

(2023) 06 BOM CK 0007

In the Bombay High Court

Case No : Criminal Application (APL) No.1538 Of 2022

Nemchand

APPELLANT

Vs

Vipinkumar

RESPONDENT

Date of Decision : 07-06-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 204, 482, 499
Indian Penal Code, 1860 — Section 499, 500
Evidence Act, 1872 — Section 105

Citation : (2023) 06 BOM CK 0007

Hon'ble Judges : G. A. Sanap, J

Bench : Single Bench

Advocate : ?P.P. Kotwal, Anjan De

Final Decision : Allowed

Judgement

G. A. Sanap, J

1. Heard.

2. Rule. Rule made returnable forthwith. Heard finally with the consent of learned Advocates for the parties.

3. In this application, filed under Section 482 of the Code of Criminal Procedure, the applicant, who is arrayed as an accused No.2 in the complaint, has challenged the order dated 04.02.2017 passed by the learned Judicial Magistrate, First Class, (Court No.4), Hinganghat, whereby the learned Magistrate was pleased to issue the process against the two accused including the applicant being accused No.2 for the offence punishable under Section 500 of the I.P.C.

4. The facts are as follows:-

The non-applicant is the original complainant (hereinafter referred to as a complainant). The accused No.2 will be referred to as the applicant. The applicant is the practicing advocate. The accused No.1 and complainant are

related to each other. Accused No.1 is residing in London. The applicant is residing at Nagpur. It is the case of the complainant that the applicant on behalf of his client/accused No.1 issued a notice and published the same in a daily newspaper Dainik Bhasker dated 10.10.2015. It was stated in the notice that the power of attorney given to the complainant by the accused No.1 was revoked. The complainant under the guise of the said power of attorney was intending to dispose of the properties of the accused No.1. The public at large was called upon by this notice not to deal with the property of the accused No.1 on the basis of the revoked power of attorney given to the complainant. According to the complainant, this newspaper has wide circulation in District Wardha, Yavatmal, Nagpur and other districts of Vidarbha region of State of Maharashtra. It is stated that the said notice was false and frivolous. There was no substance in the said notice. Similarly there was no cause for publication of such notice. The facts stated in the published notice were totally incorrect to the knowledge of the accused No.1 and the applicant. The complainant on publication of the said notice issued a notice dated 03.12.2015 to the accused No.1 and to the applicant. The accused No.1 and the applicant by the said notice were called upon to disclose the material available with them to issue such notice. The said notice was not replied by the accused No.1 as well as by the applicant.

5. It is stated by the complainant that the accused No.1 on 23.08.2007 had executed power of attorney in his favour for the specific purposes set out in clause Nos.1 and 2 of the power of attorney. The complainant renounced the said power of attorney on 22.08.2012. The accused No.1 thereafter filed Special Civil Suit No.44/2015 against the complainant and others in the Court of Civil Judge, Senior Division, Wardha. The issue with regard to the power of attorney and its renunciation are the subject matter of controversy in the said suit. It is stated that the accused No.1 and the applicant were aware of the contents of the power of attorney, the renunciation of power of attorney and correspondence in the form of notices ensued between the parties.

6. It is stated that the notice published in newspaper was per se false. It is stated that from the date of publication of said notice persons in the locality, acquaintances, friends and others from Gujrati community have been avoiding the complainant. The publication of the said notice has harmed the reputation of complainant in the estimation of his relatives and the society. According to the complainant, therefore, the offence of defamation defined under Section 499 punishable under Section 500 of the Indian Penal Code (hereinafter referred to as "the I.P.C.") has been committed by the accused No.1 and the applicant. The complainant therefore filed complaint in the Court of Judicial Magistrate First Class, Hingnath District Wardha.

7. The learned Magistrate recorded the verification statement of the complainant on oath and passed the impugned order of issuance of process against the accused No.1 as well as against the applicant. The applicant, a practicing Advocate at Nagpur, has taken exception to this order by filing this application.

8. I have heard Shri P.P. Kotwal, learned Advocate for the applicant and Shri A. De, learned Advocate for the complainant. Perused the record and proceedings.

