

(2012) 11 OHC CK 0006

In the Orissa High Court

Case No : CRLMC No"s. 1045 and 1647 of 2008

Bhakta Hari Mohanty

APPELLANT

Vs

Bishnu Charan Swain
 Basanta Manjari Satpathy Vs
State of Orissa and Another

RESPONDENT

Date of Decision : 14-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 482
Orissa Estates Abolition Act, 1951 — Section 8
Penal Code, 1860 (IPC) — Section 203, 205, 499, 500

Citation : (2013) 1 OLR 702

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : R.K. Mohanty, D. Mohanty, A.P. Bose, D. Varadwaja, P. Jena in CRLMC No. 1045 of 2008, G. Sahoo, M.K. Mallick in CRLMC No. 1647 of 2008, S.K. Sahoo and D.P. Pattnaik in both Appeals, for the Appellant; S. Dash in CRLMC No. 1045 of 2008, S. Rath in CRLMC No. 1647 of 2008, Addl. Government Advocate for O.P. 1, B. Baug and P.C.P. Das in both Appeals, for the Respondent

Final Decision : Allowed

Judgement

M.M. Das, J.—Both the aforesaid criminal misc. cases are applications u/s 482 Cr.P.C. arising out of one complaint case, being I.C.C. No. 2985 of 2007 pending before the learned S.D.J.M., Bhubaneswar. In both the criminal Misc. Cases, the petitioners have prayed for quashing the order dated 27.3.2008 passed in the complaint case taking cognizance of the offences under Sections 500/203/205 IPC and issuing process to the accused persons. The petitioners in both the cases are two of the accused persons in the said complaint case. To appreciate the rival contentions raised by the learned counsel for the respective parties, it is felt appropriate to state the facts giving rise to these cases, in brief, which are as follows:

The dispute started with regard to assertion of title over a piece of land situated in village Damana under Chandrasekharapur P.S., which stood recorded in the

name of Tilottama Samal belonging to the said village, who is dead. A group of persons from village Damana claiming to be the legal heirs of Tilottama Samal have transferred some portions of the property to different persons. Similarly, a group persons from village Dihabalarampur under Patkuara P.S. in the district of Kendrapada claiming to be the successor of late Tilottama Samal have also transferred the very same property to different persons. In course of mutation in the names of the alleged successors of late Tilottama Samal and their respective purchasers, when the matter was pending before the Board of Revenue, persons belonging to the village Damana engaged the petitioner, Shri Bhaktahari Mohanty, in CRLMC No. 1045 of 2008 as their Advocate, who argued their cases before the Board of Revenue. Being unsuccessful, the matter was carried to this Court in W.P. (C) No. 14783 of 2005. In the meantime, persons claiming to be the successors of late Tilottama Samal belonging to the village Dihabalarampur filed T.S. No. 349 of 2001 before the learned Civil Judge (Junior Division), Bhubaneswar for establishing their right as legal heirs of recorded tenant Tilottama Samal. The writ petition was disposed of by this Court by order dated 27.3.2006 with the observation that the order passed in the mutation case by the Board of Revenue shall be subject to the decision of the civil suit. After disposal of the writ petition, a number of purchasers, who purchased the property from the alleged legal heirs of late Tilottama Samal belonging to the village Damana, got themselves impleaded as parties in the pending title suit. After being impleaded as defendants, they have filed their written statements along with their respective counter claims. Shri Bishnu Charan Swain, Advocate, who is the complainant in I.C.C. No. 2985 of 2007, appeared for the alleged legal heirs of late Tilottama Samal belonging to the village Dihabalarampur and the purchasers from them. Shri Swain holds a Power of Attorney on behalf of the said alleged legal heirs of village Dihabalarampur and the transfers on their behalf were made by Shri Swain as the Power of Attorney Holder. One Sudhansubala Sahoo had purchased a piece of land which belonged to the recorded tenant Tilottama Samal. Purchasers from the alleged legal heirs of late Tilottama Samal belonging to the village Dihabalarampur who purchased the property through the Power of Attorney Holder, Shri Bishnu Charan Swain, disputed the title of the said Sudhansubala Sahoo for which she had filed C.S. No. 29 of 2002 before the learned Civil Judge (Senior Division), First, Court, Bhubaneswar for declaration of her title. After the suit proceeded for some time, the plaintiff-Sudhansubala Sahoo engaged the petitioner, Shri Bhaktahari Mohanty as her Advocate. An application was filed by the plaintiff in the said suit to implead Shri Bishnu Charan Swain as defendant wherein several instances of transfer made by Shri Swain as the Power of Attorney Holder was cited. The learned Civil Judge (Senior Division), Bhubaneswar allowed the plaintiff's prayer and impleaded Shri Swain as a defendant in the suit. The original defendant being one Soubhagya Kumar Mishra prayed for injunction in the suit upon which an order of status quo was passed. In the interregnum, the plaintiff coming to know that one M/s. Z. Engineers, a company, was the real contestant, impleaded the said company and its Managing Director as defendant Nos. 2 and 3 in the

