
(1981) 04 BOM CK 0044
In the Bombay High Court
Case No : Criminal Appeal No. 355 of 1978

P. Ram Narayan

APPELLANT

Vs

L.P. Pichan and Another

RESPONDENT

Date of Decision : 27-04-1981

Acts Referred:

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

Citation : (1982) 2 BomCR 559

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : D.M. Rane and R.G. Kodre, for the Appellant; Chopda, Public Prosecutor, M.N. Shah, for the Respondent

Final Decision : Allowed

Judgement

Sharad Manohar, J.—This is an appeal against the order of acquittal passed by the learned Magistrate, 33rd Court, Ballard Estate, Bombay, dated 31-8-1976 in Criminal Case No. 144/S of 1974. The case was initiated at the instance of the complainant who is the appellant before me. The charge was that respondent No. 1 (who will be referred to hereafter as accused No. 1) and three others had defamed the complainant and as such had committed an offence punishable u/s 500 I.P.C. I may state here at the outset that though all the four accused have been acquitted by the learned Magistrate, the present appeal is filed against accused No. 1 only. The order of acquittal in favour of the remaining three accused has, therefore, become final.

2. At the outset, I may very briefly state the substance of the grievance of the complainant against the accused. All the accused are quite respectable persons, employees and officer of the State Bank of India. They have formed a co-operative housing society and accused No. 1 is the Secretary of that society. They entered into an agreement with the complainant, who is a builder, for construction of their residential building and in the quibblings which started at the later stage in the transaction, accused No. 1 addressed a letter dated

28-3-1977 to the complainant and a copy of the same was sent by accused No. 1 to the Architects of the society. I will refer to the said letter hereafter as the "impugned letter".

The defence contention in the beginning was that at the most it could be said to be a strongly worded letter. It is not disputed before me that it is even a vituperative letter, but only that much. The complainant, however, contends that the letter does not stop at mere making the allegation vituperation, but it proceeds to defame. He contends that it is not only a vituperative letter but it is a rank defamatory one. The learned Magistrate has taken the view that the impugned letter is nothing but a strong reaction on the part of the accused to a similar worded earlier letter by the complainant. The learned Magistrate seems to imply that the letter does not go beyond the stage of vituperation. The complainant is seriously aggrieved by the said view of the learned Magistrate. The question is whether the grievance of the complainant is justified.

3. I will proceed to state the facts which are relevant for the purpose of appreciating the grievance of the complainant and the case of accused. I make it clear here that I am not merely stating the prosecution case. I am stating all the facts relevant to the case. The facts are partly admitted facts and partly they are the allegations of the prosecution initially but they had been alleged by accused No. 1 as he unfolded his case during the trial. Those facts are stated partly because they are no longer in dispute but mainly with a view to complete the chronology of events.

a) I have referred to co-operative housing society formed by the employees and officers of the State Bank of India. The name of the society is Grahalaxmi Co-operative Housing Society. The purpose of the society was to construction a building for the society for its members who were essentially the employees and officers of the State bank of India. Accused No. 1 has been at all the relevant times the Secretary of the society. Accused No. 2 was the treasurer at the relevant time. Accused Nos. 3 was the President and accused Nos. 4 and 5 were the members of the Managing Committee of the society. The complainant is a builder by profession. An agreement dated 31-3-1971 was arrived between the Promoters of the society and the complainant by virtue of which agreement the complainant undertook to construct a building for the society on the terms and conditions mentioned in the said agreement, which is produced at Ex. 4 in these proceedings. As has been the common feature of such transactions these days, there started bickerings between the builder on the one hand and the members of the Managing Committee of the society on the other. The earliest reverberations of these bickerings that are evidenced in these proceedings are to be found in the society's letters, first dated 22-1-1973 and the second dated 3-3-1973. Both those letters are produced at Ex. 10 (collectively) in these proceedings. In between these two letters there appears to be a letter by the complainant to the society dated 3-2-1973. But the same does not appear to be on record. The above two letters, Ex. 10 (colly.) appear to have been addressed

