



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF MARCH, 2020

BEFORE

THE HON'BLE MR.JUSTICE B.A.PATIL

CRIMINAL PETITION NO.2343/2018

BETWEEN :

Dadiba Kali Pundole
@ Dadiba Pundole
Aged about 54 years
Director,
Pundole Art Gallery and
Pundole's Auction House,
369, Dr. Dadabhai Naoroji Road
Mumbai-400 001.

... Petitioner

(By Smt. Jayna Kothari, Senior Counsel for
Sri Rohan Kothari, Advocate)

AND :

M/s. Bid and Hammer
Auctioneers Pvt. Ltd.,
A Company incorporated under the
Companies Act, 1956,
Having its Corporate office at
No.11, Whitefield Main Road,
Bengaluru-560 066,
Represented by its Director.

... Respondent

(By Sri C.K.Nandakumar, Advocate)

This Criminal Petition is filed under Section 482 of Cr.P.C praying to quash and set aside the order dated 13.08.2015 produced herein as Annexure-A and order dated 11.09.2015 produced herein as Annexure-B passed in C.C.no.6392/2015 taking cognizance of the Criminal Complaint in C.C.No.6392/2015 in so far as it relates to the petitioner herein and summoning the petitioner, and quash all proceedings against the petitioner in C.C.No.6392/2015.

This Criminal Petition having been heard and reserved on 13.02.2020 coming on for pronouncement of orders this day, the Court made the following:-

ORDER

This petition is filed by accused No.4 under Section 482 of Cr.P.C. praying to quash the orders dated 16.7.2015 and 11.9.2015 passed in CC.No.6392/2015 by which cognizance has been taken as against the petitioner herein.

2. I have heard Smt.Jayna Kothari, learned Senior Counsel appearing on behalf of the petitioner-accused No.4 and Sri C.K.Nandakumar, learned counsel for the respondent-complainant.

3. Though this case is listed for admission, by consent of both the parties, the same is taken up for final disposal.

4. The brief facts of the case are that complainant is an owner of auction house. The complaint has been filed alleging that a news article dated 6.7.2014 has been published in '*Mumbai Mirror*' containing certain comments in the said article. It is alleged in the complaint that the said comments affected the business of the respondent-complainant and therefore the complaint has been filed. On the basis of the said complaint, a case has been registered in PCR.No.388/2015 and subsequently, cognizance has been taken. Challenging the same, the petitioner is before this Court.

5. It is the contention of the learned Senior Counsel that four articles which have been published are not published by the petitioner. Petitioner has given only his views and as such it does not amount to defamation as

contemplated under Section 499 of IPC. It is her further submission that the petitioner-accused No.4 is neither editor, writer nor author and he has not published the said publications in '*Mumbai Mirror*' and as such he cannot be arrayed as an accused. It is her further submission that as the petitioner-accused No.4 was an expert of art of M.F.Husain, he has expressed his opinion by seeing many articles which came before him. The expression of opinion does not attract the provisions of Section 499 of IPC. It is his further submission that it is a general statement made by the petitioner which speaks about the art of Gaitonde and it is general observation as well as a fair comment. It is her further submission that different articles have been published on the fair comment and he has not contributed to the said publication. It is her further submission that in order to constitute an offence, there must be an intention and without there being any intention, the petitioner cannot be held to be guilty. In order to substantiate the said

contention, she relied upon the decisions in the case of ***Subramanian Swamy Vs. Union of India, Ministry of Law and others***, reported in **(2016)7 SCC 221**; in the case of ***Mohd. Abdulla Khan Vs. Prakash K.***, reported in **(2018) 1 SCC 615**; in the case of ***S.Khushboo Vs. Kanniammal & another***, reported in **(2010)5 SCC 600**. It is her further submission that the respondent-complainant is a habitual complainant and identical complaints have been filed against other persons and they have been quashed. It is her further submission that petitioner and the respondent reside in Mumbai and therefore Bangalore Court is not having any jurisdiction to take cognizance. It is her further submission that in order to attract the provisions of Sections 499 and 500 of IPC for defamation, the ingredients summarized in the said sections must be satisfied. In the present case, no ingredients are made out and no *prima facie* case has also been shown by the complainant. In order to substantiate the said contention, she relied upon the

