
(1999) 04 BOM CK 0065

In the Bombay High Court

Case No : Criminal Rev. Applns. No's. 367 to 371 of 1998

Balasaheb Keshav Thakre and others

APPELLANT

Vs

Kusumbai Manikrao Deshmukh and another

RESPONDENT

Date of Decision : 07-04-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 203, 397, 398
Penal Code, 1860 (IPC) — Section 500

Citation : (1999) 04 BOM CK 0065

Hon'ble Judges : S.B. Mhase, J

Bench : Single Bench

Advocate : S.M. Godsay, for the Appellant; P.V. Mandlik for respondent no. 1, K.M. Kazi, Assistant Public Prosecutor, S.V. Chillarge, Assistant Public Prosecutor S.K. Tambe, Assistant Public Prosecutor and J.P. Akolkar, Assistant Public Prosecutor for respondent-State, for the Respondent

Final Decision : Allowed

Judgement

S.B. Mhase, J.—Heard Shri V. J. Dixit, learned counsel holding for Shri S. M. Godsay, learned counsel for the petitioners in all the five revision applications, Shri P. V. Mandlik, learned counsel for the respondent No. 1 and the learned A.P.P. for the respondent-State. Rule, made returnable forthwith by the consent of the parties.

2. The respondent No. 1 has filed the complaint u/s 500 of the Indian Penal Code as according to the respondent No. 1, the petitioners have committed the offence of defamation by publishing certain articles in the newspaper on the basis of the information supplied by Shri Hanumant Chitnis who is also one of the accused while issuing process the learned Magistrate issued process as against the accused No. 4 i.e. Hanumant Chitnis but has not issued the process as against the petitioners and they were discharged in view of the provisions of section 203 of Criminal Procedure Code. The said order was challenged by the respondent complainant by filing Revision Application u/s 397 of Criminal Procedure Code

before the Sessions Court, and the Additional Sessions Judge, Parbhani by his order dated 19-8-1998 allowed the revision application and set aside the order passed against the petitioners and the Sessions Judge himself issued the process against the petitioners returnable on 26-10-1998. What is pertinent to be noted is that the Sessions Judge does not state as to under what section of the Indian Penal Code the process has been issued by him as against the petitioners. The said order is under challenge by filing these petitions.

3. It appears that the matter was heard on 19-8-1998 and the Roznama of the said date shows that "the parties are present, arguments heard of both sides and the judgment is pronounced". Para 4 of the judgment shows that "Heard learned advocate Mrs, S. R. Kulkarni and so also heard A.P.P. Mr. Sharma for State. I do not feel it necessary to hear the arguments of the respondents Nos. 1 to 4 and that too for some reason." Pointing out this material, learned Counsel Shri V. J. Dixit, submitted that the petitioners were not heard while passing the order and no reasons have been assigned by the Sessions Judge as to why right of hearing is denied to the present petitioners. He submitted that initially the order passed u/s 203, Criminal Procedure Code was in favour of the petitioners, and therefore, when the said order is being set aside by the Sessions Judge, that adversely affects rights of petitioner which he gets as a result of discharge u/s 203 of Criminal Procedure Code and therefore, while passing the adverse order against the petitioners, it was bounden duty of the Sessions Judge to hear the petitioners. The learned Counsel also invited my attention to section 398 of Criminal Procedure Code wherein it has been contemplated that while directing further investigation or recording of evidence by setting aside the order passed u/s 203 of Criminal Procedure Code, the Court of Sessions or the High Court shall not give such directions unless the hearing is offered to the accused or persons discharged u/s 203 of Criminal Procedure Code.

4. Mr. Mandlik, learned Counsel appearing for the respondent No. 1 stated that there is no question of right of hearing u/s 397 of Criminal Procedure Code. According to him, law has made a distinction between sections 397 and 398, Criminal Procedure Code and it is only when the case is being considered u/s 398 the accused persons discharged u/s 203 of Criminal Procedure Code are required to be heard. He further submitted that however, while issuing the process the accused are not required to be heard and therefore, when there is a revision against the order refusing process the revisional court can pass order in the absence of accused. He further tried to maintain that the notice was issued by the Sessions Judge to the petitioners. The petitioners appeared in consonance with the said notice, filed their say on different dates. However, they failed to address the Court being absent on the said date, and therefore, it cannot be said that the opportunity of hearing was not offered to them.

5. The facts as stated revealed from the Roznama do show that the parties were present before the Sessions Judge and the Sessions Judge has not observed that the present petitioners and/or their advocates were absent on that date. It is

further revealed from Para No. 4 of the judgment that even though the present petitioners were present through their advocate, they were not given an opportunity of hearing because the learned Sessions Judge felt that it is not necessary to hear them. What is more surprising and which is not in consonance with the judicial discipline is that the Sessions Judge while observing that it is not necessary to hear the petitioners has observed that hearing cannot be given to them "that too also for some reason". In fact, if the Sessions Judge wanted to deny the right of hearing to the petitioners he should have given reasons for denying the said right. When the power is exercised in such manner without assigning reasons, it becomes arbitrary and so is the case in the present matter. In fact the Sessions Judge has denied the right of hearing to the petitioners.

6. On the last date of hearing of the revision petition, without assigning any reasons right of hearing is denied and that part of the judgment is not in consonance with the judicial discipline. The Sessions Judge should have remembered that in view of the order being passed u/s 203 of Criminal Procedure Code by the Judicial Magistrate discharging them from the complaint and refusing to take cognizance of the offence, there is a right created in favour of the petitioners to protect the said order when it is challenged before the appropriate Forum namely before the Sessions Judge. By protecting the said order, petitioners protect themselves from the criminal prosecution which may have adverse effect on their reputation and status in the society, and therefore, when adverse proceedings are being carried out by the Sessions Judge against the petitioners, it was bounden duty of the Sessions Judge to hear the petitioners on merits and thereafter to pass the order. In view of these aspects, the order passed by the Sessions Judge stands vitiated and requires to be set aside.

7. The submission made by the learned Counsel Shri P. V. Mandlik, appearing for the respondent No. 1 that only in case of proceedings u/s 398 of Criminal Procedure Code the hearing should be given and while the case is u/s 397 of Criminal Procedure Code, it is not necessary to hear the petitioners, is without any merits. The powers u/s 398 of Criminal Procedure Code are in addition to the powers u/s 397 of Criminal Procedure Code. Absence of such provision in section 397 of Criminal Procedure Code does not mean and does not lead to an inference that the parties who are likely to be affected while setting aside the orders u/s 397 of Criminal Procedure Code shall not be heard by the Sessions Judge and/or by the High Court. It is well settled practice and principle that while considering the matter u/s 397 of Criminal Procedure Code the person against whom the power is being exercised, such person should be heard. Substantial question is that whenever a person is adversely affected as a result of the orders passed in a particular proceeding, he shall not be condemned unless an opportunity of hearing is offered. The procedure has been provided for not to take away the substantial rights of the person.

8. In the circumstances, all these revision petitions are allowed. The matters are remanded to the Additional Sessions Judge, Parbhani, with a direction to the

Additional -Sessions Judge, Parbhani to issue notices to the parties, and thereafter after hearing the parties on merits, shall dispose of the matters.

Rule made absolute accordingly.