9. Learned Advocate for the applicant submitted that complaint filed by the complainant lacks the basic averments of malice on the part of the applicant for issuance of notice on behalf of the accused No.1. Learned Advocate submitted that the applicant being a legal practitioner, in discharge of his professional duties and on the instructions of accused No.1, issued the notice and published the said notice. Learned Advocate submitted that being a legal practitioner the presumption that it was made in good faith is available to him and therefore, he cannot be prosecuted for defamation. His case would fall within exception ninth to Section 499 of the I.P.C. Learned Advocate further submitted that learned Magistrate has not made proper enquiry before issuance of process against the applicant. Learned Advocate submitted that if lawyer is made liable for prosecution every time he acts for his clients, under the instructions of the clients, then it would be impossible for lawyer to carry on his duties. Learned Advocate further submitted that perusal of the complaint in entirety would show that there is no statement that the applicant on his own made serious and baseless allegations with previous ill feeling. Or allegations were made with some grudge against the complainant and therefore, made him liable for prosecution. Learned Advocate further submitted that on the basis of the facts pleaded in the complaint an inference of malice can not be drawn against the applicant. It is submitted that in this application, the applicant has categorically pleaded the absence of malice and therefore, the complainant was at least required in his reply filed in this application to set out a case of malice against the applicant. Learned Advocate submitted that the order passed by the learned Magistrate, suffers from patent illegality. In order to substantiate his submissions learned Advocate has relied upon the following decisions:-

(i) Dr. Mir Anwaruddin Vs. Fathim Bai Abidin and another reported in AIR 1927 MAD-379

(ii) Ajit Singh Vs. Radha Kishen reported in AIR 1931

(iii) Tarapada Majumdar Vs. K.B. Ghosh and Co. respondent reported in 1979 Cal -66

(iv) Filomeno Pereira Vs. Joao Lourence Fernandes and others reported in 1981 CRI.L.J. 117 (SC).

10. Learned Advocate for the applicant submitted that the order passed by the learned Magistrate is without application of mind and as such a mechanical exercise of power. Learned Advocate pointed out that learned Magistrate in the facts situation was required to record reasons in support of order of issuance of process against the applicant inasmuch as the applicant was made to face the prosecution being an Advocate representing the accused No.1. Learned Advocate submitted that order passed by the learned Magistrate is mechanical inasmuch as the Magistrate has not recorded reasons to form a prima facie opinion for

issuance of the process against the accused. Learned Advocate submitted that on this count alone the order is required to be set aside. In order to seek support to his submission learned Advocate has relied upon the decision of the Supreme Court in the case of Lalankumar Singh & Ors. Vs. State of Maharashtra reported in AIR 2022 SC 5151.

11. Learned Advocate for the complainant submitted that the Magistrate is not required to record elaborate reasons at the stage of passing an order of issuance of process. Learned Advocate submitted that the order of issuance of process passed by the learned Magistrate must reflect only application of mind to the facts stated in the complaint as well as the evidence placed on record. Learned Advocate submitted that the order passed by the learned Magistrate satisfies this basic requirement. Learned Advocate further submitted that the applicant being an Advocate is not entitled for any special privilege. Learned Advocate submitted that the facts stated in the complaint specifically attribute a malice towards the applicant. Learned Advocate submitted that the applicant was representing the accused No.1 in all the legal proceedings and as such he was aware of the real state of affairs between the complainant and the accused No.1. Learned Advocate pointed out that before filing the complaint a notice was issued by the complainant to the accused No.1 as well as to the applicant and they were called upon to explain the material in support of their contention spelt out from the notice published in the newspaper. Learned Advocate submitted that in this case the applicant is not entitled at this stage to get the benefit of exception ninth to Section 499 of the I.P.C. Learned Advocate submitted that Court would be required to adjudicate on the said issue at the time of the final decision of the case. Learned Advocate submitted that judgments relied upon by the learned Advocate for the applicants are not applicable to the case on hand.