not to the complainant as such. They are addressed to the Architect of the society M/s. Thakkar and Merchant Architects. But it is the case of the accused that the said Architect Mr. Thakkar and the complainant are really hand in gloves with each other and it appears that the copies of the said letters were sent by the society itself to the complainant. All the said previous correspondence by accused No. 1, behalf of the society addressed to the complainant or to the Architects, is replied to by the complainant by his letter dated 12-3-1973. Letter dated 12-3-1973 plays somewhat important role in these proceedings. The view taken by the learned Magistrate is that this letter dated 12-3-1973 is also a very strongly worded letter and he has taken the view that the impugned letter is nothing but an equal and opposite reaction on the part of accused No. 1 to the said letter dated 12-3-1973 written by the complainant. Arguments were advanced by Mr. Shah, the learned Advocate for the accused, almost ad nauseam, on this point and on some other points. I will have, therefore, occasion to refer to some of the contents of letter dated 12-3-1973 presently. The letter is produced at Ex. 3 in these proceedings.

b) It was thereafter that the impugned letter was addressed by accused No. 1 to the complainant on 28-3-1973 but the accused did not stop at writing the said letter to the complainant. In the letter itself it was mentioned that the copy of the said letter was forwarded by accused No. 1 to the Architects M/s. Thakkar and Merchant. It is this letter which is alleged to be highly defamatory damaging the reputation of the complainant, and the question before me is as to whether some of the statements made therein fall within the mischief of section 499 read with section 500 I.P.C. Hence the relevant portion of the same which is alleged to be defamatory may be set out here at this stage. The letter is produced at Exh. A in these proceedings. In paragraph 6 of the said letter, it is stated as follows :

"When the facts of the case of dealings with you are presented in a Court of law, it will be clear to any honourable Judge whether we have pressurised you or you have been pressurising us from time to time. Even the appointments of the Architects viz., M/s. Thakkar and Merchant was done by us under pressure, which we can prove beyond doubt, so that they may certify anything that you submit to them, arbitrate only in favour and adopt such tactics to suit interest. In this connection we quote a famous proverb and "Most criminals are too stupid to break a life style just because they keep on getting caught." like the compulsive gambler who feels he can always beat the law of averages."

The grievance of the complainant is that the portion emphasised above is highly defamatory.

Paragraphs 9, 10 and 11 of the said letter may be set out verbatim :

"9. No Court of law would ever believe your hollow theory that you quoted the rates to the society under duress and coercion as it is always the contractors who create situation to coerce the office bearers of the society to sign certain agreements under duress as you have done by taking away the large amount of

money belonging to the members of the society on one pretext or another and obtaining signatures on agreements to suit your evil method and then blackmail the office bearers by quoting such agreement to extract more and more money on the pretext of handing over the completed project on receipt of such moneys. We were one of the few lucky office bearers of a society who refused to submit to your tactics at later stages.

10. We are convinced beyond doubt that your letter of the 12th March, 1973 is worth not even the value of the paper on which it has been typed. The emblem of Lord Krishna on your letter head does not also suit for a Lord stands for truth and you are no where near the truth. In this connection we request you to change the emblem of your letter head.

11. Lastly we quote a chinese proverb : "He that talks by the yard and does by the inch, is best dealt with by the foot."

The grievance of the complainant is that the portion in the said paras 9, 10 and 11 which I have emphasised above is highly defamatory of the complainant.

c) Evidently the complainant was scandalised by the said letter which he must have received sometime after 28-3-1973. Hence immediately on 6-4-1973 he filed a complainant against the accused in the Court of the Metropolitan Magistrate, which was Criminal Case No. 55/S of 1973. It appears that the complainant was absent when the case was called out and hence the complaint was dismissed. But either it was got restored or was replied with the same number. The fact, however, remains that the same Case No. 55/S of 1973 remained pending before the learned Magistrate till 10-10-1973.