decision of Bombay High Court in the case of **Ratan N. Tata & others Vs. State of Maharashtra & another**, in WP.No.1238/2019, disposed of on 22.7.2019; decision of co-ordinate Bench of this Court in the case of **Smt.Abhilasha Ojha & another Vs. M/s.Bid & Hammer Auctioneers (P) Ltd.**, in Criminal Petition No.7591/2016 & connected matter, disposed of on 24.9.2019; in the case of **Ramchandra Venkatraman Vs. Shapoorji Pallonji & another** [2019 SCC Online Bombay 524]; and in the case of **Birla Corporation Limited & Others Vs. Adventz Investments and Holdings Limited & others** [2019 SCC Online 682].

6. *Per contra*, the learned counsel for the respondent-complainant submitted that the complainant has made out a triable case and at this juncture veracity of the evidence cannot be gone into. It is his further submission that the petitioner is a business rivalry and making such statement, would affect the business similarly done by the complainant and his business goes

down. It is his further submission that before a day of the auction remarkable publication has been done with the aid and assistance of accused Nos.1 and 2, that itself shows the manifest of the petitioner to bring down the business of the complainant and in order to defame the complainant, such statement has been made. It is his further submission that it is the consistent effort of the petitioner to bring down the reputation of the complainant. It is his further submission that whether the petitioner is having any intention or not is a matter which has to be gone into at the time of trial. What is the wrong with the said publication of the booklet has not been fairly commented. It is his further submission that by flipping through the said booklets, he has given his opinion and he is not expert in the field and how he can come to the said conclusion has not been stated. The flipping statement itself is defamatory. It is his further submission that a petition has been filed before this Court in Criminal Petition No.8692/2015 along with

connected matters and the same was dismissed by the order 19.6.2019. Under such circumstances, the petitioner cannot contend that there is no material to bring home the guilt of the accused. It is his further submission that to prove good faith for the protection of the interest of the person making it, it is who he makes or contends good faith, has to prove and this is a premature stage to consider the material placed by the complainant. In order to substantiate his contention, he has relied upon the decision in the case of ***M.A.Rumugam Vs. Kittu @ Krishnamoorthy*** reported in ***(2009) 1 SCC 101***. It is his further submission that the learned Magistrate after taking into consideration the material placed on record has formed an opinion. It is his further submission that the complaint cannot be thrown out merely because the actual words spoken or stated have not been mentioned in the complaint. In order to substantiate the said contention, he relied upon the decision in the case of ***Balraj Khanna & others Vs.***

Moti Ram reported in **(1971)3 SCC 399**. On these grounds, he prayed to dismiss the petition.

7. I have carefully and cautiously gone through the submissions made by the learned counsel for the parties and perused the records.

8. It is not in dispute that the respondent-complainant runs an art of auction house in Bengaluru and also organized an art in New Delhi titled "Significant Indian Art". It is also not in dispute that in the said art auction, it had proposed to sell 22 works of M.F.Husain, along with many other renowned artists. It is also not in dispute that an article has been published in a newspaper with reference to the auction stated above and the petitioner-accused No.4 made a comment about the auction stating that the proposed selling of about 22 works of M.F.Husain as fake. The contention of the complainant is that the comment is made with vexatious motive with an intention to defame the complainant and

the accused got the news article published in a daily called "*Mumbai Mirror*" on 6.7.2014, a day prior to auction. The said news article was titled "Fake Encounter" and was written on the subject of proliferation of counterfeit artworks in Indian art market with reference to the alleged sale of forged paintings. On the basis of the said material the complainant contended that the petitioner-accused No.4 along with the author and the editor have committed the offences punishable under Sections 499 and 500 of IPC. It is the contention of the petitioner-accused No.4 that he was one of several experts contacted by the author of article to solicit his views which he provided with fair comments and as such he has not committed any offence as contemplated under Sections 499 and 500 of IPC.

