

(1983) 06 BOM CK 0007
In the Bombay High Court
Case No : Criminal Appeal No. 299 of 1980

Baburao Shankarrao Chavan

APPELLANT

Vs

Shaikh Biban Baban Pahlwan and another

RESPONDENT

Date of Decision : 20-06-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 105

Penal Code, 1860 (IPC) — Section 499, 500, 52

Citation : (1984) 1 BomCR 194

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Judgement

1. The appellant before me is the original complainant whose complaint against respondent No. 1 (who will be referred to hereinafter as "the accused") for offence u/s 500 of the I.P.C. has been turned down by the learned Judicial Magistrate, First Class, Nasik, who, by his order dated 14th January, 1980 acquitted the accused of the said offence.

2. The facts are very few. On 24-9-1974, the accused sent an application to the Revenue Minister, Maharashtra State, Bombay. Certain statements made in the said application and particularly statements in paragraphs 3, 4 and 6 of the same were, according to the complainant, of a defamatory character, harming the reputation of the complainant. By the said application the accused requested the Hon'ble Revenue Minister, to make appropriate enquiry in relation to the information contained in the said application. By the said application, the accused also requested the Hon'ble Revenue Minister to take appropriate action against the complainant in his jurisdiction as the Revenue Minister. Copies of the said application are also sent to the Hon'ble Prime Minister of India, to one of the Members of Parliament, to one of the Members of the Legislative Assembly, as also to the Collector of Nasik and the Income Tax Officer, Nasik. The complainant got information about this application made by the accused and hence on 20-7-1974 he filed the instant complaint out of which the present appeal arises,

for suitable action against the accused for the offence u/s 500 of the I.P.C.

3. It appears that the case was tried by the learned Magistrate as a summary case. Process was issued against the accused. Thereafter evidence was taken. The complainant was examined and he was allowed to be cross-examined by the accused. After the cross-examination of the complainant, the learned Magistrate was satisfied that although the application made by the accused dated 24-9-1974 (Exh. 21 in these proceedings) was admitted by the accused, still since the statements made in the said application fell within the ambit of Exception 8 to the provisions of the operative part of Section 499 of the I.P.C., no offence punishable u/s 500 of the I.P.C. was made out. By his order dated 14-1-1980, therefore, he acquitted the accused of the offence alleged against him. The present application is filed against the said order of acquittal.

4. Before referring to the arguments advanced at the bar I must state certain positions about which there was no dispute across the bar. The fact that the impugned application was made by the accused to the Hon''ble Revenue Minister and that the copies of the same were sent to the various persons and authorities is not disputed. Further, the fact that some of the statement made in the application were derogatory of the Complainant's character and were likely to harm his reputation in the eyes of others is not disputed. As a matter of fact, it was not seriously disputed that if the statements were not protected by any of the exceptions to Section 499 I.P.C., they would fall squarely within the ambit of the operative part of Section 499 and in that event the offence of defamation would be complete. This is the reason why I have not set out the various statements in the application (Exh. 21) in respect of which the complainant had made grievance before the Court.

In this view of the matter, the only questions that are required to be considered are as to whether :-

(a) the statements which are prima facie of a defamatory character, fall within the ambit of Exception No. 8 of Section 499 of the I.P.C. and, hence, are taken out of the purview of the operative part of Section 499; and

(b) whether there exists any other exception to Section 499 of the I.P.C. which governs the facts of the case and takes the case out of the mischief of Section 499 of the I.P.C.

5. Mr. Malphatak, the learned Advocate appearing for the complainant advanced a threefold argument before me. His first submission was that the statements contained in paragraphs numbers 3, 4 and 6 of the application made to the Hon''ble Revenue Minister were ex facie of a defamatory character. According to him, in the instant case, the Hon''ble Revenue Minister cannot be said to be a person in lawful authority to whom the application could have been made by the accused for any kind of grievance. According to him, therefore, Exception 8 has no application to the facts of the present case. In this connection, he relied on the judgment of the Supreme Court in the case Kanwal Lal Vs. State of Punjab,

The first Head Note to the said Report sufficiently brings out the principles enunciated in that case. The Head-note runs as follows :-

"The accused and one Mst. R were neighbours. The defamatory matter was contained in an application addressed by the accused who was a member of the police force to the District Panchayat Officer, Ludhiana. In this application the accused alleged that R was a woman of loose character who was having illicit connection with goondas, her paramours coming to her frequently at nights and that her immoral activities reflected badly on the locality in which the accused lived :

Held that this was grossly defamatory of R."

