
(1995) 04 BOM CK 0038

In the Bombay High Court

Case No : Criminal Application No. 1614 of 1994

Mrs. Kumudesh Bhandari

APPELLANT

Vs

Ms. Gopika Tapuriah and Another

RESPONDENT

Date of Decision : 07-04-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195, 482
Penal Code, 1860 (IPC) — Section 500

Citation : (1995) 3 BomCR 534 : (1995) 2 MhLj 425

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : H.M. Jagtiani, C.F. Billimoria and Bharati Singh, for the Appellant;
Nimish Desai and D.T. Palekar, Assistant Public Prosecutor, for the respondent No. 2, for the Respondent

Judgement

G.R. Majithia, J.—The petitioner-Mrs. Kumudesh Bhandari - has challenged the order of Additional Sessions Judge, Greater Bombay, passed in Criminal Revision Application No. 364 of 1993, dated April 5, 1994, affirming in revision the order dated October 27, 1993 passed by Metropolitan Magistrate, 12th Court, Bandra, Bombay, rejecting her application for discharge.

2. Factual matrix giving rise to this petition are as under :

Respondent No. 1 - Mrs. Gopika Tapuriah - (hereinafter "the respondent") was married to Gautam Thakkar at Lucknow on February 25, 1973; that from this wedlock three children were born, namely Gaurav, Kunal and Rohan; that the marriage was dissolved by a decree of divorce by mutual consent on August 2, 1982; that the respondent filed Miscellaneous Application No. 174 of 1990 in M.J. Petition No. 71 of 1982 before the Family Court, Bandra, Bombay, for permitting the minor children to spend some parts of vacations with her; that the application has not so far been disposed of; that the parties to the lis, viz., Matrimonial Petition No. 41 of 1982, had arrived at a settlement with regard to the temporary custody of their children and that arrangement is in force; that on

April 30, 1990 the petitioner filed an affidavit in Miscellaneous Application No. 174 of 1990 in M.J. Petition No. 71 of 1982; that the affidavit was filed to support the claim of the former husband of the respondent that she was not entitled to the temporary custody of her children; that in the affidavit it was stated that the petitioner's son Kavi had developed illicit relations with the respondent when he was staying with her and her former husband; that the illicit relation was objected to by the parents of Kavi; that the allegation made in the affidavit led to the filing of a complaint u/s 500 of the Indian Penal Code against the petitioner; paras 4 and 5 of the complaint read thus :-

"4. I say that the accused on 30-4-1990 filed an affidavit in the proceedings viz., Misc. Application No. 174 of 1982, and made false, baseless, malicious allegation concerning me with a view to harm my reputation and lowering me in estimation of my friends by casting aspersion on my morality and conduct during subsistence of my marriage with Gautam Thakkar. That accused in the affidavit has stated:

"I say that my son Kavi and Gopika developed an illicit relationship while he used to stay with Gautam and Gopika. We his parents objected to their clandestine relation."

I say that (the accused has made) aforesaid insinuations concerning me which are cheap allegation involving her deceased son and false with intent to harm or knowing or having reasons outrageous, mean and to believe that such imputation will harm my reputation by holding me out in the eyes of Court in particular and society in general that I am incompetent to be entrusted with the custody of children and thus committed an offence u/s 500 of I.P.C. Hereto annexed and marked Exhibit "A" is the copy of the said Affidavit.

5. The said Affidavit has caused irreparable damage to myself esteem and to my reputation in the estimation of other persons who have read the said article particularly Mr. Shishir Diwanji, Notary before whom it was affirmed and has adversely affected my status in society. I called upon the accused by my advocates letter dated 4-5-1990 to withdraw the aforesaid allegations unconditionally, tender unqualified apology. Though the accused has received letters but failed to comply with requisitions contained therein. Hereto annexed and marked Exhibit "B" is the copy of the said notice."

that the petitioner was served with the complaint; that she filed discharge application which was rejected by the learned Metropolitan Magistrate and that order was affirmed in revision. As stated above, the same is under challenge.