said suit and Shri Bishnu Charan Swain continued to be defendant No. 4. Shri Swain has filed his written statement, who was also appearing as an Advocate for the original defendant No. 1 and also supported the case of defendant Nos. 2 and 3. The said Bishnu Charan Swain is a practising Advocate of this Bar and also a party-defendant in the suit filed by Sudhansubala Sahoo i.e. C.S. No. 29 of 2002. I.C.C. No. 2985 of 2007 has been filed by the said Shri Bishnu Charan, Advocate, who in the meantime on an application being filed by him has disengaged himself as an Advocate for the original defendant No. 1 in the above suit. Allegation has been made in the complaint petition that the accused persons 2 and 3, who are ladies, namely, Smt. Basanti Manjari Satpathy and Smt. Sudhansubala Sahu, have filed false affidavit and the accused No. 1, namely, Shri Bhakta Hari Mohanty has prepared the appeal memo, written statement and amendment petition, which were filed in different courts including this Court, defaming the complainant knowing fully well that those are false in content but to vilify the character, honour and prestige of the complainant and lower his prestige in the society. In those pleadings and affidavits, certain derogatory words have been used deliberately knowing the same to be false, thereby causing irreparable loss to the complainant. All the accused persons are guilty of being authors and propagators of those incriminating materials in open Courts and before the litigant public at large. The accused No. 1 (Shri Mohanty) who prepared the appeal petition in Misc. Appeal No. 299 of 2001 stated and read over the contents before this Court by which the complainant has been defamed. A copy of the said appeal memo was annexed to the complaint petition. The alleged defamatory statements made by the complainant were quoted in the complaint petition. With regard to the other two accused persons, it has been stated in the complaint petition that they are two ladies, who have filed their affidavits though the accused No. 1-Shri Mohanty as their Advocate and those affidavits were duly placed by the accused No. 1 in open Court with a motive to harass the complainant and strengthen his stand, thereby lowering the prestige of the complainant on such false statements. Allegation was also made that derogatory statement has been made in the amendment petition filed in the civil suit (C.S. No. 29 of 2002) on behalf of the plaintiff by the accused No. 1, who is the Advocate for the plaintiff. The alleged statements made in the misc. appeal as well as the amendment petition and affidavits are as follows:

Para-5. That it further appears from the records that this Bishnu Charan Swain had also obtained a Power of Attorney from Tilottama Samal in 1982 by which time Tilottama was already dead. Obviously a false person was set up as Tilottama Samal and from her as Power of Attorney was obtained.....

Para 6.....More interestingly the death certificate filed to show that Tilottama died in 19.3.92 discloses that Tilottama died at Tala Telengabazar, Cuttack. Tala Telengabazar Cuttack is resident of the Power of Attorney Holder and Advocate Sri Bishnu Charan Swain. As indicated above, Tilottama of Chandrasekharapur, Bhubaneswar died on 5.6.67.

