IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION [APL] NO.774 OF 2017

Applicant : **X** (Name withheld)
(Original Accused No.1)

-- Versus --

Non-Applicant : **Y** (Name withheld)
(Original Complainant)

=-=

Shri G.L. Bajaj, Advocate for the Applicant
Shri R.M. Daga, Advocate for the Non-Applicant

=-=

CORAM : S.B. SHUKRE, J.
RESERVED ON : 30th AUGUST, 2018.
PRONOUNCED ON : 2nd NOVEMBER, 2018.

ORAL JUDGMENT :-

Admit. Heard finally by consent.

02] By this application, the legality and correctness of the order of issuance of process, dated 24/07/2017, passed by the Judicial Magistrate First Class, Court No.2, Nagpur, in Misc. Criminal Complaint No.2286/2017 has been challenged. The applicant is legally wedded wife of the non-applicant. A matrimonial dispute has been brewing between the couple for quite some time and before different fora one after another or simultaneously. Their

relations got strained especially after the applicant left her matrimonial house on 21/11/2016 taking along with her the couple's daughter. The applicant did not return home and it was learnt by the non-applicant that she was staying at the house of her parents at Rajahmundry (Andhra Pradesh). The non-applicant tried his best to persuade the applicant to return to her matrimonial home along with the daughter, but in vain. The applicant too, on her part, filed a divorce petition bearing O.P. No.7/2017 in the Court of Principal Civil Judge, Senior Division, Rajahmundry. The Family Court on 26/04/2017 passed an order directing, *inter alia,* grant of interim custody of the daughter for a certain period of time to the non-applicant.

03] The order dated 26/04/2017 was challenged by the applicant by filing a writ petition being Writ Petition No.2927/2017. In this petition, certain statements were made by the applicant casting aspersions on the potency and capacity of the non-applicant. These statements disturbed the non-applicant and were perceived by the non-applicant as *per se* defamatory.

04] Following the perception nurtured by the non-applicant, the non-applicant filed a complaint case being Misc. Criminal

Complaint No.2286/2017 for setting the law in motion for taking action against the applicant for offences punishable under Sections 500 and 506 of Indian Penal Code ('IPC' for short). In the complaint, a few more persons, being in-laws of the non-applicant, were also added as accused persons and so the intervention of the criminal court for taking action under Section 120-B of IPC against all the accused persons was also sought. Section 34 of IPC was also invoked.

05] Initially, the learned Magistrate deferred the issuance of process and directed inquiry under Section 202(1) of the Code of Criminal Procedure ('Cr.P.C.' for short). On perusal of the statement of the non-applicant and statement of the witness examined by the non-applicant and the allegations made in the complaint, the learned Magistrate expressed his satisfaction that *prima facie*, offences punishable under Sections 500 and 506(I) of IPC were made out and, therefore, he issued process under these offences against the applicant and other co-accused persons by the order passed on 24/07/2017. Here, we are concerned only with the applicant, who has been made accused No.1 in the criminal complaint, as it is her, who has challenged in this application the order dated 24/07/2017 passed by the learned Magistrate.

06] Shri G.L. Bajaj, learned Counsel for the applicant submits that this application filed under Section 482 of Cr.P.C. is maintainable at law, as held in the case of *Urmila Devi vs. Yudhvir Singh – (2013) 15 SCC 624*. He submits that the Hon'ble Apex Court has made it clear that for challenging the order of issuance of process, both remedies, one under Section 397 of Cr.P.C. and the other under Section 482 of Cr.P.C., are available.

