

GRM

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 1934 OF 2022

Praful V. Pethad & Anr. ... Petitioners

V/s.

Syed Haved Munir Hashmi & Anr. ... Respondents

Mr. P. G. Sabnis, Adv. for the Petitioners.

Mr. Tahir Prande i/b Juris Consillis, Adv. for Respondent no. 1.

Mr. A. R. Patil, APP for the State/Respondent No. 2.

CORAM : R. G. AVACHAT, J.

DATED : JANUARY 3, 2023

P.C. :

1. Heard.

2. The challenge in this writ petition is to the order dated 16/02/2022 passed by the learned Metropolitan Magistrate, 12th Court, Bandra, Mumbai issuing process in C.C. No. 207/SS/2021. Vide impugned order, the process came to be issued against the petitioners herein for the offence punishable under Section 500 of the Indian Penal Code, 1860 (for short “**IPC**”). The same is sought to be quashed in this writ petition.

3. The petitioners are the Chairman & Secretary respectively of Greater Bombay Middle Class Arunodaya Co-operative Housing Society (for short “**society**”). It is their case that in the year 1967, the MHADA had leased a plot of land to the society for construction of 18 flats for the society members. 17 out of 18

members paid contribution. A building comprising of 17 flats came up. The space of 18th flat on the ground floor remained vacant. In the year 1991, the respondent/original complainant became the Chairman of society. His sister-in-law purchased the unconstructed space, which was marked for Flat No. 18 and agreement to that effect was executed on 23/05/1994. Respondent no. 1 in the capacity of Chairman of the society, permitted transfer of Share Certificate in respect of Flat No. 18, inspite of having been aware of non-existence of such a flat. Construction of the flat (No. 18) came to be carried out later on without obtaining permission from Bombay Municipal Corporation (for short “**BMC**”). The BMC therefore issued a notice for demolition of the unauthorized construction. The matter reached the Courts of Law. The application for regularization of unauthorized construction was allowed on the condition of payment of regularization fees. The sister-in-law of respondent/complainant then assigned the flat by executing Gift Deed to the wife of respondent/complainant. The respondent’s wife therefore applied for the membership of society. The sister-in-law of respondent was in arrears of maintenance amount for the period from 2005 onwards. The transfer of Share Certificate was therefore not allowed because of outstanding dues of maintenance charges. The respondent’s wife therefore started making complaints against office bearers of the society.

4. The wife of respondent filed a complaint before Maharashtra State Consumer Redressal Commission (for short “**Consumer**

Commission”) for various reliefs. The petitioners in their capacity as ‘Office Bearers of the society’, filed their reply on behalf of the society.

5. According to the respondent/complainant, the following averments in the written statement/reply to complaint filed by the wife of respondent, are defamatory *per-se*:-

“The complainant is taking advantage of her own wrongs and that of her husband Mr. Javed M. Hashmi (who owns flat no. 3 in the society and who was the Chairman of the society from 1991 to 1996) during which period the unauthorised construction of Flat No. 18 was done entangling the society in protracted litigation. The present complaint is the latest among the series of former ones deliberately made with the malafide intention to harass the society and to stop the ongoing redevelopment process of the society building.”

6. The learned Advocate for petitioners would submit that it is a dispute *inter-se* the ex and the present office bears of the society. The statement made in the written statement filed in a judicial proceeding, has very much relevance with the issues involved therein. Although the respondent is not a party thereto, the proceeding has been initiated at the instance of his wife. The averments in para 3 of the written statement could by no stretch of imagination be termed as “Defamatory”. The matter is yet to be tried. The petitioners may support their contentions with relevant evidence. The learned Advocate has relied on a bunch of authorities to urge for allowing of the writ petition. He would

further submit that the learned Magistrate has not applied his mind for passing the order impugned herein. The order indicate that the statement is assumed to have been made in a notice reply. The same is factually incorrect. The Magistrate concerned, has not considered as to whether there exist sufficient grounds for proceeding against the petitioners. According to the learned Advocate, the order impugned herein is thus liable to be set aside.