9. The question as to what constitutes defamation came up before the Hon'ble Apex Court in the case of ***Mohd. Abdulla Khan Vs. Prakash K.*** (cited *supra*)

wherein at paragraphs-11 to 13 and 16 it has been observed as under:-

"11. *Committing any act which constitutes defamation under Section 499 IPC is punishable offence under Section 500 IPC. Printing or engraving any defamatory material is altogether a different offence under Section 501 IPC. Offering for sale or selling any such printed or engraved defamatory material is yet another distinct offence under Section 502 IPC.*

12. *If the content of any news item carried in a newspaper is defamatory as defined under Section 499 IPC, the mere printing of such material "knowing or having good reason to believe that such matter is defamatory" itself constitutes a distinct offence under Section 501 IPC. The sale or offering for sale of such printed "substance containing defamatory matter" "knowing that it contains such matter" is a distinct offence under Section 502 IPC.*

13. *Whether an accused (such as the respondent) against whom a complaint is registered under various sections of the IPC (Sections 500, 501 and 502 IPC) could be convicted for any of those offences depends upon the evidence regarding the existence of the facts relevant to constitute those offences.*

14. xxx xxx xxx xxx

15. xxx xxx xxx xxx

16. *We must make it clear that for the acts of printing or selling or offering to sell need not only be the physical acts but include the legal right to sell i.e. to transfer the title in the goods, the newspaper. Those activities, if carried on by people, who are employed either directly or indirectly by the owner of the newspaper, perhaps render all of them i.e. the owner, the printer, or the person selling or offering for sale liable for the offences under Sections 501 or 502 IPC, (as the case may be) if the other elements indicated in those sections are satisfied."*

10. It is the contention of the learned counsel for the petitioner-accused No.4 that to constitute an offence, there must be an intention to defame the complainant. In order to substantiate the said contention, she relied upon the decision in the case of **Subramanian Swamy Vs. Union of India** (cited *supra*), wherein at paragraph-165 it has been observed as under:-

"165. *In Ramlila Maidan Incident, In re [Ramlila Maidan Incident, In re, (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810] , the Court had opined that: (SCC p. 34, para 22)*

"22. ... a common thread runs through Parts III, IV and IV-A of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all

the three constitutional aspects emerging from these Parts."

11. Learned Senior Counsel has also referred to the decision in the case of ***S.Khushboo Vs. Kanniammal & another***, (cited *supra*) wherein at paragraphs-25, 27 and 28 it has been observed as under:-

"25. *In the present case, the appellant takes full responsibility for her statement which was published in India Today, a leading news magazine. It would be apt to refer back to the decision of this Court in Ranjit D. Udeshi v. State of Maharashtra [AIR 1965 SC 881 : (1965) 2 Cri LJ 8] wherein it was held that if a mere reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. It was observed that in the field of art and cinema, the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions, the same are taken for granted without in any way tending to debase or debauch the mind. What*

is to be considered is whether a class of persons, not an isolated case, into whose hands the book, article or story falls will suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. Even though the decision in that case had upheld a conviction for the sale of a literary work, it became clear that references to sex cannot be considered obscene in the legal sense without examining the context of the reference.

26. xxx xxx xxx

27. *There are numerous other decisions, both from India and foreign countries which mandate that "obscenity" should be gauged with respect to contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person. Owing to the clear formulation on this issue it is not necessary for us to discuss these precedents at length.*

28. *In the present case, the appellant has merely referred to the increasing incidence of*

premarital sex and called for its societal acceptance. At no point of time the appellant described the sexual act or said anything that could arouse sexual desires in the mind of a reasonable and prudent reader. Furthermore, the statement has been made in the context of a survey which has touched on numerous aspects relating to the sexual habits of people in big cities. Even though this survey was not part of a literary or artistic work, it was published in a news magazine thereby serving the purpose of communicating certain ideas and opinions on the abovementioned subject. In the long run, such communication prompts a dialogue within society wherein people can choose to either defend or question the existing social mores. It is difficult to appreciate the claim that the statements published as part of the survey were in the nature of obscene communications.

12. On close reading of the decision in the case of **Mohd. Abdulla Khan Vs. Prakash K.** (cited *supra*), it indicates that if the content of any news item carried in a newspaper is defamatory, the mere printing of such

material knowing or having good reason to believe that such matter is defamatory itself constitutes a distinct offence under Section 501 of IPC and without there being any knowledge or reasonable belief, the accused cannot be held for the offence punishable under Section 499 of IPC.