Mr. Malphatak contended that in the instant case also the Hon"ble Revenue Minister could not be said to be a person in lawful authority for the purpose of dealing with the accusations made in the application Exh. 21. Exception 8, therefore, had no application and hence, the offence must be said to have been fully established, contended Mr. Malphatak.

6. The second line of Mr. Malphatak's argument was that the essence of the offence of defamation is publication of the defamatory statement. Once it is admitted that the statements made in the application are of a defamatory character, the question arises as to whom the publication was made. Even assuming that the publications made to the Hon"ble Revenue Minister or to the Collector or to the Income Tax Officer, were publications to persons in lawful authority, the fact remains that copies of the said application were sent also to Shri Madhu Limaye, who was a Member of Parliament at that time, and Mr. D. B. Patil, who is a Member of the legislative Assembly. Mr. Malphatak contended that in no case can the publication to such persons be said to fall within the ambit of Exception 8 to Section 499 of the I.P.C.

7. The third line of Mr. Malphatak's argument was that, in any event, Exception 8 cannot be invoked by the accused because the communication made by him to the Hon"ble Member of Parliament and of the Legislative Assembly is not proved by him to have been made in good faith. According to him, Exception 8 has no application if the accusation concerned is devoid of good faith and the onus of proving that the communication was made in good faith is upon the person who wants to plead good faith. The argument was that the accused is claiming benefit of the exception and if he wants the benefit, all the facts which make the benefit available to him must be proved by himself.

8. So far as the first line of his argument, advanced by reliance upon the judgment of the Supreme Court in Kanwal Lal's case is concerned, I am afraid it will not be possible for me to agree with him. To my mind, the facts of the case of the Supreme Court were basically of a different character. In that case, allegations as regards the character of a woman were made in an application addressed to District Panchayat Officer, Ludhiana, and it could not be pointed out as to what power or jurisdiction the officer of a District Panchayat had to deal

with anything done by the woman which involved sexual mis-behaviour on her part. That was a case where the officer to whom the publications was made was an officer who was having no power or jurisdiction whatsoever to do anything in connection with the subject matter of the grievance made before him about the woman's character. In no sense, that officer was a person in lawful authority in connection with the subject matter of that case. In the instant case, on the other hand, the statements made in the application are related to a subject which directly falls within the jurisdiction of the Revenue Minister. For instance, the accused stated that the occupants had not paid the occupancy price and had not got the order of regrant and the application alleges that the said occupants were persuaded to obtain the orders of regrant with a view to transfer the lands ultimately to the complainant, thus violating the condition contained in the order of regrant prohibiting alienation. It is further stated in the said application that there was the direct involvement of the complainant in these transactions and he has made substantial profits out of them. Both these aspects are within the ambit of the powers of the Revenue Minister as well as of the Income Tax authorities. Both the Revenue Minister as well as the Income Tax authorities can, therefore, be said to be lawful authorities so far as the subject matter of the application is concerned. The authority of the Supreme Court relied upon by Mr. Malphatak does not, therefore, help him to any appreciable extent.

9. The question, however, remains as to whether the fact that copies of the said application were sent to one of the Members of Parliament and to one of the Members of the Maharashtra Legislative Assembly brought into play the operative part of Section 499 of the I.P.C. The further demurrer is that in the absence of proof of good-faith, Exception 8 just cannot be invoked. Contention is that the publications made to these persons have no justifications whatsoever and such publications must be said to be an offence within the meaning of Section 499 for the very simple reason that the persons having this capacity cannot be considered to be those in lawful authority within the contemplation of Exception 8 to Section 499 I.P.C. Likewise, continues the argument, there is no evidence of good faith before the Court and that this is not one of the cases in which the element of good faith will be, more or less a matter of reasonable presumption.