07] On merits of the matter, Shri Bajaj submits that the impugned order has been passed without any application of mind. He submits that it is well settled law that the alleged defamatory statement must appear to be apparently defamatory and not upon it's minute consideration. He submits that it is not permissible in law to read a few words from the whole sentence in isolation and draw a convenient meaning. He submits that when a statement was made by the applicant in Writ Petition No.2927/2017 that the non-applicant was an impotent person, the applicant only meant that due to some medical problem, the conception of the child was not possible and that is the reason why after the words “impotent person”, the applicant has also asserted like “the child was born by medical ovulation period technique as was suggested by the Gynecologist”. According to him, this statement, when read in it's

entirety, would not appear to be defamatory *per se*. On the contrary, he maintains that it is a fact that the child was born through a technique of medical ovulation period and it was required to be resorted to because of some medical issues faced by the non-applicant.

08] Shri Bajaj further submits that it is also well settled law that whenever an allegation made in a litigation is found to be true, it does not amount to defamation within the meaning of Section 499 of IPC. He places his reliance upon the cases of *Smt. Raminder Kaur Bedi vs. Shri Jatinder Singh Bedi – ILR (1988) II Delhi 633* and *Kallumatam Gurubasayya vs. Sanna Setra Siddalingappa* in Criminal Revision Case No.1094 of 1939 decided by Justice Lakshmana Rao on 22nd February, 1940.

09] Shri R.M. Daga, learned Counsel for the non-applicant, taking an objection on the maintainability of this application filed under Section 482 of Cr.P.C., submits that when the order of issuance of process is revisable under Section 397 of Cr.P.C. and that being the settled law, this application deserves to be dismissed on the sole ground of not being maintainable before this Court due to availability of alternate remedy. For his such

submission, he places reliance upon the cases of (i) *Om Kumar Dhankar vs. State of Haryana & another – (2012) 11 SCC 252*; (ii) *Girish Kumar Suneji vs. Central Bureau of Investigation – (2017) 14 SCC 809*; (iii) *Rajendra Kumar Sitaram Pande vs. Uttam & another – (1999) 3 SCC 134.*

10] The next submission of the learned Counsel for the non-applicant is upon the merits of the case. According to him, no interference from this Court in exercise of it's power under Section 482 of Cr.P.C. is warranted in the present case for the reason that when examined from any angle, the impugned order cannot be considered to be an order, which is perverse or patently illegal or contrary to law or causing grave prejudice or injustice to the parties. He submits that when the complaint discloses that the statements were made by the accused, which were defamatory *per se* and were made, with intention or knowledge to harm that such imputations will harm the reputation of the complainant, *prima facie* case would have to be said as made out against the applicant and, therefore, this Court should be very slow in interfering with the order impugned here. He further submits that whether there is sufficient evidence to establish guilt of the accused for the offences for which process has been issued is a

question that needs to be examined only after recording of evidence at trial and it can never be a subject matter of a proceeding under Section 482 of Cr.P.C. He also submits that even such issues as to whether or not the statement has been made in good faith or was for public good would only raise questions of fact which, for their resolution, require evidence and therefore, examination of such questions of fact at the stage of considering the legality and correctness of order of issuance of process is not permissible in law.

11] For the submissions so made on merits of the matter, Shri Daga has relied upon the following cases :

i. *Mohd. Abdulla Khan vs. Prakash K – 2018(2) Mh.L.J. (Cri.)(S.C.)721*.

ii. *M.N. Damani vs. S.K. Sinha & others – AIR 2001 SC 2037*.

iii. *Jeffrey J. Diermeier & another vs. State of West Bengal & another – (2010) 6 SCC 243*.

iv. *Trichinopoly Ramaswamy Ardhanani, Bombay & others vs. Kripa Shanker Bhargava – 1990 CRI.L.J. 2616 (M.P. High Court)*.

v. *Thangavelu Chettiar vs. Ponnammal – 1966 Cri.L.J. 1149 (Madras High Court)*.

vi. *Shri Sopullo Datta Naik Dessai vs. Shri Yeshwant Govind Dessai & another – 2010 ALL MR (Cri) 151.*

vii. *M.K. Prabhakaran & another vs. T.E. Gangadharan & another – 2006 CRI.L.J. 1872*.