12. At the outset, it is necessary to state that so far the accused No.1 has not challenged the order passed by the learned Magistrate dated 04.02.2017 issuing process against him. The challenge has been raised to this order by filing the application by the applicant, who is accused No.2. The applicant is practicing Advocate at Nagpur. It is to be noted that the applicant has no personal interest in the litigation between the parties as well as in the disputed property.

13. According to him, the accused who has been residing in London instructed him to act on his behalf. It is his contention that on the instructions of the accused No.1, he prepared and got the said notice published in the daily newspaper Dainik Bhasker. In order to appreciate the rival submissions, at this stage, it would be necessary to consider the settled legal position. In the case of Dr. Mir Anwaruddin Vs. Fathim Bai Abidin (supra) it is held that where a legal practitioner in the course of his professional duties in Court makes a statement which may assist his client in his case, there in the absence of independent proof of malice, a presumption that it was made in good faith and the practitioner cannot be charged for defamation as the facts would bring the case within exception ninth to Section 499 of the I.P.C. It is held that if the statement was

one which was obviously was necessary to be made in the interests of his client, even proof of independent private malice cannot rebut the presumption of good faith. Where the interest of his client calls for the same, a practitioner is privileged to make the statement even though thereby he may be gratifying his private malice. The same principle has been laid down in the case of *Ajit Singh Vs. Radha Kishen* reported in AIR 1931 Lah 246.

14. It is to be noted that the facts of the case on hand and the facts in the case of *Tarapada Mujumdar Vs. K.B. Ghosh and Co.* (supra) are somewhat identical. In this case, learned Single Bench of Calcutta High Court has considered the decisions of the English Courts as well as Indian Courts. For the purpose of clarity and proper understanding of the position of law prevailing in London on the issue of liability of the lawyers for defamation, it would be necessary to reproduce the relevant paragraphs from this decision dealing with the foreign decisions. It would be necessary to extract paragraph Nos.7 and 8. The same reads thus:-

"7. The liability of lawyers for defamation has been considered in several decisions in England. Reliance was placed on the well-known decision of the Court of Appeal in England in the case of *Munster v. Lamb*, (1883) 11 QBD 588. There the Court has observed that no action would lie against an advocate for defamatory words spoken with reference to and in the course of an enquiry before a judicial tribunal, although these were uttered by the advocate maliciously and not with the object of supporting the case of his client, and were uttered without any justification or even excuse and from personal ill-will or 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 tribunal. There H was charged before a Court of petty sessions with administering drugs to the inmates of M's house in order to facilitate the commission of a burglary at it. M was the prosecutor, and L, who was the solicitor, appeared for the defence of H. There was some evidence, although of a very slight character, that a narcotic drug had been administered to the inmates of M's house on the evening before the burglary, and H had been at M's house on that evening. During the proceedings before the court of petty sessions, L, acting as advocate for H, suggested that M might be keeping drugs at his house for immoral or criminal purposes. There was no evidence that M kept any drugs for those purposes. It was held that no action by M for defamation would lie against L. There at page 600 Brett, M. R. observed that so long as an advocate acted bona fide and said what was relevant, owing to the privileged occasion defamatory statements made by him did not amount to libel or slander although those would have been actionable if they had not been made while he was discharging his duty as an advocate. The Master of Rolls further observed at page 603 that if upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they spoke maliciously and without reasonable or probable cause, it was all the more for the benefit of the administration of the law that counsel also should have an entirely free mind.

The Master of Rolls, however, was speaking there with reference to counsel actually conducting a case before the tribunal. Similar view was expressed by Fry, L. J. at page 607 of the report. In the case of *Royal Aquarium and Summer and Winter Garden Society v. Par-kinson*, (1892) 1 QB 431 : (1891-4 All ER 429) It was observed by the Court of Appeal that absolute privilege attached to all judicial proceedings and also to the proceedings of tribunals which had the attributes of a court of justice but it did not extend to the proceedings of a tribunal acting administratively, although such a tribunal had to decide judicially in the sense of acting fairly and impartially. The statement of a member of a county council on such an occasion, however, will, if made bona fide and without malice, be entitled to qualified privilege. It was further observed that malice could be established by proof of a state of mind short of deliberate falsehood, but which led the person publishing the words complained of, from anger or some other wrong motive to be reckless whether the aspersions he cast on other people were true or false, regardless of the truth. The burden of proving malice was on the plaintiff in an action for defamation. Lopes, L. J. at page 436 of the reprint report observed, *inter alia*, as follows:--