10. Before dealing with these arguments, it will be necessary and useful referring to Mr. Lalit's reply to the same. Mr. Lalit, the learned Advocate for the accused, did not even attempt to support the reasoning of the learned Magistrate invoking the provisions of said Exception 8. It was not his contention that the two Hon'ble Members of the two Legislative Bodies were persons who had a lawful authority over the complainant. To my mind, this concession on the part of Mr. Lalit was quite justified. The two Hon'ble Members of the two Legislative Bodies were no doubt persons of great importance to the country and their indirect power to bring about desirable changes vis-a-vis the Society and vis-a-vis the various members of the Society including the accused cannot at all be doubted. All the same, it cannot be concluded that the two personages had any lawful authority

over the complainant as such within the contemplation of the said 8th Exception. What the exception contemplates is not a person having wide powers or a person performing important and valuable State functions. The said exception envisages that the person to whom such defamatory communication has been made should be a person having a direct authority over the persons against whom the communication is made. In other words, the Exception contemplates that the person to whom the communication is made should have the power to take necessary action either himself or through his subordinates against the person against whom the accusation is made. In the instant case a Member of Parliament cannot do anything directly either himself or through his subordinates to bring the complainant to book. It cannot be, therefore, said that a Member of Parliament or a Member of Legislative Assembly is a person having lawful authority over the complainant within the contemplation of the said Section.

11. But while not invoking the provisions of said Exception 8, Mr. Lalit relied upon the provisions of Exception No. 9 of Section 499 of the I.P.C. His contention was that when the accused sent a copy of his application to the Hon''ble Member of Parliament and to the Hon''ble Member of the Legislative Assembly, he did it in good faith for the protection of his own interest because the complainant had been trying to swallow his land by dubious means and because the accused felt that the Hon''ble Members of Parliament as also the Hon''ble Members of the Legislative Assembly would use their good offices and investigate and sift the entire matter and would throw light upon the antisocial activities of the complainant on the floor of the House. He contended that in any event this act on his part done was for the public good and, hence, the provisions of Exception No. 9 to Section 499 of the I.P.C. came into play, thus taking this act of the accused out of the ambit of Section 499, I.P.C.

12. In support of this contention, Mr. Lalit relied upon the judgment of the Court of Criminal Appeal in *King v. Rule* 1937 (2) KB 375. In that case, the defendant wrote two letters addressed to a Member of Parliament from his Constituency. The letters contained statements that were defamatory about the Police Officer and about the Justice of Peace having jurisdiction in the place where the defendant resides. He was charged with the offence of publication of defamatory libels. Just as in the present case, even in that case before the English Courts, the fact that the statements were of a libellous character could not be denied. But the defendant pleaded that the publication was made in circumstances which gave rise to privilege. This defence was negatived by the trial Court. But the Court of Criminal Appeal held that the Member of Parliament to whom the letter was addressed came from the same constituency to which the defendant belonged as the voter and to which territory the work of the police officer and of a Justice of Peace related and that, hence, the Member had sufficient interest in the subject matter of the letter written by the defendant to the Member voicing his grievance. According to the Court of Criminal Appeal, this fact rendered the occasion of such publication a privileged occasion and that in the absence of evidence of malice on the part of the defendant his conviction could not be

sustained.

Relying upon this decision, Mr. Lalit contended that even in the instant case the two members of the two legislative bodies had sufficient interest in the grievance and, hence the occasion would be considered to be a privileged occasion.