Para-7 There is no such record in favour of the other Tilottama Samal of Dihabalarampur Tilottama Samal of Chandrasekharpur having died in 1967 could not have executed a Power of Attorney in 1982.

Para-8. It might be that Sri Bishnu Charan Swain misusing his authority as an Advocate is trying to take advantage of the (illegible). It may also be that there was actually no such person in Dihabalarampur in the name of Tilottama Samal and the name has been invented for oblique ends. There was no reason why Tilottama Samal of Dihabalarampur in the district of Kendrapara shall die at Tala Telengabazar in the town of Cuttack.....

2. The alleged statements made in the affidavit filed in W.P. (C) No. 14783 of 2005 are as follows:

Para-2 - As a matter of fact, it is Sri Bishnu Charan Swain who is at the root of all the manipulations".... If Sri Bishnu Charan Swain was really the son of Tilottama it is not understood why he did not appear for Tilottama in the settlement camp, before the Settlement Commissioner and before the Mutation Court. It is also worth noting that in none of these cases, the village Dihabalarampur finds mention as the address of Tilottama....." The rest of the materials in para-4, 5, 6 are also false evidence tendered before the Court and derogatory to the prestige of the complainant and intentionally used as imputations and conveyed obliquely or indirectly, by way of question and irony.

3. The alleged statements made in the amendment petition filed by the plaintiff in C.S. No. 29 of 2002, which are alleged to be defamatory, are as follows:

(b) The defendant No. 2, Tapan Kumar Mohanty, who appears to be the Director of "Z" Engineer and Construction Pvt. Ltd. claims to have purchased the property from one Siprarani Jena who had purchased the same from Bishnu Charan Swain, Power of Attorney Holder of one Tilottama Samal of Diba Balarampur in the district of Kendrapara. It is, however, submitted that Tilottama Samal of Diba Balarampur was not the owner of the suit property, which is situated in village Damana (locally known as Chandrasekharpur) in the district of Khurda. It appears that the above named Bishnu Charan Swain taking advantage of his status as an Advocate, who was appearing the Revenue Courts for the other co-sharer Uchhab Sahoo has manipulated documents for an unlawful gain.

(c) That the plaintiff apprehends that in fact there is no Tilottama Samal in village Diha Balarampur of Kendrapara District who could have died on 19.3.1992 at Tala Telenga Bazar in the Town of Cuttack. At any rate, Tilottama Samal of Damana not having sold the suit property to Siprarani Jena, the purchaser from her Tapan Kumar Mohanty can not legitimately defeat the claim of the plaintiff. It now appears that this Bishnu Charan Swain claiming to be the Power of Attorney Holder of so called sons of Tilottama Samal of Diha Balarampur has fought many cases against the purchasers from Tilottama Samal or her heirs of Damana. No where the Record of Right reflecting Tilottama Samal, wife of Dhanurdhar Samal of Damana as owner of the suit property has been challenged as incorrect.

Tilottama Samal of Diha Balarampur or her so called sons have never come to village Damana to possess the suit property or to fight cases in the Revenue Courts. It is Sri Bishnu Charan Swain, who has been running the show and the plaintiff apprehends that Sri Swain has been the master of all manipulations and fraud. Manu official records also appear to have been manipulated. In view of all this it is necessary that the suit should be decided in presence of Sri Swain. He is, therefore, impleaded as a defendant in his suit.

(e) That it is also appears that after procuring the fraudulent deeds of sale Tapan Kumar Mohanty and many other purchasers of the type with the active connivance of Sri Bishnu Charan Swain have created many documents. All these being on the basis of the registered documents, their validity will depend upon the sustainability of the original transaction which again depends upon the title of the vendors. Defendant No. 2, therefore, has not moved in clean hands in as much as he is guilty of fraud and manipulation. He, therefore, cannot defeat the title and possession of the plaintiff. It is asserted here again that Tilottama Samal of Damana was the real owner of the property and she has not sold it to Sipra Rani Jena, who is the vendor of defendant No. 2.