"The authorities establish beyond all question that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised 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. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will, to check any abuse of it by those who appear before them. It is, however, a privilege that ought not to be extended. It belongs, in my opinion, to courts recognised by law, and to such courts only." In the case of *Boxsius v. Goblet Freres*, (1894) 1 QB 842 the Court of Appeal was concerned with a case where a solicitor acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office, and was copied into the letter-book by another clerk. In an action against the Solicitor for libel it was held that the occasion was privileged, since the communication if made by the solicitor direct to the plaintiff would have been privileged, and the publication to his clerks was necessary and usual in the discharge of his duty to his client, and was made in the interest of his client. Similarly in the case of *Baker v. Carrick*, (1894) 1 QB 838, a solicitor acting on behalf of his client, gave written notice to an auctioneer not to part with the proceeds of the sale of certain goods, entrusted to him for sale, on the ground that the owner of the goods had committed an act of bankruptcy upon which an order of bankruptcy might be made against him. In an action by the

owner of the goods against the solicitor for libel it was held by the Court of Appeal that the action was privileged, since the solicitor was acting in the ordinary course of his duty to his client and the occasion would have been privileged had the client himself written the letter.

8. In the case of *Adam v. Ward* reported in 1917 AC 309, it was similarly held that a lawyer acting on behalf of his client in course of a pending judicial proceeding would enjoy absolute privilege."

15. Learned Single Bench has also considered the number of decisions delivered by the Indian Courts on this subject. The decision in the case of *Dr. Mir Anwaruddin Vs. Fathim Bai Abidin* and another (*supra*) has also been considered by the Single Bench of Calcutta High Court. In order to understand erudite opinion expressed by the Single Bench it would be necessary to reproduce the relevant paragraphs. Paragraph Numbers 9 to 11 are extracted below:-

"9. The question was similarly examined in India in the case of *Nikunja Behari Sen v. Harendra Chandra Sinha*, ILR 41 Cal 514 : 18 Cal WN 424 : (AIR 1914 Cal 255 (1)). There was the question of criminal liability and the Court held that there was absolute privilege. The law on this aspect of the matter was stated by a Special Bench of this Court in the case of *Satish Chandra v. Ram Dayal* reported in 24 Cal WN 982 : (AIR 1921 Cal 1). There the Court observed at page 1001 of the report:

"If a party to a judicial proceeding is sued in a civil court for damages in respect of a statement made therein on oath or otherwise, his liability in the absence of statutory rules applicable to the subject must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England."

In the case of *Fakir Prasad Ghosh v. Kripasindhu Pal Bhuti*, AIR 1927 Cal 303, the Division Bench of this Court observed that a pleader must use a certain amount of commonsense and caution in asking a defamatory question. There might be cases where, under proper instructions, he is entitled to ask questions which are defamatory to the person, so as to impeach his credit. But where the questions were asked with utter recklessness, and without regard to seeing whether there was any truth in them, and with absolute disregard of whether he was entitled to ask them or not and they were asked not for the good of the case but with no other view than publicity to injure the reputation of the witness, it was held that the questions were asked in absolutely bad faith. In the case of *Anwaruddin v. Fathim Bai Abidin*, AIR 1927 Mad 379, it was held that utterances calculated to be defamatory by a lawyer in the course of his professional duties and required by his duty to his client were absolutely privileged. It was further held that when a lawyer acting in the course of professional duties makes a *prima facie* defamatory statement, good faith is to be presumed and bad faith is not to be

assumed unless there is independent allegation or proof of private malice.