3. In the complaint filed u/s 500 I.P.C. against the petitioner, it was stated that the respondent filed a petition for the custody of her children and in that petition, the former husband of the respondent made allegations of unchastity with a view to disentitle her to the custody of the children. In those proceedings, viz., Misc. Application No. 174 of 1990, the petitioner filed an affidavit in support of the claim of the respondent's husband. The respondent says that the statements

made in the affidavit reproduced above constitute an offence punishable u/s 500 I.P.C.

4. The petitioner says in the discharge application that the alleged defamatory statement was made in an affidavit filed in good faith for the interest of the respondent's children and as such the case falls under the 9th Exception of section 499 I.P.C.

5. Learned Counsel for the petitioner submitted that the Court before which the affidavit containing the alleged defamatory statement was filed has not adjudicated on the veracity of the statement made therein. He further submitted that if the Court before which the affidavit was filed finds that false evidence was given in judicial proceedings, that Court can proceed against the petitioner and punish her for giving false evidence. The Court before which false evidence was given can proceed u/s 195 of the Criminal Procedure Code (hereinafter "the Code") and direct filing of a complaint in conformity with section 340 of the Code. Learned Counsel for the respondent submitted that the Criminal Application is not maintainable and that there is no bar in law for maintaining the complaint u/s 500 I.P.C. He further submitted that a second revision petition by the same party is not maintainable in view of the bar created u/s 397(3) of the Code and that the same party cannot move this Court for exercising inherent powers u/s 482 of the Code.

6. Indisputably, the petitioner filed the affidavit in the Family Court to support the claim of the respondent's former husband that the respondent was not entitled to the custody/temporary custody of her children. The petitioner gave reasons disentitling her the custody. The truthfulness or otherwise of the statements made in the affidavit has to be examined by the Court before which it was filed. If the Court finds that the imputation was false, the Court can proceed against the affiant u/s 195 of the Code and direct filing of a criminal complaint against her for giving false evidence in judicial proceedings. In the instant case the Family Court has not gone into the truthfulness of the statements made in the affidavit. It will be incongruous if the respondent is allowed to proceed with the complaint filed u/s 500 I.P.C. on the ground that the statements made in the affidavit filed in the Family Court are defamatory. Even otherwise I find that the petitioner's case will fall within the ambit of Exception 8 of section 499 of the I.P.C.

7. Learned Counsel for the respondent submitted that notwithstanding the provisions of section 195 of the Code the petitioner can still maintain the complaint u/s 500 I.P.C. He drew my attention to the case of Basir-ul-huq and Others Vs. The State of West Bengal, . In that case the facts were as under :--

The mother of complainant Dharendra Nath Bera died some time in the evening of September 3, 1949. At the time of her death the complainant was not present in the house. He returned to his house at about 8.30 p.m. and he along with other persons took the dead body to the cremation ground. The appellant in the

Apex Court lodged information at the police station to the effect that the complainant had beaten and throttled his mother to death. When the funeral pyre was in flames, the appellant accompanied by the Sub-Inspector of Police arrived at the cremation ground. The appellant pointed out the dead body and told the Sub-Inspector that the complainant had killed his mother by throttling her and there were marks of injury on her body. The fire was extinguished and the dead body was taken down from the pyre in spite of the protests from the complainant. On examination of the dead body, it was found that there was no marks of injury on it and the appellants could not point out any such marks. The dead body was sent for post-mortem examination which was held on September 5, 1949 but no injury was found on the person of the deceased. The Police Sub-Inspector after investigation reached the conclusion that a false complaint was filed against Dhirendra Nath. On September 24, 1949, the complainant filed a complaint under sections 297 and 500 I.P.C. against the appellants. The learned Magistrate convicted the appellants. However, on appeal, the order was set aside by the Sessions Judge holding that the appellants had committed an offence, if any, u/s 182 or 211 I.P.C. and that the Court was not competent to take cognizance of those offences except on a complaint by a proper authority under the provisions of section 195 Cr.P.C. Against the order of acquittal, a revision petition was preferred to the High Court and the High Court reached the conclusion that on the facts alleged in the complaint, distinct offences under sections 182, 297 and 500 I.P.C. had been disclosed and that if distinct offences were committed, the Magistrate was not debarred from taking cognizance of those offences to which the bar u/s 195 Cr.P.C. did not apply. The judgment rendered by the Calcutta High Court was affirmed by the Apex Court observing thus :--

"11. As regards the charge u/s 500, Penal Code, it seems fairly clear both on principle and authority that where the allegations made in a false report disclose two distinct offences, one against the public servant and the other against a private individual, that other is not debarred by the provisions of section 195 from seeking redress for the offence committed against him."