13. I do not think that the above authority is strictly applicable to the facts of the case. In the case before Court of Criminal Appeal the position was that not only the recipient of the letter namely, the Member of Parliament had sufficient interest in the subject matter of the communication but even the defendant who had vociferated the complaint was held to be having sufficient interest in the subject matter. In that case, the Court had refrained from expressing any opinion as to the general rights and general duties of the Members of Parliament. The Court held that it was sufficient for the purpose of that case to say that a Member of Parliament to whom a written communication is addressed by one of the residents of his Constituency asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that Constituency in relation to his office, had sufficient interest in the subject matter of the complaint to render the occasion of such publication a privileged occasion. In fact the Court referred to the earlier judgment of the Court in the case of *Hebditch v. MacIlwaine* (1894) 2 QB 54, where it was held that the persons (in that case, a board of guardians) to whom the libel was published had no interest in the matter. This authority was sought to be cited on behalf of the Crown out it was distinguished on the ground that a Member of Parliament had a duty to be circumspect about the conduct of every public official in this Constituency. The authority goes this far and no further. The larger question as to whether a Member of Parliament had sufficient interest in relation to a personal grievance of any citizen of the country against another person was specifically kept by that Court out of its consideration. Moreover, no effort was made by the learned Advocate before citing this authority before me to satisfy himself, in the first instance, that the law on this point in England is identical as the codified law in India. As is well known, a large part of the English Law, Civil as well as Criminal, was a part of the common law modified from time to time by various statutes. We have in our country the I.P.C. which is a Code all by itself. For deciding as to whether a particular kind of offence is committed by the accused or not reliance upon English decisions may, in conceivable cases, be misplaced and misleading. My attention was not invited to the legal position that the above mentioned judgment of the Court of Criminal Appeal was purporting to interpret the identical statutory provisions as obtained in Exception 9 to Section 499 I.P.C. The entire discussion in the said judgment is based upon the law relating to privileges. It is not, however, shown that our law codified in that behalf in Section 499, I.P.C., follows the identical pattern of the law existing in England.

I am sorry that I got no help from the bar whatsoever on this point. All that the learned Advocate for the respondent was content with was to throw this

authority at the face of the Court. No effort was made on behalf of the learned advocate for the respondent to satisfy me that the legal provisions in the two countries were identical. Nor any attempt was made on the part of the learned Advocate for the appellant to satisfy me that the legal position was otherwise.

However, I myself would have looked into the matter with a view to find out the state of law in question in England with comparison to one in our country. But I find that this appeal is capable of being allowed even on the assumption that the law on this point in both the countries is the same. Hence, I do not propose to delve deeper into the matter.

Let me then analyse the said judgment of the Court of Criminal Appeal further. The Court in that case held that the accused had substantial interest in the subject matter of the imputation and, further, that the Member of Parliament had a substantial interest in receiving the communication containing the imputations. But the judgment has not held that even a Member of Parliament has sufficient interest in any criminal act committed by any citizen or resident of the country. The case before the Court of Criminal Appeal was one where the Member of Parliament was held to be having sufficient interest in the conduct of the public official. In the present case before us, no grievance is made by the accused against any of the governmental authorities. The accusations are personally against the complainant only as regards his own conduct. That conduct might be harmful to the accused himself; on that account, he may be entitled to approach certain authorities with a view to get protection. For instance, if any criminal activity is carried on by the complainant, the accused would be entitled to go to the Police Station and narrate his fear to the Police Officer and the basis on which the fear is founded. No offence of defamation is committed by him while taking such action. But if the allegations of alleged criminality is mouthed by the persons totally unrelated to the subject matter of the accusation who cannot do anything about it by way of any help to the person sending the communication, the Court would have to seriously consider whether any privilege can be claimed by such person. If the accused is motivated by public interest and if he finds that the complainant has been avoiding payment of various taxes, he would be justified in giving the information, which he bona fide received from various sources, to the Tax Department so that they can take appropriate action against the complainant in the interest of general public. Such an occasion would certainly be a privileged occasion. But if the accused makes a public statement to persons who are not concerned with the Income Tax Department, that is to say, to persons who are having no lawful authority over the complainant in connection with these tax matters, to the effect that the complainant has been evading taxes, the occasion may not be considered to be a privileged occasion. A communication made to the taxing authority may be privileged but the same communication made to an authority entrusted with the work of, say, sports & welfare, may not be privileged.

In the instant case, following the principles laid down by the judgment of the

Court of Criminal Appeal, a Member of Parliament must be deemed to be having sufficient interest in a communication involving misbehaviour on the part of the public official functioning in his own Constituency. I am prepared to go a step further and I am prepared to assume that every Member of Parliament should be held to be having sufficient interest about the conduct of every public official throughout the length and breadth of the country. Question, however, remains as to whether the conduct of a private person is a matter of sufficient interest for the Hon^{ble} Members of Parliament so as to attract the privilege granted by Exception 8 to Section 499 I.P.C. The above mentioned judgment in *King v. Rule* does not spell any such position.