10. In the case of *Tulsidas Amanmal v. S.F. Billimoria*, AIR 1932 Bom 490, an Advocate was charged under Section 499 of the I. P. Code with defamatory statements made in course of duties as advocate. It was held that the Court ought to presume on grounds of public policy that he had acted in good faith and upon instructions and ought to require other party to prove express malice. It was held by the Division Bench of the Bombay High Court that a member of the Bar in India has no absolute privilege. Strictly speaking an advocate who makes defamatory statements in the conduct of a case has no wider protection than a layman, that is to say, he has to bring his case within the terms of Excep. 9 of Section 499 and under Section 105 of the Evidence Act; the burden of proof would normally be upon him. But in practice the Courts have held on grounds of public policy that an advocate is entitled to special protection and that if an advocate is called in question in respect of defamatory statements made by him in the course of his duties as an advocate, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice. In the case of *Rajender Singh v. Uma Prasad*, AIR 1935 All 117, the court was concerned with the question of contempt and it was held that advocate has to exercise his own judgment and discretion and in case where scandalous or defamatory matters are to be communicated he has to warn his client much more so where the offence would amount to one of contempt of Court Full Bench of the Madras High Court in *re a Pleader, Gudivada*, AIR 1946 Mad 538, was concerned with the Legal Practitioner Act, 1879. It was held by the Full Bench that -- although an advocate has his duty towards his client, he has other duties and responsibilities as well. He should not on the instructions of his client, make a charge of fraud without satisfying himself that there are reasonable grounds for the allegation. In the case of *Mt. Zulekha Khatoon v. Bishnu Chandra Dhar*, 1964 Cal LJ 263, *Arun Kr. Mukherjee, J.* was concerned with a case where one B acted as the Solicitor for M. and in discharge of his ordinary duties to his said client, addressed letters to Z and Z thereupon sued both B and M for damages on ground of having been defamed by such letters, but failed to allege or establish any malice on the part of B towards Z, It was held that was a case of improper addition of party to the suit and the name of B was struck out from the cause title, records and proceedings of the suit.

11. Mr. Justice S. C. Ghose in the un-reported decision in the case of *Bhupa-tish Roy Chowdhury v. Soven Tagore* in Suit No. 1689 of 1968 (Cal), judgment delivered on 13-4-1972 more or less took the same view. In the case of *Rustom K. Karanjia v. Krishnaraj M.D. Thackersey*, AIR 1970 Bom 424, it was observed by the Division Bench of the Bombay High Court that it was not sufficient to attract the protection of qualified privilege that the subject matter was one of general public interest. Malice, in law, which was presumed in every false and defamatory statement stood rebutted by a privileged occasion. In such a case, in order to make a libel actionable, the burden of proving actual or express malice was always on the plaintiff."

16. In the case of *Filomeno Pereira Vs. Joao Lourence Fernandes and others* (supra) the Hon'ble Apex Court has considered the alleged defamatory statement in the affidavit drafted by the Advocate under the instructions of the client. In this case, summons was issued against the Advocate in a complaint filed for defamation. In this case, it is held that lawyer is not the Judge and it is not for him to decide whether the allegations made by his client against opponent are true or false. It is held that in exceptional circumstances, he is bound to act on the client's instructions. If serious and baseless allegations are made against opponent, a lawyer may make himself liable for prosecution but in that case it has to be clearly established that he has acted in bad faith or maliciously. The lawyer can certainly rely on Exception ninth to Section 499 of the I.P.C. A Court may presume that a lawyer who has signed the pleading has acted bona fide and without malice. It is held that unless such presumption is made no lawyer can possibly discharge his duties towards his client. If a lawyer makes himself liable for prosecution every time he makes a serious allegations in a pleading under instructions of his clients, it would be impossible for him to carry on his duties.

17. Exposition of law from the decisions (supra) clearly spells out that unless and until the action of the Advocate is actuated with malice or previous ill feeling against the opponent of his clients then the benefit of exception ninth to Section 499 of the I.P.C. is available to him. The presumption of absence of malice is in favour of the Advocate in such a situation. If a lawyer in impending judicial proceeding acts in his professional capacity on the instructions of his client then his statements are immune from being the basis of action of defamation, unless express malice is pleaded and when challenged, it is established. The defence of the good faith in view of the presumption of absence of malice is available to the Advocate, as provided under exception ninth to Section 499 of the I.P.C.