12] Shri Daga has also relied upon the case of *State by the Inspector of Police, Chennai vs. S. Selvi & another – AIR 2018 SC 81*, wherein it is held that in an application filed for discharge of the accused, it is not permissible for the court to appreciate the entire material on record as if the court is trying the criminal case and the duty of the court is only to find out whether or not a *prima facie* case has been made out.

13] In the cases relied upon by Shri Daga, learned Counsel for the non-applicant, which are referred to in the paragraph No.9 it has been consistently held that an order of issuance of process is revisable under Section 397 of Cr.P.C. This would make it clear to us that remedy in the nature of a criminal revision application filed under Section 397 of Cr.P.C. before the Sessions Court is certainly available for an accused aggrieved by the order of issuance of process against him. But the question is, whether availability of such a remedy would, by itself bar the entry of the accused in this Court through the door of Section 482 of Cr.P.C. or not.

14] The answer to the question could be found out by referring to the observations of the Hon'ble Apex Court in the case of *Urmila Devi (supra)*. The Hon'ble Apex Court by referring to it's various judgments rendered earlier has held that an order of issuance of process or summons to an accused in exercise of it's power under Sections 200 to 204 of Cr.P.C. can always be a subject matter of challenge under the inherent jurisdiction of the High Court under Section 482 of Cr.P.C. Considering it's previous cases, Hon'ble Supreme Court held that in such a matter even the revisional jurisdiction under Section 397 of Cr.P.C. would be available to the aggrieved party. The exposition of the Hon'ble Supreme Court in this regard appears in paragraph 21 to 23. These paragraphs are reproduced thus :

> *21. Having regard to the said categorical position stated by this Court in innumerable decisions resting with the decision in Rajendra Kumar Sitaram Pande, as well as the decision in K.K. Patel, it will be in order to state and declare the legal position as under :*
>
> *21.1. The order issued by the Magistrate deciding to summon an accused in exercise of his power under Section 200 to 204 Cr.P.C. would be an order of intermediatory or quasi-final in nature and not interlocutory in nature.*

21.2. Since the said position viz. Such an order is intermediatory order or quasi-final order, the revisionary jurisdiction provided under Section 397, either with the District Court or with the High Court can be worked out by the aggrieved party.

21.3. Such an order of a Magistrate deciding to issue process or summon to an accused in exercise of his power under Sections 200 to 204 Cr.P.C. can always be subject-matter of challenge under the inherent jurisdiction of the High Court under Section 482 Cr.P.C.

22. When we declare the above legal position without any ambiguity, we also wish to draw support to our above conclusion by referring to some of the subsequent decisions. In a recent decision of this court in Om Kumar Dhankar v. State of Haryana, the decisions in Madhu Limaye, V.C. Shukal, K.M. Mathew, Rakesh Kumar Mishra v. State of Bihar ending with Rajendra Kumar Sitaram pande, was considered and by making specific reference to para 6 of the judgment in Rajendra Kumar Sitaram Pande, this Court has held as under in para 10: (Om Kumar Dhankar Case)

In view of the above legal position, we hold, as it must be, that revisional jurisdiction under Section 397 Cr.P.C. was available to Respondent 2 in challenging the order of the Magistrate directing issuance of summons.

The first question is answered against the appellant accordingly.

23. Therefore, the position has now come to rest to the effect that th revisional jurisdiction under Section 397 Cr.P.C. is available to the aggrieved party in challenging the order of the Magistrate, directing issuance of summons.

15] So, the position of law now is that both remedies, one under Section 397 of Cr.P.C. and other under Section 482 of Cr.P.C., are available. The applicant-accused No.1 has chosen the latter remedy and in view of the law laid down by the Hon'ble Apex Court in the case of *Urmila Devi*, it is not possible to hold that the choice so exercised by the applicant is bad in law or was something not at all available to her at the threshold itself. The objection about the maintainability of this petition is, therefore, rejected.