(f) That one Uchhab Sahoo of Damana is distant agent of Tilottama Samal. He was assisting Tilottama Samal in the matter of Mutation and fixation of rent after abolition of the Zamindari. There also Sri Bishnu Charan Swain as Advocate was appearing for Uchhab Charan Sahoo who was claiming to be co-lessee and not for Tilottama Samal. In this process the said Uchhab Sahoo produced a copy of the order passed in M.C. Case No. 75 of 59-60 showing fixation of rent in favour of both Uchhab Charan Sahoo and Tilottama Samal. Now the plaintiff has come to learn that this certified copy is also a fake one and in fact there is no such order. The forged copy was produced only to satisfy the illiterate Tilottama Samal. At any rate, Tilottama Samal of Damana being a tenant under the Zamindar her tenancy is protected under Sec. 8 of the O.E.A. Act, especially where her name has been mutated in Tahsil Jamabandi and rent has been accepted for her.

4. The initial deposition given by the complainant before the learned S.D.J.M., Bhubaneswar is as follows:

Initial statement of Sri Bishnu Charan Swain, aged about 74 yrs. S/o. Lunjanath Swain of village Talatelenga Bazar, P.S. Purighat, Dist-Cuttack on S/A.

I am the complainant of this case. I know all the three accused persons. The alleged incident was a continuous one. The accused persons used to publish affidavits and materials in diff. Court of law defaming me. Accused Nos. 2 and 3 are the clients of accused No. 1. Accused No. 1 appeared for accused Nos. 2 and 3 in different litigations pending in different courts as I appeared against accused Nos. 2 and 3. In misc. appeal No. 299/2001 filed before Hon"ble High Court of Orissa, accused No. 1 has attacked my character, without any affidavit of the parties. In para-4 he has given false informations regarding agreement made

with "Aradhana Property Development Pvt. Ltd." Similarly the facts mentioned in Para 5, 6, 7 and 8 are all false which are derogatory to my character as a practising Advocate of the Bar. Accused No. 2 also has filed an affidavit before Board of Revenue in OSS Case No. 1836/03 along with 28 other cases and the said affidavit has been marked as "Annexure 4" before the Hon"ble H.C. in W.P. (C) No. 14783/05. That para-3 of that petition is blatantly false, fabricated and designed which clearly reveals my name. The damaging paras are from para 3 to 7. All the relevant documents have been filed (xerox copies) in this Court today: The accused No. 3 filed a petition u/o. 7, R. 17, before CJ (S.D.), BBSR in Title Suit No. 29/02 using derogatory words against me in para 13(b) to (e) in proposed amendment. It is stated that for my illegal gain, I have falsely manipulated the documents being the mastermind in connivance with one Tapan Kr. Mohanty. All these are drafted by accused No. 11 enrolled in 1961. By this publication, I lost my prestige, dignity and unable to maintain prestige against the public. My family members were also shocked and ashamed. I am now working as. President of All Orissa Revenue Court Bar.

5. Basing on the averments made in the complaint petition and the initial deposition as well as the enquiry conducted u/s 202 Cr.P.C., the learned S.D.J.M., Bhubaneswar has passed the impugned order taking cognizance of the offences against the petitioners in both the Crl. Misc. Cases and the other accused persons and issuing process.

6. Mr. R.K. Mohanty, learned counsel appearing on behalf of the petitioner (Shri Bhakta Hari Mohanty, Advocate) in CRLMC No. 1045 of 2008 contended that from the above scenario, it is apparent that the petitioner (Shri Bhakta Hari Mohanty, Advocate) appeared in several cases on behalf of the plaintiff in C.S. No. 29 of 2002 as a legal practitioner and the statements made in the affidavits and the pleadings of the parties concerned have been supported by verifications/ affidavits by the concerned party. Thus, the petitioner has not exposed anything, which can be imputed personally upon him. He further submitted that the alleged statements stated to be defamatory have been made in the pleadings and affidavits, which are part of the judicial records and the same cannot come under the definition of "Defamation". As the petitioner appeared as an Advocate, no personal liability can be attributed to him from the statements made in the pleadings/affidavits of the parties. He further urged that the complainant except citing different portions of the pleadings and affidavits has made no prima facie allegations with regard to the personal involvement of the petitioner Shri Bhakta Hari Mohanty, Advocate and such step has been taken by the complainant to dissuade Shri Bhakta Hari Mohanty from appearing in the litigation between the parties as an Advocate and no offence whatsoever is made out in the complaint petition against the petitioner Shri Bhakta Hari Mohanty.

