraud", "deliberately flouting all the courts mandatory orders", "making false statement on oath", "this litigation has become an excellent source of income for him to illegally pocket monies under the guise of legal expenses", "he fraudulently refused to accept the notice".

(xiv) Upon hearing the above mentioned imputations; the complainant fellow colleagues, Court staff and other litigants started looking at him suspiciously. Some of his fellow colleagues and staff members of the Court enquired with him about the correctness and genuineness of the imputations uttered by accused No.2 in the Court hall openly and complainant had to exert himself substantially to clarify their suspicion and to show that the above said imputations were made only in order to defame his image in the eyes of judicial authority as well as before the society at large including the persons sitting in the Court hall.

(xv) The accused No.2 with due deliberation and malicious intention read the said imputations in the Court hall openly well knowing that such imputations are *per se* defamatory and derogatory and shall harm his reputation in the eyes of judicial authority as well in the eyes of his fellow colleagues, Court staff as well other litigants, who were present in the Court at the relevant time.

(xvi) The accused No.1 and 2 were well aware that the above stated affidavit-in-reply would become part and parcel of the record of the society and it would be read by members of the Managing Committee and others and it would certainly harm complainant's reputation in the eyes of the members of the said society.

(xvii) The complainant sincerely believe and have every reason to believe that if complainant had not been a member of the Board of Administrator of the society, accused No.1 and 2 would have not made such defamatory and derogatory imputations against him to distort his image.

(xviii) Other office bearers and members of the said society read the said reply containing imputations made by accused No.2 on behalf of accused No.1 and upon reading the same, they suspected as to whether the above said proceeding is an excellent source of his income to pocket money illegally under the guise of legal expenses and they inspected the accounts of the society thereafter. They also questioned complainant integrity and honesty after reading the said imputations.

(xix) Upon seeing the record of the society and details furnished by complainant, they were satisfied that the imputations made by accused No.1 through accused No.2 were only for the purpose of defaming his image in the eyes of the members of the society as well as the others. The then office bearers of the Managing Committee did discuss the contents of the said reply with the occupants of the society. They also questioned complainant's integrity and honesty, after the said discussion.

(xx) The accused No.1 and 2 conjointly with common intention made defamatory and derogatory statements against the complainant in the said reply filed in the Co-operative Court on solemn affirmation and further read the same in the open Court in the presence of complainant fellow colleagues, Judicial Officer, Court Staff and litigants. The accused No.1 and 2 were aware of the fact that the said reply would form part of the record of the society and it would be read by the members and office bearers of the said society, made averments in furtherance of common intention and thereby committed an offence under Section 500 read with 34 of the Indian Penal Code.

(xxi) The complainant addressed legal notice through his advocate to accused No.1 and 2 through Registered Post and called upon them to tender unconditional apology to the complainant as well as to the members of Managing Committee for making such defamatory and derogatory imputations against the complainant and causing harm to his reputation.

3. Learned Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai issued process against the accused vide order dated 07.03.2018 for offence punishable under Section 500 read with 34 of the Indian Penal Code.

4. The applicant No.1 has appeared in person on behalf of both the applicants. Learned Advocate Mr. Kandalkar appeared for respondent No.1. Written arguments/written submissions filed by both sides are also on record.

5. The submissions of applicants can be summarized as follows:-

(i) The applicant No.1 is the senior citizen aged around 76 years. She has been deliberately roped in the proceedings. The learned Metropolitan Magistrate has mechanically issued order of process.

(ii) The offence of defamation is not made out in the complaint and it would be abuse of process of law to prosecute the applicants.

(iii) The complainant has suppressed vital documents while filing the complaint.

(iv) The impugned complaint is counter blast to complaint of applicant No.2 filed for offence punishable under Section 500 and 506 of the IPC.

(v) The case of the applicants would be covered by exception 8 and 9 of Section 499 of the IPC.

(vi) Reply dated 16.02.2016 filed in M.A. No. 8 of 2015 was the plea of merits in the proceedings pending before the Co-operative Court.

(vii) If, according to the complainant, statement made in the reply were false, it was for him to initiate action under Section 340 read with Section 195 of the Cr.P.C.

(viii) Learned Sessions Judge has erroneously dismissed Revision Application preferred by applicants.

(ix) The Managing Committee passed no confidence motion against the respondent/complainant.

(x) The complaint was initiated after a period of about 2 years.