d) In the meantime, in June 1973, Suit No. 4727 of 1973 was filed by the complainant against the society, inter alia, for recovery of certain dues from the society. That suit was contested by the society but ultimately the suit was compromised and consent terms were filed in the same on 10-10-1973. Extensive arguments have been advanced before me to contend that certain stipulations contained in Clause 14 of the consent terms precluded the complainant from filing the present complaint. I have not found it possible to accept any of the arguments for more reasons than one, but in order to appreciate them it is better to set out the contents of the said Clause 14 of the said consent terms. The said Clause 14 runs as follows :

"14. Criminal Case No. 55/S of 1973, filed by the 2nd defendant against some members of the plaintiffs and pending in the Presidency Magistrate's 33rd Court, at Ballard Pier, Bombay and fixed on 10th October, 1973 shall be allowed to be dismissed on 10th October, 1973 for default of appearance of the second defendant. This has been agreed to maintain Goodwill between the parties. The second defendant has liberty to refile the same in the event of non-compliance by the plaintiffs of the terms mentioned herein above. On compliance of the terms, the subject matter of the complaint and claims arising thereunder shall be deemed settled out of Court between the parties and the second defendant shall

not refile the complaint."

But it is contended by both the sides that the real intendment and effect of the said Clause 14 could not be appreciated unless certain other relevant terms of the consent terms were examined. The said relevant clauses are Clauses 4 to 7. They are as follows :

"4. The plaintiffs to pay to the defendants a sum of Rs. 20,000/- (Rs. Twenty thousand only) within two weeks of receipt of intimation in writing from the defendants stating that 16 Geysers and 32 fans have been already fixed in respective flats. If the plaintiffs fail to pay the said sum, the defendants will benefited to stop further work until the said payment of Rs. 20,000/- is made with interest thereon at 12% per annum from the day prescribed herein for payment.

5. The defendants to complete the entire construction work as per the agreements and extra work detailed in the schedule on the property on or before 15th February, 1974 subject to circumstances beyond the control of the defendants and the defendants shall intimate about the same to the plaintiffs within 3 days of the completion of the said entire work and shall forward with the said intimation necessary certificates, letters and papers, required from the plumber and Electrician for the purpose of obtaining occupation and/or completion certificate from the Municipality.

6. The plaintiffs to pay to the defendants a sum of Rs. 43,500/- within three weeks of the receipt of the intimation and certificates, letters and papers referred to in Clause 5 above. The plaintiffs shall also deposit a sum of Rs. 5000/- in the joint names of Shri Madanlal Shah and Shri R.G. Korde, Advocates, or such other name or names as the parties may hereafter agree, which amount shall be paid to the defendants on the expiry of the defect liability period mentioned in the agreement dated 31-3-1971, subject to the defendants having remedied the defects if any found during the said period and subject to deduction there from of such as may be decided in the event of the failure of the defendants to remedy the defects and/or getting water connection as per Clause 8 herein below.

7. On payment of the aforesaid sum of Rs. 43,500/- (forty three thousand and five hundred only) and after plaintiffs depositing Rs. 5000/- mentioned in Clause 6 above, the defendants shall leave the property with all their materials and implements brought by them on the site for utilising for the construction work and which might remain unutilised in the construction."

Clause 9 contains arbitration clause. Clause 11 provides that by the said compromise the claims arising out of the agreement between the parties relating to the extra work and relating to the breach of the agreement stood settled.

Mr. Shah, however, contended further that there is something in Clause 13 of the said consent terms which really thrown light upon the real intendment of the parties. The said portion of Clause 13 is as follows :

"The aforesaid agreement for payment is subject to the defendants carrying out their obligations mentioned herein".