I, therefore, have grave doubt as to whether the above mentioned authority has got any application to the facts in the present case.

14. But even assuming that the above mentioned authority spells some privilege or immunity in connection with the impugned communication to the Hon^{ble} member of Parliament and to the Hon^{ble} Member of the Legislative Assembly on the ground that both the Members had sufficient interest in the subject matter of the imputation, still that much of position does not put an end to the difficulties of the accused. To take the case out of the rigours of Section 499 read with Exception 9 to the same, it is not enough for the accused to point out that the recipient of the defamatory publication is a Member of Parliament or is a Member of the Legislative Assembly and that the publication was made for the public good or for the protection of his personal interest. It is further necessary that the imputation on the character of another person, if it was likely to harm his reputation, is made by the accused in good faith and this requirement brings me to the third line of Mr. Malphatak's argument. He contends that not only to attract Exception No. 9 of Section 499 but even for the attraction of Exception No. 8 of Section 499, it is necessary that the defamatory communication made by the accused to the State Government or the Member of Parliament or the Member of the Legislative Assembly or the concerned authorities was made in good faith.

The expression "good faith" employed by Exceptions Nos. 8 and 9 of Section 499 of the I.P.C. is defined by Section 52 of the I.P.C. as follows :-

"'good faith' - Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention."

Evidently, the accused claims that the imputations were made by him in good faith and in order to vouchsafe that claim he contends that the contents of the impugned application, Exhibit 21, were true. The accused has, however, let no evidence whatsoever to show that those acts of making those defamatory communication to the various authorities and to the member of those bodies were done in good faith in the sense that any care was taken and attention was paid by the accused before believing these allegations or before making them.

15. To my mind, this objection of Mr. Malphatak is of great force. But before

discussing the legal position emerging from this question, it is necessary in the instant case to examine the position relating to the burden of proof. This is so because I find that in the instant case just as there is no evidence for proving the existence of good faith led by the defence, likewise there is no evidence of absence of good faith led on behalf of the complainant. Question then arises as to what is the result if there is no evidence of good faith on either side in the instant case. Normally speaking, the onus of proving the commission of an offence is upon the prosecution exclusively. An argument could, therefore, be plausibly advanced on behalf of the defence, that absence of good faith is an integral part of the offence and if that is so, it is the prosecution who must establish the absence of good faith on the part of the accused. But, to my mind, such an approach would be erroneous, in the instant case, in the context of the provisions of Section 105 of the Evidence Act. The general law relating to defamation is to be found in the operative part of Section 499 of the I.P.C. and the various exceptions Nos. 1 to 10 only carve out the circumstances in which the act of the accused, which was otherwise defamatory, would not amount to defamation within the meaning of the section. The onus of proving these circumstances must, therefore, be borne and discharged by the accused himself and it is not the function of the prosecution to prove that no such circumstance exists. The provisions of Section 105 of the Evidence Act are quite unequivocal on this point. They refer to the self-same exertions as are contained in Section 499 of the I.P.C. and it is provided by said Section 105 that the burden of proving the existence of the circumstances bringing the cases within the relevant exception is upon the accused. The section goes a step further and states that if the existence of such circumstances is not proved by the accused, the Court shall assume that the circumstances were absent. It, therefore, cannot be legitimately contended that the burden of proving the want of good faith was upon the complainant or that the accused was subject to no onus to prove good-faith on his part or that the non-discharge of the onus of the accused would not be of any consequence.

16. The following position, therefore, stands crystallised :-

- (1) that by making an application, Exh. 21, and by sending the copies of the same to the various authorities and the members of the Legislatures, the accused had committed an act which is prohibited by the operative portion of Section 499 of the Indian Penal Code;
- (2) that if the accused wanted to wriggle out of the rigours of Section 499 of the I.P.C., he ought to have proved that his act was covered by Exception No. 8 or 9 of Section 499 of the I.P.C.;
- (3) That the said Exception No. 8 or 9 could be invoked by him only if he led evidence and proved that the application, Exhibit 21, was made by him and copies of the same were sent by him to the various authorities and persons in good faith; and

(4) If he failed to discharge the onus of proving good faith, the Court must hold that the accused was not guided by any element of good faith and that, hence, Exception No. 8 or 9 of Section 499 of the I.P.C. did not come into operation at all. The inexorable result of this contention is that the operative portion of Section 499 I.P.C. holds the field and his liability for the offence spelt out by the same becomes inescapable.