18. Before advertng to the facts of the case in the context of the issue, it is necessary to state that the Advocate in the course of his professional duties is required to put forward everything which can assist his client. In this process therefore, the good faith is to be presumed and bad faith is not to be assumed may be because statement is prima facie defamatory. In some cases, there can be proof of private malice but it must be pleaded and established. The Advocate more or less assumes the role of service provider. It needs to be stated that for public policy and public convenience, in the scheme of administration of justice, the role of Advocate assumes significance. The Advocate has to justify the faith put in him by his client. The Advocates being integral part of the scheme of administration of justice need to be given full freedom for vindication of the rights of the clients. The lawyer owes the duty to his clients and he must therefore, carry out faithfully his client's instructions. It is the duty of the lawyer to plead allegations in the plaint or written statements or other pleadings on the instructions of the client. However, at the same time, the Advocate is required to be conscious and mindful that he should not plead what is obviously irrelevant, void or baseless allegations. It is therefore, apparent that the obligation to discharge the professional commitments or duties has to be properly balanced by

the advocate. The privilege available to the Advocate is required to be kept within the bounds of the law as set out hereinabove.

19. In the backdrop of the above stated legal position the submissions advanced by the learned Advocates are required to be appreciated. The contents of the notice published in the Dainik Bhasker newspaper is a part of the complaint. The accused No.1, on whose instruction this notice was published by the applicant-Advocate, is residing in England. Admittedly, on 23.08.2007, a general power of attorney was executed by the accused No.1 in favour of the complainant to take care of his certain personal affairs in his absence. Clause Nos.1 and 2 of the said power of attorney are relevant. It is stated by the complainant that on 22.08.2012 he renounced the power of attorney, which was the subject matter of the notice published in the newspaper.

20. According to the complainant, it was stated in the notice that the said power of attorney was revoked on 22.08.2012. The complainant has stated that the power of attorney was not revoked by the accused No.1 but he on his own renounced the same. Perusal of the notice published in the newspaper would show that the facts with regard to the execution of power of attorney by the accused No.1 in favour of the complainant on 23.08.2007 and revocation or cancellation of the said power of attorney on 22.08.2012 have been stated in the said notice. By this notice public at large was informed that on the basis of the said power of attorney, the complainant has no right to deal with property of the accused No.1. The public at large was informed that on the basis of the said power of attorney, the public shall not enter into any transaction of the property of the accused No.1 with the complainant. Perusal of the contents of the notice would show that there was dispute between the complainant and the accused No.1 and therefore, the power of attorney was revoked. It is not the case of the complainant that without execution of power of attorney in his favour by the accused a false and malicious notice was published in the newspaper. It is to be noted that the accused No.1 has filed a Special Civil Suit No.44/2015 in the month of March 2015 against the complainant and others in the Court of Civil Judge Senior Division, Wardha. In the said suit complainant has filed written statement on 26.06.2016. The notice in question was published on 10.10.2015. It, therefore, goes without saying that suit filed by accused No.1 was pending against complainant and others in respect of the immovable property. The power of attorney was executed on 23.08.2007. It was revoked/renounced on 22.08.2012. The dispute with regard to the immovable property started in 2015. In this context, the accused No.1 instructed the applicant to publish the notice and inform the public at large that on the basis of said power of attorney nobody should purchase the property of the accused No.1 from the complainant. In my view, this facts would be very relevant while deciding the role attributed to the applicant.