13. Whether the publication made in "*Mumbai Mirror*" constitutes an offence or not has to be analyzed only on the basis of the publication which has been made. The references which have been made in the publication dated 6.7.2014 mention: "It was one of 22 Husain works that went up for sale last Friday at Significant Indian Art organized the Bangalore based auction house Bid & Hammer. A day prior, the MF Husain Foundation, a trust that controls the exhibition, sale and purchase of all art created by Husain, sent the auction house a legal notice claiming the works were counterfeit, urging them to cancel the event. Nritya, a painting by Rabindranath Tagore joined the ranks when Kolkata art

historian Susobhan Adhikary claimed the original was at Visva Bharati in Shantiniketan although Prof. Ratan Parimoo authenticated the work for Bid & Hammer. Further it is mentioned "A city gallerist puts it in prospective when he says India consumes more Black Label than Johnnie Walker produces; the business of art is no exception. There are twice the number of paintings Van Gogh created in his lifetime spinning in the market. "Even New York's The Metropolitan Museum of Art does not know which of the Rabindranath in its collection is genuine. They bought it with the right intention and now, all are being questions." Says director of Pundole Art Gallery and auction house, Dadiba Pundole. Further it has also been published "let alone his signature" - in a note attached to a horses in acrylic on canvas dated 'Dubai, 2010' does not seem to be his." In that context, if the material which has been produced by the complainant is perused, they are going to throw the light that there is some material. But it is a matter of fact and

it has to be proved in the evidence. Whether the accused is having any intention or not is also a matter of evidence. Without there being proper adjudication by the Court it cannot be said that there is any intention or not. At this stage complaint cannot be thrown out on the mere ground that there is no *prima facie* material to constitute an offence under Section 499 of IPC. This proposition of law has been laid down in the case of ***Balraj Khanna & others Vs. Moti*** (cited *supra*), wherein at paragraph-25, it has been observed as under:-

"25. After a consideration of the various decisions referred to above, we are of the opinion that the propositions laid down in English decisions dealing with libel that the actual words alleged to be used must be stated in the indictment cannot be applied on all force when dealing with the cases of defamation by spoken words under Section 499 IPC. It will be highly desirable no doubt if the actual words stated to have been used by

an accused and which are alleged to be defamatory are reproduced by the complainant. The actual words used or the statements made may be reproduced verbatim by the complainant if the words are few and the statement is very brief. But in cases where the words spoken are too many or the statements made are too long, in our opinion, it will be the height of technicality to insist that the actual words and the entire statements should be reproduced verbatim. The object of having, if possible, the actual words or the statements before the Court is to enable it to consider whether those words or the statements are defamatory in nature. That purpose or object will be served if the complainant is able to reproduce in his complaint or evidence in a substantial measure the words of imputation alleged to have been uttered. If the statements or the words placed before the Court by the complainant are held to be not defamatory, it will mean that the complainant will have to lose. Therefore, it is to his interest to get a proper adjudication from the Court that as far

as possible the words spoken or the statements actually made and which he alleges to be defamatory are before the Court. But a complaint cannot be thrown out on the mere ground that the actual words spoken or the statements made have not been stated in the complaint. From the point of view of accused also it is necessary that the matters alleged to be defamatory in the complaint must be so stated as to enable them to know the nature of the allegations that they have to meet."

14. Keeping in view the aforesaid proposition of law, I am of the considered opinion that at this stage, it is not just and proper to come to the conclusion that there is no material. If at all the contention of the petitioner-accused No.4 is that it is a *bona fide* one and it will fall within the Exceptions contained in Section 499 of IPC, then under such circumstances, it is for the petitioner to prove good faith for the protection of the interest of the person and he has to plead the exception stated in the said Section and burden shifts upon him to

prove the same. Under such circumstances, now it is to be safely held that at this stage it is premature to analyze and come to such conclusion. This proposition of law has been laid down in the case of **M.A.Rumugam Vs. Kittu @ Krishnamoorthy** (cited *supra*), wherein at paragraphs-19 and 20 it has been observed as under:-

"19. For the purpose of bringing his case within the purview of the Eighth and the Ninth Exception appended to Section 499 of the Penal Code, it would be necessary for the appellant to prove good faith for the protection of the interests of the person making it or of any other person or for the public good.