16] The principles of law which I find to be useful for considering merits of the case and which arise from such cases, relied upon by the learned Counsel for the non-applicant, as that of *Mohd. Abdulla Khan*, *Jeffrey J. Diermeier*, *Trichinopoly Ramaswamy Ardhanani*, *Thangavelu Chettiar*, *Sopullo Datta Naik Dessai*, *M.K. Prabhakaran* and *S. Selvi* (paras 11 and 12 supra) are as follows :

[I] The essentials of offence of defamation are that there should be some imputation harming the reputation of a person and publication of such imputation by communicating it to a person other than a person against whom the imputation is made.

[ii] Existence of the aforestated two essentials of the offence of defamation must be ascertained from the allegations made in the complaint and other material produced on record, if any, by applying the test of face value or *prima facie* worth of the material on record taken as it is, and a detailed analysis of the material available on record is not permissible.

[iii] The question as to whether or not there is sufficient evidence to establish guilt of the accused or the question as to whether or not the imputation has been made in good faith or for public good or the question as to whether or not the imputation depicts the factual position, all are the questions which must be answered on merits of the case after a detailed evidence is available and not at the stage of issuance of process.

[iv] A defamatory statement made in the plaint or written statement or a reply gets published the moment such plaint or written statement or reply is filed in a Court of law.

These principles of law would have to be borne in mind while examining the impugned order for it's legality or otherwise.

17] Of course, Shri Bajaj, learned Counsel for the applicant relying upon the case of *Raminder Kaur Bedi* has submitted that when the alleged defamatory imputation is made a ground for seeking divorce and is upheld by the civil court, conviction of the accused for an offence of defamation would not be possible and, therefore, the interest of justice would require that the criminal case is stayed till disposal of the divorce case. The learned Counsel for the non-applicant submits that this case does not involve any issue about stay of the criminal proceedings.

18] I think, the learned Counsel for the respondent is right. What has been challenged in this application is the order of issuance of process and no issue about the necessity of staying the trial of the criminal case has arisen in these proceedings and, therefore, the case of *Smt. Raminder Kaur Bedi* would not help the applicant in any manner.

19] Shri Bajaj has also submitted that when the complaint is founded on an allegation in a plaint filed in a civil proceeding

and has been found to be false, the offence would not be that of defamation punishable under Section 500 of IPC, but an offence relating to giving of false evidence punishable under Section 193 of IPC as held in the case of *Kallumatam* (supra). The learned Counsel for the non-applicant would like to express his disapproval to the submission so made by the learned Counsel for the applicant.

20] The disagreement expressed by the learned Counsel for the non-applicant, here also, I would say, is not misplaced. Giving of false evidence is a different and distinct offence from that of the offence of defamation punishable under Section 500 of IPC. The offence of giving of false evidence made punishable under Section 193 of IPC has been defined under Section 191. The definition indicates that any person who is bound by law or oath to state the truth or who is bound by law to make a declaration upon any subject, makes any statement which is false and which he either knows or believes to be false is said to give false evidence. So, it is clear that the offence of false evidence is committed when the person is required to give evidence or make a declaration upon a subject, as mandatorily required under the law. This offence is about making false declaration or statement knowing it to be false

at a time when the law or the oath administered to such a person binds him to give a true disclosure of a fact and such a person, inspite of knowing his responsibility under the law, when chooses to speak or declare falsehood, is said to commit offence of giving false evidence. So, the offence is essentially of something which is a matter of evidence or law and not of pleadings. If any defamatory statement is made in pleadings, what would arise would be an offence of defamation punishable under Section 500 read with Section 499 of IPC and not of offence of giving false evidence punishable under Section 193 read with Section 191 of IPC.

21] In the present case, the offence of defamation has, *prima facie,* arisen from pleadings and not from evidence. In *Kallumatam,* the facts are not stated, but what can be inferred from the observations of Court is that no offence of defamation was involved and only offence of giving of false evidence was attracted as during course of evidence, a false allegation was made by a party. For the offence of giving of false evidence, complaint by Court is necessary or otherwise cognizance cannot be taken. But, no complaint was filed by the Court and, therefore, the Court observed that a party cannot be permitted to evade that provision of law which requires Court to file a complaint by filing a

complaint of defamation. These facts would indicate that *Kallumatam* has no application to the facts of this case.