17. The question then arises is as to what should be the nature and extent of the evidence to be led by the accused to prove the requisite good faith on his part while making the application. Exhibit 21, to the Government and sending the copies of the same to the various authorities and persons. As stated above, the concept of good faith is defined in Section 52 of the I.P.C. The definition makes a departure from the usual definition contained in the General Clauses Act. All that the General Clauses Act requires as a postulate for good faith is honesty, existence of negligence or diligence being irrelevant. The honest belief of the maker of the imputation may, perhaps, be enough for the purpose of inferring good faith if the general law contained in the General Clauses Act held the field. But proving mere honesty is not enough as far as the provisions of the Penal Code are concerned. Under the Penal Code, it is necessary that the belief entertained by the accused is entertained by him after taking due care and attention in that behalf and he has made the defamatory imputation to the persons concerned by employing circumspection. The expression "due care and attention" is of a wide import and connotation. It is not enough for the accused to enter the plea of his honest belief in the allegations made by him against the target of his accusations. It is further necessary for him to satisfy the Court that before making those allegations, he had made necessary inquiries to satisfy himself that the belief that he entertained has got a reasonable foundation. If he proved that the allegations are true, then the burden upon him will be so much the lighter because in that case it will be almost taken for granted that he has taken all the necessary due care and attention while making those allegations; but if he does not take the responsibility of proving the truth of the allegations, then it is necessary for him at least to show that he believed in those allegations and his belief was not a wanton or reckless belief but was a belief based on and rooted in careful inquiries having been made by him in that behalf. This is the minimum that the accused is required to prove before he can claim any measure of good faith in committing the act.

18. I may discuss a few authorities on this question. In (1914) 15 CrI LJ 675 *Bulchand Ramchand v. Emperor* the creditors of "A", an unadjudicated insolvent, saw the complainant "B" leaving the shop of "A" with some kind of bundle under his, "B's" arm. The creditors suspected that "B" was removing away valuable property belonging to "A". Without further ascertaining the factual position, they straightway accused "B" of receiving the stolen property. For this purpose, they rushed to the police station and a complaint was lodged against "B" for receiving the stolen property. The police ultimately opened the bundle in question but only to the charging (chagrin ?) of the creditors that the bundle carried by "B"

contained nothing but bits of cloth and nothing of the nature of any kind of stolen property. The creditors were proceeded against by "B" for defamation and they pleaded good-faith in making such accusation against "B". The Court held that no care and attention was taken by the accused while making the accusation against "B" and, hence, they were guilty of the offence of defamation u/s 499, I.P.C.

In *Emperor v. Abdool Wadood Ahmed* ILR 1907 Bom, 293 : 5 Cri LJ 237, the defence to the grievance of defamation of fair comment and good-faith rested inter alia on the provisions of Exception 9 to Section 499 I.P.C. In that case, a Pamphlet issued by the accused was alleged to be containing personal and malicious abuse, far over-stepping the bounds of fair comment. While considering the defence of the plea of fair comment, this Court held that -

"It would be monstrous, for instance for a critic to suggest as an inference from a mere grammatical inaccuracy in a work, that its author was a swindler or a libertine. For that would be a recklessness of inconsequence; excluded by the requisites of good faith. Good faith requires not, indeed, logical infallibility but due care and attention."

It was further observed in the judgment as follows :-

"At the same time it must be borne in mind that good faith in the formation or expression of an opinion, can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment."

The Court examined the pamphlet published by the accused and concluded as follows :-

"These it is impossible to regard as anything else than a general imputation on the complainant, purporting to be based on his supposed general conduct and not solely on what appears in the Fatwa. And we therefore think that the accused cannot be wholly acquitted of defamation."