It will be seen that the consent terms were arrived at on 10-10-1973 and the date for the hearing of the Criminal Case No. 55/S of 1973 was 10-10-1973 itself. Those consent terms were, therefore, produced by the learned Advocate for both the parties before the learned Magistrate on 10-10-1973. Technically the complainant remained absent on that date in the Court. The learned Magistrate referred to the consent terms which were produced before him and he observed that the complainant was absent and hence the complaint was dismissed and the accused were discharged.

e) It appears to be the grievance of the complainant that the accused did not comply with the obligations enjoined upon them by the consent terms. Hence on 27-10-1974 the complainant filed the present complaint against the four accused. Along with the complaint he produced the defamatory letter at Ex. A and contended that the particular portion referred to by me above was defamatory of his character. It appears that process was issued by the learned Magistrate against all the accused. However, the learned Magistrate was of the view that the letter was no doubt critical of the complainant's conduct but, according to him, could not be said to be defamatory. This is what the learned Magistrate observed in the concluding portion of his discharge order.

"..... for the purpose of considering the charge of defamation, one has to see whether the letter has tendency to convey anything evil against the person so as to lower him in the estimation of others. Simply by criticising him, I do not think that the complainant is defamed by this letter. I, therefore, hold that the letter is no defamatory,"

We, therefore, refused to frame charge against the accused and passed an order discharging all of them.

f) The complainant being aggrieved filed Criminal Revision Application No. 123/75 to this Court against the said order of discharge passed by the learned Magistrate. In the said revision application rule was issued by this Court which came up for hearing before Naik, J. By his judgment dated 20-11-1975 he made the rule absolute. I am alive to the fact that strictly speaking the observations made in the said judgment could not be said to be binding upon the learned trial Magistrate because they related to, and could relate to, only the question as to whether a prima facie case was made against all or any of the accused. But all the same, the observations are made relating to certain legal position which is germane for the purpose of this petition and hence it is worth while setting out certain relevant portion out of the said judgment.

g) After setting out the relevant facts and arguments this Court observed as follows :

Now, the first point to be considered is as to whether the expressions complained

of in the letter are prima facie defamatory.

In paragraph 6 of the letter Ex. A, it is observed as under :

"When the acts of the case of the dealings with you are presented in a Court of law, it will be clear to any honourable Judge whether we have pressurised you or you have been pressurising us from time to time. Even the appointments of the Architects viz. M/s. Thakkar and Merchant was done by us under pressure which we can prove beyond doubt so that they may certify anything that you submit to them architects only in your favour and adopt such tactics to suit your interest. In this connection we quote a famous proverb, "Most criminals are too stupid to break a lifestyle just because they keep on getting caught." They are like the compulsive gambler who feels he can always beat the law of averages.

Now speaking for myself it is impossible to hold that such an observation is not per se defamatory. There is a clear suggestion by innuendo that the complainant is a criminal and since habits die hard it is impossible for him to cease to be a criminal. Now in this connection we may refer to Explanation 3 to section 499 and illustration (a) to that section".

After stating the position relating to Explanation 3 and illustration (a) of section 499 I.P.C. this Court further observed as follows :---

"Prima facie, therefore, it would appear that the expressions to which the attention is drawn by him occurring in the letter in question is defamatory and it would be for the defence to show that its case falls under any of the exceptions to section 499. There are also other allegations in the complaint which are complained of for instance, the agreement which the accused have entered into with the complainant is called an "uncivilised." It could not be said that expression is defamatory. Again there is an observation in paragraph 9 of the letter to question which would indicate that the complainant took the agreement to suit his evil methods and then blackmail the office bearers by quoting such agreement to extract more and more money on the pretext of handing over the completed project on receipt of such moneys. The expression "Blackmail" also prima facie would appear to be defamatory. Again in paragraph 10 there is a discussion to the effect that the emblem of Lord Krishna on the letter head of the complainant does not suit the complainant for a Lord, stands for truth whereas it is alleged that the complainant is, therefore, advised to better change the emblem of his letter head. There is a clear ironical suggestion that the complainant is a liar. That again, prima facie would be defamatory. Last on in paragraph 11 of the letter, a Chinese Proverb is quoted to the effect : "He also talks by the yard and does by the inch, is best dealt with by the foot". It is unnecessary for me to say at this stage that this observation by itself is defamatory. But since that observations has got to be read in the context of the entire letter, prima facie it could not be said that the letter, containing such an allegation is not defamatory. At any rate sufficient to say that as I have observed earlier the reference in para 6 to the complaint as a habitual criminal is enough

to show that the letter complained of is defamatory and if that is so it could not be held that no case was made out against the accused to frame a charge. On the other hand, it must be held that there was good ground for presuming that the accused have committed an offence triable under Chapter XIX of the Code of Criminal Procedure, 1973."