7. Learned counsel for the opp. parties in these Crl. Misc. Cases, on the contrary, contended that after recording the initial statement of the complainant, the learned S.D.J.M., Bhubaneswar conducted an enquiry u/s 202 Cr.P.C. and only

thereafter being satisfied about the existence of a prima facie case with regard to commission of the offences under Sections 500/203/205 IPC has taken cognizance of the said offences and directed issuance of process to the accused persons. Learned counsel for the opp. parties also brought to the notice of this Court the averments made in various pleadings and affidavits, which have been stated in the complaint petition, as quoted above, in support of his contentions that the petitioner (Shri Bhakta Hari Mohanty) in course of argument of the misc. appeal as well as hearing of the other applications made derogatory and defamatory submission against the complainant. Such defamatory submission has been recorded in paragraph-6 of the judgment passed in Misc. Appeal No. 299 of 2001 which has been reported in *Minati Sahoo Vs. Baishnab Raut and Another*, , the relevant portion of which is as follows:

.....On the other hand, Shri Mohanty argued with vehemence that Sri Swain, learned counsel for the defendant-respondent Nos. 1 and 2 was the brain behind to fabricate the documents with a view to grab the suit property inasmuch as he has executed the sale deeds as power-of-attorney holder of late Tilottama Samal stated to be his natural mother and had obtained the death certificate of Tilottama Samal from Cuttack Municipality after a long lapse of time. It was also alleged that orders of some authorities have been interpolated to show that Tilottama Samal was resident of Diha Balarampur under Patkura Police station and not a resident of village Damana or Chandrasekharapur under Chandrasekharapur police station.....

8. On the other hand, Shri Mohanty argued that Shri Bishnu Charan Swain, the counsel who was appearing for the defendants-respondents 1 and 2 was the brain behind the fabricated documents with a view to grab the suit property. Various case laws have been relied upon by Mr. R.K. Mohanty, learned counsel appearing for the petitioner as well as Mr. Baug, learned counsel appearing for the opp. parties.

9. Before considering the rival contentions of the learned counsel for the respective parties, it would be appropriate to refer to the relevant exceptions to the definitions of defamation as given in Section 499 IPC. 8th and 9th exceptions to Section 499 IPC refer to accusation made in good faith against any person, to any of those, who have lawful authority over that person with respect to the subject matter of accusation and with respect to imputation on the character of another, provided that the imputation is made in good faith for the protection of interest of the person making it, or of any other person, or for the public good. No action of libel or slander lies whether against the Judges, counsel, witnesses or parties, for words written or spoken in the course of any proceedings, before any Court recognized by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed. As such words written or spoken in the course of any proceeding are in good faith. (See *Royal Aquarium etc. v. Parkinson* (1892) 1 QB 43, 451).