19. At this stage, I may also refer to two more authorities. They would show that a statement made before an appropriate authority for the protection of the accused himself may not amount to defamation. But the same statement made before an irrelevant authority without examining the truth or basis for the same, in other words, without due care and attention, would be defamatory within the meaning of Section 499, I.P.C. This Court had occasion to examine this question in *Shri Govardhansing Raghuvanshi v. Chandanmal Ramprasad Rathi* in Special Criminal Appln. No. 529 of 1980, decided on 22-4-1981 : 1982 (1) B C R. 519. In that case, in substance, the facts were as follows :-

The complainant had obtained a decree for possession of the suit premises against the accused. When he tried to execute the decree, the accused/judgment-debtor gave his statement by way of reply to the darkhast and in that reply scandalous allegations were made against the decree-holder. The nature of the

allegation was that the decree-holder was a tax evader and a smuggler and what not. None of the allegations had anything to do with the defence to the Darkhast for possession and the allegations were defamatory per se. When the complaint was filed by the decree-holder against the accused/judgment-debtor the accused sought to shield himself under the various Exceptions to Section 499 and he started cross-examining the complainant by making claim to protection given by said exceptions. Under the guise of that claim to those exceptions, he started asking all sorts of rambling questions to the complainant ostensibly with the desire to show that the allegations made against the complainant were the true allegations and to show alternatively that they were made in good-faith. In the application filed by the complainant to this Court to prevent the learned Magistrate from allowing the cross-examination to proceed in such a rambling manner, this Court was required to consider the question as to whether the provisions of any of the exceptions to said S. 499 were available for the accused even assuming that they were true. While examining the said question, this Court found that truth of the allegation is not necessarily a complete defence available to the accused in the case of defamation. While it may be true that in certain cases truth of the allegation may itself be a basis for the plea of good faith, this Court held that it was not in every case that truth of the allegation was a relevant defence for the accused. This Court found that while allegations relating to tax evasion on the part of the complainant could be said to have been made in good faith, before say, the authorities under the I.T. Act, those very allegations were thoroughly irrelevant in the proceedings for execution of a decree for eviction and no amount of truth about such allegations would clothe the accused with the shield of good faith. I may point out that the same position obtains even in the present case. I have already observed above that if the allegation in the impugned communication related to any kind of evasion of Income Tax or Capital gain tax by the accused and if they are made before the authorities under the I.T. Act, claim to good faith could, in given circumstances, be made by the accused legitimately. If it was the contention of the accused that the order of regrant was obtained by the complainant by defeating the provisions of law, then the grievance in that behalf could be justly made by him against the complainant before the relevant Department of the Government and if the statement containing such grievance involved words and expressions which were defamatory, the accused could, in given circumstances, make a legitimate claim of good-faith on his part. But the same statement would not attract any element of good-faith, if made before the irrelevant authorities or if made, not with a view of the protection of the accused himself. In this connection, I may refer to an authority of the Calcutta High Court in the case of Muhammad Gul v. Haji Fazley Karim ILR (1929) Cal 1013 : 31 Cri LJ 369. In that case, the accused had filed a petition of complaint to the Magistrate against the complainant. The Court found that there was a large body of evidence establishing the fact that the complainant was quite a respectable person. The Court further found that the accused was persistently charging the complainant with conspiracy with the enemies of the accused and charging him also of threatening the accused in

various ways. The Court found that the accused was driven to file the complaint with the Magistrate making the allegation to the above effect with a view to seek protection from the Magistrate. It was in these circumstances that the Court held that the accused "acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others."

It will be, thus, seen that while the essential element of good-faith is due care and caution and while the accused must prove due care and caution on his part while making the defamatory allegation, it was also necessary further that the claim to good faith will have no basis if the allegations are made before irrelevant authorities.

In the instant case, I find that the allegations made are not in good faith in any sense of the term.

20. Turning to the admitted facts of the case, the position is that beyond making a bare statement before the Court in his examination u/s 313 of the Cr.P.C., to the effect that the contents of the application (Exh. 21) are true, not as much as an attempt is made by the accused to put it across to the Court as to why he believed the said contents to be true and as to what attempts he had made to ensure that his belief was not unfounded and to satisfy the court that the belief that he entertained was not without foundation.