The ratio of this judgment is inapplicable to the facts of the instant case.

8. The second objection of the learned Counsel for the respondent to the maintainability of the petition is not well-founded. The learned Counsel referred to the case of Dharampal and others Vs. Smt. Ramshri and others, . In that case of Apex Court found that the second order of attachment issued by the Magistrate was invalid as the first order of attachment was never finally vacated. The first order of attachment automatically stood revived when the revision petition against that order was dismissed by the Sessions Judge and the Sessions Judge was in error in entertaining a revision petition against the fresh order of attachment. It was in this context that the Apex Court observed that the second revision petition was barred in view of the provisions of section 397(3) of the Code and after so holding, the Court observed thus :--

"4. There is no doubt that the learned Magistrate had committed an error in passing the subsequent orders of attachment when the first attachment was never finally vacated and had revived the moment the revision application filed against it was dismissed by the learned Sessions Judge. It appears that none of the parties including the Sessions Judge realised this error on the part of the Magistrate. The learned Sessions Judge had also committed a patent mistake in entertaining revision application against the fresh orders of attachment and granting interim stays when he had dismissed revision application against the order of attachment earlier. Let that be as it is. The question that falls for our consideration now is whether the High Court could have utilised the powers u/s 482 of the Code and entertained a second revision-application at the instance of the 1st respondent. Admittedly the 1st respondent had preferred a Criminal Application being Cr.R. No. 189/78 to the Sessions Court against the order passed by the Magistrate on 17th October, 1978 withdrawing the attachment. The Sessions Judge had dismissed the said application on 14th May, 1979. Section 397(3) bars a second revision application by the same party. It is now well settled that the inherent powers u/s 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code. Hence the High Court had clearly erred in entertaining the second revision at the instance of the 1st respondent. On this short ground itself, the impugned order of the High Court can be set aside.

The Apex Court has held that the party which cannot invoke the revisional jurisdiction in view of the bar created u/s 397(3) of the Code, the same party cannot invoke the jurisdiction of the Court u/s 482 of the Code. The bar is against the party and the party cannot circumvent the provisions of section 397(3) of the Code by asking the Court to exercise inherent powers. But there is no bar for the Court to exercise inherent powers in a given case in the interest of justice. In *H.K. Rawal and Another Vs. Nidhi Prakash and Another*, , a Full Bench of the Allahabad High Court answered the following question :--

"(2) Whether in a case where an application u/s 397, Cr.P.C. has been made by any party in the Court of Session and the application is decided against him, it is open to that party to invoke extra-ordinary jurisdiction of this Court u/s 482, Cr.P.C. in any case to seek redress against that order, despite the bar created in sub-section (3) of section 397 of the said Code."

After referring to the cases of *Madhu Limaye Vs. The State of Maharashtra*, , *Raj Kapoor and Others Vs. State and Others*, , *V.C. Shukla Vs. State through C.B.I.*, and *Rajan Kumar Manchanda v. State of Karnataka*, 1988 All Cri.C. 54 (S.C.), the Full Bench answered the question thus :--

"19. Our answer to the second question referred to us is that where an application u/s 397, Cr.P.C. filed by any party in the Court of Sessions is decided against him it is open to that party to invoke the extraordinary jurisdiction of the High Court u/s 482, Cr.P.C. only if the order of the Sessions Judge has resulted in the abuse of the process of the Court and/or calls for interference to secure the

ends of justice as the bar under sections 397(3) and 399(3), Cr.P.C. is not applicable to the exercise of the inherent powers by the High Court u/s 482, Cr.P.C. in such a case. If on the other hand the order of the Sessions Judge has determined the dispute between the parties as indicated in our judgment, it cannot be interfered with by the High Court in revision at the instance of the same party or suo motu or in the exercise of its inherent powers u/s 482, Cr.P.C. in view of the bar under sections 397(3) and 399(3), Cr.P.C.