21. Perusal of the complaint would show that there is no allegation that there was previous ill feeling between the complainant and the applicant for some

reason or the other. The complainant and the accused No.1 are relatives. The applicant on being asked by the accused No.1 made his services as Advocate available to the accused No.1. No other role or allegation has been made against the applicant in the complaint. In order to justify the prosecution against the applicant for a defamation, it was necessary on the part of the complainant to sufficiently plead the malice or previous ill feeling in the complaint. Applicant in this application, has made categorical statement that he has discharged his duties in view of his professional commitments on the instructions of his client. It is his case that his act was strictly as per the instructions of his clients and as such, was done in the good faith and protected under exception ninth of Section 499 of the I.P.C. The complainant has filed affidavit in reply to this application. Perusal of the affidavit would show that there is no statement that for one reason or the other, the act of publication of notice on behalf of his client was in bad faith or actuated with malice. It is to be noted that on the basis of the facts pleaded in the complaint, the inference of malice cannot be drawn in this case to dislodge the presumption of the bona fide act of the applicant, more so when he acted on instructions to discharge his obligation and to protect the interest of his clients in accordance with law. It needs to be stated that in a case where the malice has not been sufficiently pleaded and the challenge is made on that ground, it becomes the duty of the complainant to demonstrate the malice. In this case, there is no iota of material to establish the malice on part of the applicant. In my view, therefore, proposition of law squarely applies to facts of the case. On the basis of facts and proposition of law, the action initiated against the applicant in the form of the complaint and the order of issuance of process by the learned Magistrate cannot be sustained.

22. A grievance is made that learned Magistrate has not applied his judicial mind to the facts of the case. A further grievance is made that the order passed by the learned Magistrate is mechanical inasmuch as the learned Magistrate in the peculiar facts of the case was supposed to record the sufficient reasons, which he has not recorded before passing the order. In order to substantiate this submission reliance has been placed on decision in the case of Lalankumar Singh & Ors. Vs. State of Maharashtra (supra). Paragraph Nos.28 to 30 of this judgment are extracted below:-

"28. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal vs. Central Bureau of Investigation reported in (2015) 4 SCC 609, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process,

if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed.

If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.

29. A similar view has been taken by this Court in the case of Ashoke Mal Bafna (supra).

30. In the present case, leaving aside there being no reasons in support of the order of the issuance of process, as a matter of fact, it is clear from the order of the learned Single Judge of the High Court, that there was no such order passed at all. The learned Single Judge of the High Court, based on the record, has presumed that there was an order of issuance of process. We find that such an approach is unsustainable in law. The appeal therefore deserves to be allowed."

23. The Hon'ble Apex Court has held that the order of issuance of process is not empty formality. The Magistrate is required to apply his mind as to whether sufficient grounds for proceeding exists in the case or not. The formation of an opinion is required to be stated in the order itself. It is further held that if it is found that if such an exercise is not undertaken then the order cannot be sustained.

24. The copy of the order passed by the Magistrate is at Annexure A. The perusal of the order prima facie reveals that learned Magistrate has not taken proper care before passing the order. The applicant is an Advocate. It has been stated in the complaint that on the instructions of the accused No.1 he published the

notice in the newspaper. The learned Magistrate was therefore required to satisfy himself that there was sufficient pleading in the complaint to attribute a malice to the applicant. Learned Magistrate was required to prima facie consider the applicability of exception ninth of Section 499 in the case on the basis of the facts pleaded in the case. Learned Magistrate as can be seen from the record has not recorded reasons for issuance of process against the applicant. Learned Magistrate was expected to record briefly the reasons in the fact situation. In my view, therefore, on this count also order passed by the learned Magistrate cannot be sustained.

25. In view of the above, I am satisfied that the complaint filed against the applicant as an accused No.2 does not satisfy the basic requirements of law as set out hereinabove. The Advocate, who is acting on the instructions of his clients cannot be made to face such prosecution in a casual and routine manner. There must be strong material to prima facie establish the malice or previous ill feeling between the parties. If such mechanical approach is adopted in such cases then it would be difficult for the Advocate to effectively and meaningfully defend his client. Therefore, this application deserves to be allowed.

26. Accordingly, the application is allowed.

27. The order passed by the learned Magistrate issuing process against the applicant accused No.2 dated 04.02.2017 is quashed and set aside to the extent of the applicant/ accused No.2.

28. As a result of this learned Magistrate shall pass a formal order for dismissal of complaint against the applicant/ accused No.2.

29. Rule made absolute in the above terms. The criminal application stands disposed of accordingly.