7. The learned Advocate for respondent would submit that the respondent is not a party to the proceeding before Consumer Commission. The aforementioned averments were made only with an intention to harm the respondent's reputation. The respondent therefore issued a notice to the petitioners herein. They neither replied to the notice, nor tendered apology or struck out the defamatory contentions. The respondent was therefore constrained to file the complaint. The learned Advocate would further submit that the aforesaid defamatory contentions have no reference to the issues involved in the complaint to Consumer Commission, preferred by the respondent's wife. Averments made in the complaint or written statement or in the proceeding in the Court, contain defamatory statement, it amounts to publication. The statements made in judicial proceedings do not have any privilege. If the petitioners propose to bring their case within the ambit of exception to Section 499 of IPC, that could be a matter of evidence. The same could only be considered during trial of the case. Since the respondent was not a party to the proceeding between the society and his wife, whatever has been averred

against him, must be assumed to have been made with the malafide intention. The reputation of a person is his valuable asset. The aforesaid submissions made by the learned Advocate for respondents are based on the various authorities. The petitioners admitted to have made the aforesaid statement in court proceeding. As such, according to the learned Advocate, there is no case for the petitioners in this writ petition. He therefore urged for the dismissal thereof.

8. Considered the submissions advanced. Perused the authorities relied on.

9. “Whether particular averments are defamatory in nature?”, could be found only on adverting thereto. As such, it is a question of fact. There can be no dispute that the defamatory statement made in a judicial proceeding, is not privileged. The alleged defamatory statement is therefore again reproduced below :-

“The complainant is taking advantage of her own wrongs and that of her husband Mr. Javed M. Hashmi (who owns flat no. 3 in the society and who was the Chairman of the society from 1991 to 1996) during which period the unauthorised construction of Flat No. 18 was done entangling the society in protracted litigation. The present complaint is the latest among the series of former ones deliberately made with the malafide intention to harass the society and to stop the ongoing redevelopment process of the society building.”

10. The record indicates that all was not well between the

petitioners and office bearers of the society on one hand and the respondents on the other hand. The factual matrix has already been adverted hereinabove. True that the respondent is not a party to the proceeding before the said Consumer Commission. If we closely scrutinize the alleged defamatory statement, it would be revealed that the petitioners want to contend that the respondent's wife is taking advantage of her own wrong and that of her husband. Admittedly her husband (respondent herein) was the Chairman of the society. As such, what has been averred, would be a matter of evidence in the concerned proceeding. It has been alleged that an unauthorized construction of flat (No. 18) was made during the tenure of respondent, who was the Chairman of society. These averments do not *per-se* indicate that the petitioners have made such statement with a view to malign the respondent's reputation. Needless to mention that the business of society is run by the elected representatives, who are from among the members thereof. Besides the Chairman, there are office bearers such as, Secretary, Treasurer, etc. It is therefore reiterated that by no stretch of imagination, it could be assumed that the averments are *per-se* defamatory in nature. The parties to the Consumer Commission's complaint are yet to go for trial thereof. It also appears that the learned Magistrate overlooked the fact that the alleged averments are made in a written statement and not in a notice. The same indicates the casual manner in passing the order impugned herein.

11. Since this Court finds the aforesaid matter to have not been

defamatory in nature, interference with the order impugned herein is warranted. In the result, the petition deserves to be allowed with the following order :-

ORDER

- a. Criminal Writ Petition No. 1934 of 2022 is allowed.
- b. The order below Exhibit-1 dated 16/02/2022 passed by the learned Metropolitan Magistrate, 12th Court, Bandra, Mumbai in C.C. No. 207/SS/2021 issuing process against both the accused persons (the petitioners herein) for the offence punishable under Section 499 read with 500 of the Indian Penal Code, 1860 is set aside. The said proceeding (C.C. No. 207/SS/2021) therefore stands disposed of.
- c. Criminal Writ Petition No. 1934 of 2022 stands disposed of accordingly.

(R. G. AVACHAT, J.)