9. Reliance can also be usefully placed on the case of *In Re: Puritipatti Jega Reddy*, . A Division Bench of the Andhra Pradesh High Court referred the following two questions for decision by a Bench of three Judges :--

"(1) Whether it would be open to party to invoke the provisions of section 482, Cr.P.C. 1973, when he seeks to file a second revision in the High Court u/s 397(3)?

(2) Whether sub-section (3) of section 397 takes away the jurisdiction of this Court (High Court) to suo motu exercise its revisional jurisdiction in a case where the Sessions Judge had already exercised his revisional jurisdiction under sub-section (3) on an application made to him under that sub-section?"

The first question was answered by the Full Bench thus :--

"15. Now coming to the first contention as to whether it is open to a party to invoke the provisions of section 482 Cr.P. Code when he seeks to file a second revision in the High Court u/s 397(3), it is manifest that he is precluded from filing a second revision in the High Court by virtue of the provisions of section 397(3). We have already pointed out that the High Court can exercise its inherent powers where that exercise is warranted irrespective of the manner in which the matter has been brought to its notice. Therefore, a party who has been unsuccessful before the Sessions Judge, may seek to bring it to the notice of the High Court u/s 482 Cr.P.C. But that shall not be automatically taken notice of by the High Court. It must be scrutinised and examined whether there has been miscarriage of justice in any particular case before it entertains any such petition filed by an unsuccessful party. The best course would be to place the matter before the Court for admission and at the time of such admission, the Court must be prima facie satisfied before it admits that there has been abuse of the process of any Court or that the High Court's interference would be warranted in the ends of justice. Once that prima facie satisfaction is reached by the High Court at the time of admission, then a petition even by the party who has been unsuccessful before the Sessions Judge can be received, entertained and finally disposed of. The label given to the case is immaterial. It is the satisfaction of the Court whether the case warrants the exercise of its power u/s 482 which is important. Therefore, such matters must be carefully scrutinised even at the admission stage. That is our answer to the first question."

The second question was answered in the following manner :--

"9. The language of sub-section (3) of section 397 contains no ambiguity. If any person has already chosen to file a revision before the High Court or to the Sessions Court under sub-section (1), the same person cannot prefer a further application to the other Court. To put it in other words, sub-sections (1) and (3) make it clear that person, aggrieved by any order or proceeding can seek remedy by way of a revision either before the High Court or the Sessions Court. Once he has availed himself of that remedy, he is precluded from approaching the other forum. It is equally manifest from the provisions of sub-section (3) that this bar is limited to the same person who has already chosen to go either to the High Court or to the Sessions Court seeking a remedy and that it does not apply to the other parties or persons. Further the bar contained in sub-section (3) is only against that person who has already chosen the remedy either before the High Court or before the Sessions Judge. It is not permissible to extend the bar contained under a statute to other persons or to other fields. It is well established that the bar against seeking a remedy in a Court of Law or against a Court of law rendering justice should be strictly construed. It is noteworthy that sub-section (1) of section 397 empowers the High Court or the Sessions Court to call for and examine the record of any proceeding before any inferior Criminal Court. That is to say, it can exercise this power of calling for and examining the record suo motu also. The language of sub-section (3), strictly limited as it is to a person who has chosen to seek the remedy from one of the two courts, cannot be extended to the High Court exercising its powers conferred on it under the provision of the Code. It is patent that the bar contained in sub-section (3) is only against the person who has already chosen his remedy before one of the two forums."

10. In the light of these pronouncements, there is no bar to the maintainability of this petition. In fact, the question of exercise of inherent powers u/s 482 of the Code, which arises in this petition, did not specifically arise in Dharampal's case (supra). The objections raised by the learned Counsel for the respondent are thus repelled.

11. For the reasons stated above, the petition succeeds. The order of the Metropolitan Magistrate, 12th Court, Bandra, Bombay, dated October 27, 1993 and of the Additional Sessions Judge, Greater Bombay, in Criminal Revision Application No. 364 of 1993, dated April 5, 1994 are set aside. The discharge application filed by the petitioner before the Magistrate is thus allowed. Rule is made absolute in the above terms.

Certified copy expedited.