22] Keeping in mind the principles of law, discussed earlier and found to be applicable, let us now consider the merits of the case.

23] A perusal of the complaint and the statements of the non-applicant and his one witness, both made on oath, show that there is an imputation made by the applicant in the writ petition that she filed in this Court, which was Writ Petition No.2927/2017. They also show that prior to filing of the petition, the applicant had issued a threat of doing something so as to injure reputation of the non-applicant, if the non-applicant conducted himself the way he was asked not to by the accused persons. The imputation made against the non-applicant, in order to comprehend it's *prima facie* worth, requires consideration at this stage. It reads thus :

> *"The petitioner wanted to avoid writing this in this petition but the conduct of the respondent compels her to write that the respondent is an impotent person and the child was born by medical ovulation period technique as was suggested by the gynecologist."*

24] Reading the aforestated allegation as it is and without adding anything to it or subtracting anything from it *prima facie,* one gets an impression that it is *per se* defamatory in character and has been, *prima facie,* calculated to cause harm or injury to the reputation of the non-applicant. It also gives an impression that apparently it has been made with consciousness about the repercussion that such a statement would have on the life of the non-applicant. Even if the expression “impotent person”, as the learned Counsel for the applicant would like this Court to do, is read in all its contextual setting, in particular, in the context of the birth of the child by adopting a medical procedure on the suggestion of the Gynecologist, still the apparent harm that the expression “impotent person” causes, is not diluted or washed out. This is for the reason that *prima facie* the word “impotent” when understood in it's plain and grammatical sense, reflects adversely upon the manhood of a person and has a tendency to invite derisive opinions about such person from others and, therefore, use of such word and its publication as contemplated under Section 499 of IPC would be sufficient to constitute, in a prima facie manner, the offence of defamation punishable under Section 500 of IPC. Now, if the non-applicant submits that this word has been used by her in some different sense denoting medical

condition of the non-applicant affecting the process of conception, it would be a matter of evidence to be proved accordingly. At this stage, the meaning apparently indicated by the word would have to be taken as it is. Then, such imputation has been made by filing a writ petition and, therefore, the other ingredient of publication is also fulfilled in the present case. Therefore, *prima facie,* the offence punishable under Section 500 of IPC is made out in this case.

25] As regards the offence punishable under Section 506 of IPC, which is about criminal intimidation of the complainant, I must say, even on this count, the allegations contained in the plaint and the material available on record, prima facie, are sufficient to show that this offence too has been constituted in the present case. There are allegations supported by the material brought on record that prior to the filing of the writ petition, the applicant had issued threat to the non-applicant to damage or injure his reputation. The offence of criminal intimidation has been defined under Section 503 of IPC and it requires a threat given by the accused to the complainant of such nature as would cause injury to the complainant's reputation or property or another person in whom the complainant is interested and it must be done with intent to cause alarm to the complainant or such other person or make the

complainant or such other person do or omit to do something which otherwise he would not do or would omit to do under the law of land. The material as disclosed by the allegations in the complaint and the statement of the witnesses, in my view, is sufficient to *prima facie* make out the case for proceeding further in the matter under Section 506(I) of IPC as well.

26] All these aspects of the matter have been properly considered by the learned Magistrate and, therefore, I do not see any reason to make any interference with the impugned order. The application stands dismissed.

(S.B. SHUKRE, J.)

At this stage, the learned Counsel for the applicant makes a prayer that the exemption granted by this Court to the applicant from her personal appearance before the trial Court be extended for a further period of eight weeks.

The prayer is opposed by the learned Counsel for the non-applicant.

Considering the fact that Diwali festival is round the corner, it is appropriate that the prayer is granted.

Prayer is granted.

(S.B. SHUKRE, J.)

*sandesh