(xi) Initiation of the impugned complaint is misuse of law by the respondent, who is practicing advocate. The Sessions Court erred in rejecting the revision application. The order is contrary to documentary evidence on record.

(xii) Learned Magistrate was not justified in taking cognizance of criminal complaint by issuing process against the applicants.

(xiii) The complainant had not disputed nor denied truthfulness and correctness of contents of reply dated 16.02.2016.

(xiv) The averments in reply dated 16.02.2016 were true and made in good faith placing true facts on record of Co-operative Court in M.A. No.8 of 2015 which was necessary to be put on record of Court for arriving just decision of the case.

(xv) There was no intention on the part of applicants to defame the respondent. The applicants were within their legal rights to place true and correct facts as a matter of their plea of their case before the Co-operative Appellate Court vide affidavit dated 16.02.2016.

(xvi) The criminal complaint does not disclose any facts constituting the offence under Section 500 of IPC. The complaint is filed to cause undue harassment to the applicants.

(xvii) The Co-operative Court considered affidavit in reply dated 16.02.2016 and dismissed M.A. No.8 of 2015 filed by the society vide order dated 26.02.2016.

(xviii) No confidence motion dated 21.07.2017 was passed by Managing Committee against the complainant to remove him from Managing Committee with immediate effect for misusing and misappropriation of fund of society.

(xix) In the complaint filed by applicant No.2 against the respondent No.1, the learned Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai had issued process against the respondent No.1 for offence punishable under Section 500 and 506 read with 34 of the Indian Penal Code vide order dated 09.12.2016.

(xx) Letter dated 31.07.2017 was addressed by treasurer of society to Branch Manager, Saraswat Co-Operative Bank Ltd. to freeze society's bank account to prevent misuse and misappropriation of society's fund by respondent No.1 as chairman of society.

(xxi) The High Court has passed order dated 20.01.2017 in Civil Application No.277 of 2017 in Criminal Writ Petition No.11602 of 2016 and Writ Petition No.7245 of 2016 which speaks about act of respondent/complainant. All these documents were suppressed by respondent No.1

while filing complaint before the Court of learned Magistrate.

(xxii) The order passed by Sessions Court reflects non application of mind by the Sessions Court while dismissing the revision application.

(xxiii) The learned Sessions Judge had considered submissions of applicants but erroneously rejected their Revision Application.

(xxiv) The respondent No.1 is taking advantage of his wrong by misusing criminal law.

(xxv) The contents of affidavit in reply of applicant No.2 dated 16.02.2016 were true and correct, and made in good faith, placing true facts on record of Court in MA No. 8 of 2015 which were essentials. There was no intention to defame respondent No.1.

(xxvi) No confidence motion was passed on 21.07.2017 against respondent No.1 by Managing Committee Members of the society, by its majority for misusing the society’s funds without consent of Managing Committee. Members complained to Deputy Registrar, Co-operative Society and others to expel him from committee with immediate effect on no confidence motion. The members complained to bank of society against respondent No.1 and got society's account freezed to restrain respondent from withdrawing money.

(xvii) The complaint does not disclose any facts constituting alleged offence under Section 500 of IPC. The applicant No.1 filed affidavit of service dated 19.03.2016 in Revision Application No.11 of 2015 and 12 of 2015 indicating service upon society which was denied. The order dated 20.01.2017 passed by this Court in Civil Application No. 277 of 2017 exposes conduct of respondent before High Court. Order of process was obtained by suppressing vital documents.

6. Learned advocate for respondent No.1 submitted as under:-

(i) Prima facie case is made out against the applicants constituting the offence under Section 500 of Indian Penal Code.

(ii) The submissions of the applicants are in the nature of that defence which are required to be considered during the trial.

(iii) The documents relied upon by the applicants cannot be considered at this stage and the complainant must be given an opportunity to prove his case.

(iv) Learned Magistrate had issued process on the basis of averment in the complaint and material produced before the Court. The order of process need not be elaborate. The order indicate that prima facie case is made out against the accused for issuing process under Section 500 read with 34 of the Indian Penal Code.

(v) The learned Sessions Judge has dismissed revision application by assigning reason and no case is made out to interfere in the said order.

(vi) The averment in the affidavit-in-reply filed before the Co-operative Court are *per se* defamatory. The contents of the reply were read over in the Court. The complaint specifically mentioned that there was publication of the averment in the reply which was caused harm to the reputation of the complainant.