With the above observations this Court made the rule absolute, set aside the order of discharge passed by the learned Magistrate and sent back the case to him for the purpose of framing the charge and for the purpose of proceeding further in the matter.

Thereafter, the learned Magistrate framed the charge against all the accused u/s 500 I.P.C.

4. The defence of all the accused was as follows : Before taking any defence upon the merits of the case, it was contended that in view of the consent terms dated 10-10-1973 the complaint was premature and was not maintainable. The objection, therefore, was raised at the very threshold to the effect that in a sense the complaint was not maintainable; or, in other words, that the Criminal Court was not justified in entertaining the same. On merits, accused No. 1 admitted the contents of the said letter. We, however, denied that there was any communication of the said letter by him to the Architects or that there was any publication of the said letter. The contention was that the said letter written to the complainant happened to be in a file which was sent to Architects and that there was no desire to communicate the said letter to the Architects. The publication of the letter was thus denied. But more important than that, what was contended was that the statements in the said impugned letter were bona fide statements and were made in good faith. Provisions of Exceptions 7, 8 and 9 and also 10 to section 499 I.P.C. were, therefore, relied upon and it was contended that even assuming that any of the statements were defamatory as contemplated by section 499 still the action was saved by virtue of the said exceptions.

5. The complainants led his evidence thereafter. He examined himself as well as Architect Shri Thakkar. Shri Thakkar was examined by the complainant with a view to prove both, the publication of the said defamatory letter as also for proving the effect, the same had upon the recipient of the said letter, viz. Shri Thakkar. In addition to the oral evidence, the complainant produced a few documents. I may state here that the additional documents produced by the complainant do not take his case any further than what is done by the impugned letter Ex. A itself and hence no reliance was placed upon the same before me by Shri D.M. Rane, the learned Advocate for the complainant. No oral evidence was led on behalf of the accused as such but quite a few documents were produced or got produced and proved by them. Those documents are produced at Exs. Nos. 1 to 10 (colly.) in these proceedings.

6. The accused were thereafter examined by the learned Magistrate u/s 313 of

the Criminal Procedure Code. It is not necessary to refer to the defence of accused Nos. 2 to 5 because, as stated above, there is no dispute that the order of acquittal passed in their favour is quite justified. Accused No. 1 admitted in his examination u/s 313 that he had signed the impugned letter Ex. A. He stated that the same was sent by him to the complainant but he denied that he had sent the copy of the same to the Architects. He however, had no explanation to the statement made by Shri Thakkar in his evidence that he had received the copy of the said defamatory letter sent to him by accused No. 1. He denied that the contents of the letter, Ex. A, were defamatory and stated that he did not know whether the position of the complainant was lowered in the eyes of the society by virtue of the said letter. However, he alleged that the complainants and Shri Thakkar had joined hands and that was the reason why they were deposing falsely against him. In his statement he stated that he was filing the written statement. His examination u/s 313 Cri.P.C. is dated 13-8-1976 and on the same day, i.e. on 13-8-1976, he filed a written statement in the case.

The first contention taken by him in his written statement was that in view of the fact that the first complaint, Criminal Case No. 55/S of 1973, was dismissed, the present complaint filed by the complainant was premature by reason of the stipulation contained in Clause 14 of the consent terms, Ex. No. 1. He denied that the copy of the impugned letter was sent by him to Shri Thakkar, the Architect. He stated in para 4 of the written statement that a copy of the impugned letter Ex. A was lying in the file of the society which was handled by the witness Shri Thakkar as the Architect of the society. All the same he denied in para 5 of the written statement that there was any publication of the alleged defamatory statements. In para 6 of the written statement he contended that the statement made in the impugned letter, Ex. A, were made bona fide and in good faith and hence the case was covered by the exception enumerated by Serial Nos. 7 to 10 of section 499.