20. It is now a well-settled principle of law that those who plead exception must prove it. The burden of proof that his action was bona fide would, thus, be on the appellant alone.

15. Though it is the contention of the learned Senior Counsel for the petitioner that it is a general statement and he is making or speaking about the art of Gaitonde and it is a general observation and fair

comment, when the publication has been made with the said remarks, on one day before the said auction, that itself manifest to bring down the business of the complainant. Even as mentioned *supra* the reference has also been made to the shop of the complainant. Under such circumstances, whether it is a general statement or a fair comment, the said aspect requires the evidence and at this stage this Court cannot hold a mini trial and cannot come to the conclusion. When Section 499 of IPC specifically speaks about the intention, intention has to be ascertained only at the time of trial. In that angle also, the contention of the learned Senior Counsel for the petitioner-accused No.4 is not acceptable.

16. I have gone through the decisions relied upon by the learned Senior Counsel for the petitioner-accused No.4. Even at paragraphs-23 and 24 of the decision in the case of ***S.Khushboo Vs. Kanniammal & another*** cited by her, it has been observed by the Hon'ble Apex Court as under:-

"23. *Similarly, Section 509 IPC criminalises a "word, gesture or act intended to insult the modesty of a woman" and in order to establish this offence it is necessary to show that the modesty of a particular woman or a readily identifiable group of women has been insulted by a spoken word, gesture or physical act. Clearly this offence cannot be made out when the complainants' grievance is with the publication of what the appellant had stated in a written form. Likewise, some of the complaints have mentioned offences such as those contemplated by Section 153-A IPC (promoting enmity between different groups, etc.) which have no application to the present case since the appellant was not speaking on behalf of one group and the content of her statement was not directed against any particular group either.*

24. *Coming to the substance of the complaints, we fail to see how the appellant's remarks amount to "obscenity" in the context of Section 292 IPC. sub-section (1) of Section 292 states that the publication of a book,*

pamphlet, paper, writing, drawing, painting, representation, figure, etc. will be deemed obscene, if—

- *It is lascivious (i.e. expressing or causing sexual desire); or*
- *Appeals to the prurient interest (i.e. excessive interest in sexual matters); or*
- *If its effect, or the effect of any one of the items, tends to deprave and corrupt persons, who are likely to read, see, or hear the matter contained in such materials.*

In the past, authors as well as publishers of artistic and literary works have been put to trial and punished under this section.”

17. The question as to what injury has been caused to the complainant because of the said publication has to be assessed on the facts of the case and it is a question of law and which would be decided by the trial Court during trial. As already held, the *mens rea* aspect is also a matter of trial. But in the decision quoted by the learned Senior Counsel there is no specific legal injury

caused to the complainant and in that light the Hon'ble Apex Court has given the benefit and allowed the petition. But in the instant case, no such situation is existing and in the said case after the trial the said observations have been made. Now the petitioner-accused No.4 has approached this Court under Section 482 of Cr.P.C. Full material is not before this Court or before the trial Court. In that light, it is very difficult for this Court to arrive at any conclusion as to whether the act of accused constitutes an offence or not. Even in the case of ***Subramanian Swamy Vs. Union of India, Ministry of Law and others*** (cited supra) similar observations have been made, since that writ petition was filed under Article 32 of Constitution of India with reference to freedom of speech and expression of an individual. The facts of the present case are different with the facts in the decision referred to by the learned Senior Counsel for the petitioner. In that light, the ratio laid down is not applicable to the case on hand.

18. Considering the aforesaid facts and circumstances of the case and looking from any angle, the petitioner-accused No.4 has not made out any good grounds so as to quash the proceedings.

19. Though the learned Senior counsel for the petitioner-accused No.4 contended that the petitioner is the resident of Mumbai and Bengaluru Court has no jurisdiction, *prima facie* the same cannot be gone through at this juncture. The said question requires a detailed look on the facts, publication made and other aspects. In that light also, the said contention of the learned Senior Counsel for the petitioner cannot be acceptable.

20. In view of the aforesaid discussion held by me, the petition being devoid of merits, is liable to be dismissed and accordingly, the same stands ***dismissed***.

Sd/-
JUDGE

*ck/-