(vii) The grounds urged by applicants that the averment in the affidavit in reply would be covered by exception 8 and 9 of Section 499 of the IPC cannot be considered at this stage.

(viii) The applicants had admitted contents of the reply and tried to justify the same.

(ix) The applicant No.2 on instructions of applicant No.1 filed affidavit and vehemently asserted that the respondent No.1 is a big fraud and deliberately flouting the orders of the Courts by making false statements on oath and illegally pockets money as the said litigation has become an excellent source of income.

(x) The applicant No.2 while advancing her arguments on behalf of applicant No.1 before co-operative Court stressed on the said defamatory words 'Big Fraud', "deliberately flouting the orders of Court by making false statements on oath. He illegally pockets money as the said litigation has become an excellent source of income, in the open Court and at that time, clients and colleagues of respondent No.1, litigants and Court staff were present. Due to the said defamatory imputations the persons present in the Court stared at respondent No.1 with suspicion and questioned him about imputations.

(xi) The society Nishigandh C.H.S. was party to the proceedings and copy of the said affidavit was received in the office of the said society which was read by the office bearers of society and others, who then raised suspicion against respondent No.1 and few of them, questioned him about the imputations.

(xii) The complainant sent the legal notice through his Advocate to the applicants wherein the said defamatory imputations were mentioned and brought to then notice of the applicants. They were called upon to tender apology. The applicant did not reply the said notice nor apologize.

(xiii) Para No. 13 to 20 of the complaint are per se defamatory imputation. In para 13, the complainant has reproduced defamatory imputation made by the applicants in the said affidavit.

(xiv) On the basis of documents, verification statement of the complainant, the learned Magistrate was satisfied that the said documents and verification statement of complainant make out prima facie case against the applicant for issuing process as stipulated under Section 204 of the Cr.P.C.

(xv) The applicants preferred Revision Application before the Sessions Court and appended documents to justify their contentions that the order issuing process is bad in law and without application of mind. The documents relied upon by the applicants were not part of criminal complaint. Such documents cannot be considered at this stage. The Revision Application was rejected by giving proper reasons. The learned Sessions Judge has observed that the order of process cannot be said to be illegal, incorrect and improper.

(xvi) The applicant No.1 through applicant No.2 made per se defamatory imputations before the Court of law and others which makes the power of attorney holder and the person, who executed the power of attorney jointly liable.

(xvii) There is no necessity that the trial Court should evaluate the merits of the matter at the time of issuance of process. The Court has to see whether prima facie case is made out on the strength of documents produced by complainant.

(xviii) The shelter of Exceptions 8 and 9 to Section 499 of IPC is not available to the accused. The onus lies upon the accused to prove exceptions by leading evidence before the trial Court. The Shelter of good faith is also not available to the accused when evidence is not led.

7. In the case of Darusing Durgasing Vs. State of Gujarat & Anr.[1] it was observed that averments and allegations made in affidavit in reply with a view to bring true facts before Court and the said averments made in good faith and without malice, it cannot be treated as defamatory causing any injury to reputation of complainant and such averments are covered by exceptions 7, 8, 9 to Section 499 of IPC. In the case of S. Khushboo Vs. Kanniammal & Anr.[2] it was observed that, when criminal law machinery is set in motion, superior Courts should not mechanically use their inherent power or writ jurisdiction to intervene with process of investigation or trial, to such form of judicial review is permissible to prevent miscarriage of justice. At the time, in case, there is sufficient evidence against accused, which may establish charge against him or her, proceedings cannot be quashed. In the case of Ramesh Roy Vs. The King[3] it was observed that to invoke

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1 2006 CRI. L.J. 720
2 2010 Cri.LJ. 2828
3 1952 Cri.L.J. 611