10. The English Law with regard to a criminal action against the Advocate for defamatory words spoken during the course of a judicial proceeding is well settled that no action lies against an Advocate for defamatory words spoken with reference to and in course of an inquiry before a judicial Tribunal, although they are uttered by the Advocate maliciously, and not with the object of supporting the case of his client and are uttered without any justification or even excuse and from personal ill-will and anger towards the person defamed, arising out of a previously existing cause and are irrelevant to every issue of fact which is contested before the said judicial Tribunal. This was held in the case of *Munster v. Lamb*, (1883) 11 QBD 588. Counsel's words are absolutely privileged, although he may have exceeded his instructions. This was held in the case of *The Queen v. Kierman*, (1855) 5 Ir CLR 171. The Madras High Court and the Bombay High Court are of the view that an Advocate cannot be proceeded against either civilly or criminally for words uttered in his office as Advocate. He has fullest liberty of speech in the course of a trial before a judicial Tribunal so long as his language is justified by his instructions or by the evidence or by the proceedings on the record. Mere fact that his words are defamatory or that they ultimately turn out to be absolutely devoid of all solid foundation would not make him responsible nor render him liable in any civil or criminal proceedings. (See (1886) ILR 10 Mad 28 (FB) and (1899) 2 Bom. LR 3 (FB). The Patna High Court in the case of *Maharaj Kumar Jagat Mohan Nath Sah Deo v. Kalipada Ghosh*, (1992) ILR 1 Pat. 371 has expressed similar view as the Madras and Bombay High Courts. The Allahabad High Court also was of the same view in *Sheodatt Sharma v. Ram Swarup Sastry*, ILR (1945) All 702.

11. With regard to pleadings and affidavits also, it has been expressed in several decisions in no uncertain terms, that, no action lies against a man for a statement made in a pleadings or affidavit in course of a judicial proceeding, of defamation, even if such statements are alleged to have been made maliciously and without any reasonable or probable cause. However, where affidavits contain scandalous matter, the Court has jurisdiction to direct for expunging the same.

12. Keeping the above in view, this Court, proceeding to examine the relevant portions of the averments made in the appeal memo, affidavit and amendment petition which are alleged in the complaint petition to be defamatory, finds that all the said averments, which are alleged to be defamatory by the complainant have been stated in connection with the claim of the party making such averments in the pleadings, more so, when the complainant has been impleaded as a party in the said case, i.e. C.S. No. 29 of 2002.

13. Over and above the fact that the said statements have been made in various pleadings filed on behalf of the accused Nos. 2 and 3 in different proceedings, Who were represented by the accused No. 1 as their advocate, a perusal of the said pleadings and statements do not prima facie show that the same is defamatory and appears to have been made in good faith with regard to the subject matter of dispute in the said proceedings. It further appears that except

the vague allegation of the complainant and the witnesses that when the accused No. 1 was putting forth the case of his client before this Court or the Civil Court or revenue Court in course of argument, uttered such words, by which the prestige of the complainant has been lowered in the estimation of the public, no case of defamation prima facie appears to have been made out against the petitioners in the above two Criminal Misc. Cases, who are the accused persons in the complaint case.

14. With regard to exercise of inherent power of this Court u/s 482, Cr.P.C., it is now well settled that an order taking cognizance of any offence or issuing process, where absolutely no prima facie case is made out against the accused persons, amounts to abuse of the process of law and should be nipped at the bud, as otherwise the same would tantamount to abuse of the process of the Court.

15. The Supreme Court in the case of Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, has expressed in view that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion, as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegation in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of the allegation made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complaint to succeed in bringing the charge home against the accused.

(Emphasis supplied)

16. Applying the above principle to the facts of the present case, this Court is of the view that the learned Court below, while passing the order in the complaint petition on 27.03.2008 taking cognizance of the offences under Sections 500/203/205 IPC and issuing process to the accused persons (petitioners in the above Criminal Misc. Cases) has not applied his judicial mind to the facts of the case and materials before him. Even if the said materials are considered, this Court finds that there is absolutely no case made out by the complainant with regard to commission of the above offences by the accused persons and if the impugned order dated 27.03.2008 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. No. 2985 of 2007 is not quashed, the same will amount to abuse of the process of law as well as process of the Court. In the result, therefore, the order dated 27.03.2008 passed in the aforesaid complaint case filed by the opposite party, taking cognizance of the offence as stated above and issuing process against the petitioners stands quashed. As a consequence, I.C.C. No. 2985 of 2007 also stands quashed.

The Criminal Misc. Cases are accordingly allowed.