If there is no such evidence before the Court, the Court would have no justification for holding that due care was taken and due attention was paid by the accused while entertaining the belief about the anti-social activities committed by the complainant. Mr. Malphatak invited my attention to the judgment of the learned Judicial Magistrate in this behalf and pointed out that the learned Magistrate had taken good faith for granted and he had just failed to apply his mind to the question as to whether there was any justification for such approach. Mr. Malphatak contended that the question of onus of proving good faith does not appear to be present before the mind of the learned Magistrate and he seems to be completely oblivious of Section 105 of the Evidence Act. Whatsoever was done by the accused was, according to the learned Magistrate, done by him in good faith, howsoever defamatory the imputations might be and howsoever harmful they might be to the sufferer.

21. Mr. Lalit had no answer to this attack. He could not dispute the correctness of the proposition that the onus of proving the existence of good faith was, in the instant case, upon the accused, having regard to the provisions of Section 105 of the Evidence Act. However, he contended that both the accused as well as the Court were oblivious of the interplay of Exception No. 8 or 9 to Section 499 of the I.P.C. and of the provisions of Section 105 of the Evidence Act and, hence, that this is a fit case where the matter should be sent back to the trial Court and an opportunity should be given to the accused to lead evidence as to whether the imputations were made by him in good faith or not. Mr. Malphatak naturally opposes this request and I have no other alternative but to uphold his objection.

It is not as if the opportunity to lead evidence on the question of good faith was denied to the accused in the trial Court. What the accused has indulged in is that, in the first place, he had made allegations against the complainant quite airily and, secondly, the same vein of airiness continued while defending the prosecution lodged by the complainant in the Court. The accused has not even been sorry about his act at all. He had ample opportunity in the trial Court to lead evidence, as much as he pleased, to prove that the belief he had entertained about the truth of the contents of his application, Exhibit 21, was a justified belief or that he entertained the same after due care and attention. "Couldn't care less" would about sum up his attitude towards that opportunity. He has sown the wind and if he reaps the whirlwind, he must thank none other than himself for that. On the evidence as it stands, the offence committed by him stands established. The request made by Mr. Lalit, if granted, would mean that the accused should be given an opportunity to re-establish the liability which is already established by the evidence on record. In other words, by acceding to his request, I would be giving him an opportunity to fill up the lacuna in his evidence. I do not see any jurisdiction or justification for doing any such thing. I must, therefore, accept the last contention urged by Mr. Malphatak, namely, that the statements contained in the application, Exhibit 21, were not made by the accused in good faith and, hence, neither Exception No. 8 or 9 to Section 499 of the I.P.C. could come to his rescue. The offence u/s 499 of the I.P.C. on the part of the accused is, therefore, complete.

22. Coming to the question of sentence, I may state here that a reasonable offer was made by the complainant in his initial notice before the prosecution by way of reparations. At the time of the hearing of the appeal and even after the hearing of the appeal, another equally reasonable offer was made by the complainant to put an end to this matter. The accused has, however, remained adamant and wanted the appeal to be decided on merits. He has shown adamance but no repentance. In these circumstances, it is not possible to accept Mr. Lalit's request that this should be regarded as a case where the accused should be given a mere warning and should be let off with that. The damage done to the reputation of the complainant cannot be redressed by mere warning or reprisal to the accused. At the same time, I am not inclined to pass a sentence of imprisonment in the instant case. To my mind, the ends of justice would be met if I impose a sentence of fine of Rs. 1,000/- upon the accused for having committed the offence of defamation of the complainant.

23. The appeal is, therefore, allowed. The order of acquittal passed by the learned Trial Magistrate is set aside and the accused is convicted u/s 500 of the I.P.C. and is sentenced to pay a fine of Rs. 1,000/- and in default to suffer simple imprisonment for a period of three months. The accused is given time till 30th September, 1983 to pay the fine. If the accused does not pay the fine within 30th September, 1983, the police are directed to take the accused in custody and to enforce the the above mentioned order of sentence of three months simple imprisonment in default of payment of the fine.

24. Appeal allowed.