Exception 8 the accused need not prove allegations to be true and it is enough if he shows that he had reasonable grounds to believe in allegations. In order to come within Exception 8th the accused persons is not bound to prove that the allegations made by him are true. It is sufficient if he proves that on reasonable grounds he believed the allegations to be true and in that belief he *bonafide* made the accusation to the lawful authority. In the said case, the accused was convicted for the offence of defamation and the Court was considering the Revision Application challenging the conviction. In the case of Sau. Kamal Shivaji Pokarnekar Vs. The State of Maharashtra and Ors. decided by Supreme Court in Criminal Appeal No. 255 of 2019 vide order dated 12.02.2019, it was observed that it is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether the prima facie case has been made out for summoning the accused persons. The Magistrate is not required to evaluate the merits of the material. The Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not. Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegation therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere. Defences that may be available, or facts/aspects which when established during the trial, may lead to acquittal, are not grounds for quashing the complaint at the threshold. In the case of Kanti Bhadra Shah and Ors. Vs. The State of West Bengal[4] it was observed that the orders in the nature of issuing process are not required to be in details. In the case of State of Bihar Vs. Murad Ali Khan and Ors.[5] it was held that while exercising powers of quashing the High Court would not embark upon an enquiry whether allegations in complaint were likely to be established by evidence or not.

4 AIR 2000 SC 522
5 AIR 1989 SC 1

That was function of trial Magistrate when evidence come before him. The complaint means any allegation made orally or in writing to a Magistrate with a view to his taking action that some person, had committed an offence. In the case of State of Bihar and Ors. Vs. K. J. D. Singh[6] it was observed that the exercise of the powers by the High Court under Section 482, Cr.PC to quash the prosecution launched against the respondent at the stage when the trial had not even commenced was not proper. In the case of Sewakram Sobhani Vs. R. K. Karanjia and Ors.[7] it was observed that it is for the accused to plead 9th Exception in defence. The accused has to discharge burden to prove good faith which implies exercise of due care and caution. It is upon accused to show that attack on character of complainant was for public good. Good faith and public good are questions of fact and matters for evidence.

8. It is the settled law that at the stage, of issuance of process the Court is required to see whether prima facie case is made out for issuing process and taking cognizance of the complaint. The learned Magistrate while issuing process has observed that the Court has perused the

6 MANU/SC/0902/1993
7 AIR 1981 SC 1514

complaint, documents, verification of complainant and that prima facie case is made out against the accused for the said offences. Hence, the process was issued for offence punishable under Section 500 read with 34 of the IPC. The order of process was challenged before the Sessions Court by preferring revision application which has been dismissed by learned Additional Sessions Judge vide order dated 25.08.2018. While rejecting the revision application, the learned Sessions Judge has observed that the contention of the accused is that the complainant ought to have initiated perjury proceedings under Section 340 read with 195 of the Cr.P.C. before the same Court i.e. Co-operative Appellate Court. The said contention has no merit. The accused had alleged that the complainant was big fraud and deliberately flouted all the Court's mandatory orders and made false statement on oath. Calling complainant as a big fraud on that count, has exceeded the justifiable statement of alleging that the complainant made false statement on oath. The grounds urged by accused that the averment was made in good faith has to be proved by accused.

9. It is pertinent to note that in the affidavit-in-reply filed by applicants before the Co-operative Court, it was

stated that the respondent No.1 is big fraud, who on behalf of society is deliberately flouting all the court's mandatory orders for reasons best known to him by making false statement on oath in the Misc. Application and in all the Court proceedings as this litigation has become an excellent source of income for him to illegally pocket monies under the guise of legal expenses. From the averment in the complaint prima facie offence under Section 500 of IPC is made out. The learned Magistrate has rightly observed that prima facie case is made out against the accused. The ground urged by applicants cannot be considered at this stage. The applicants are relying upon several documents which are in the nature of purported defense of applicants. The contention that the case of applicants is covered by Exceptions 8 and 9 of Section 500 of IPC will have to be established during trial. Hence, no case is made out for interfering in the impugned orders. Hence, I pass the following order.

ORDER

i. Criminal Application No. 786 of 2018 is rejected and disposed of;

ii. The applicant No.1 is exempted from appearing in the proceedings before the trial Court.

iii. The learned Magistrate may direct the applicant No.1, to appear before Court, only when her presence is necessary.

iv. In the event, the applicants prefer an application permitting the applicant No.2 to appear on behalf of applicant No.1, the trial Court shall decide such application in accordance with law.

v. The observations made in this order are prima facie for deciding this application and the trial Court shall not be influenced by the same during the trial.

vi. At this stage the applicants seeks extension of interim relief granted by this Court by a period of eight weeks. Since, interim order is in operation since 23rd July, 2018, the same is extended by a period of eight weeks.

(PRAKASH D. NAIK, J.)

DNYANESHWAR ASHOK ETHAPE

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