7. Thereafter the learned Magistrate heard the arguments. He examined the entire evidence. He, however, arrived at the conclusion that the impugned letter could not be said to be defamatory at all. In this connection he held as follows :

So far as the contention relating to the maintainability or premature character of the complaint was concerned, the learned Magistrate was clearly of the view that the said contention was not tenable. The learned Magistrate did not enter into the question as to whether the accused had really complied with the requirement of the terms of the consent terms upon which requirement alone it could ever be said that the complainant could not immediately refile the complaint. The learned Magistrate took the view that even assuming that the accused had complied with all the requirements of the consent terms, still at the most the stipulations contained in Clause 14 of the consent terms constituted a waiver on the part of the complainant of his right to set the criminal law in motion. The learned Magistrate observed that there cannot be a waiver of such a nature in connection with any criminal complaint to be filed in Court. We held that no contract or

agreement such as the one contained in the consent terms could preclude the complainant from refiling the complaint. The said objection was, therefore, overruled by the learned Magistrate.

Likewise the learned Magistrate disagreed with the accused when it was contended that there was no publication of the said letter. The story related by accused No. 1 in his written statement to the effect that the copy of the impugned letter was sent by the Architect only because he happened to handle the file in which the copy was kept, was found by the learned Magistrate to be an unacceptable version. We found that there copies of all the correspondence addressed by the accused to the complaint were sent by the society to the Architect as well as and according to the learned Magistrate there was abundant evidence on the record to show that the copy of the impugned letter was in fact sent by accused No. 1 to Architect Shri Thakkar. According to the learned Magistrate that was sufficient for the purpose of proving the publication of the defamatory material.

However, after taking this much of the view in favour of the complainant, the learned Magistrate proceeded to taken the view that the impugned letter could not be said to have defamed the complainant at all. The first reason for coming to this conclusion was that, according to him, the relevant statements finding place in the impugned letter were not per se defamatory. In this connection the observations made by Naik, J., in the above criminal revision application were brought to his notice and it was urged that this Court had taken the view that the statements were defamatory per se. The learned Magistrate, however, reacted to this contention by stating that the observations made by this Court in the said criminal revision application were in the context of the question as to whether there was any prima facie case made out by the complainant against the accused or not. The learned Magistrate took the view that this Court had no occasion to express its final opinion upon the question as to whether these questions were defamatory per se or not.

After taking the view that the observations made by this Court to the impugned statements were defamatory per se was not a final and considered view of this Court, the learned Magistrate held that the question as to whether the impugned letter, Ex. A was defamatory or not had to be examined on a two-fold back ground.

- a) the impugned letter had to be read as a whole,
- b) it had to be read in the context of the letter dated 12-3-1973 written by the complainant to the accused in reply to which letter the impugned letter was written by the accused.

It does not appear that the learned Magistrate has applied his mind to the question as to whether the objectionable statements projecting prominently out of the impugned letter were per se defamatory or not. He seems to have taken the view that the complainant's own letter dated 12-3-1973 was a very strongly

worded letter. He did not take the view that the said letter dated 12-3-1973 was defamatory in any sense but his view seems to be of the nature that if a person writes a strongly worded letter to a respectable person and if the respectable recipient hits back by writing a letter which is more strongly worded it would not amount to defamation even though the counter letter is defamatory per se and even though the second letter is not only addressed to the person defamed but is published to the world at large.

8. As regards one of the objectionable portion of the letter, the learned Magistrate has observed that only those defamatory statements which were quoted by the complainant specifically could have to be examined by the Court to ascertain whether they were defamatory or not. The learned Magistrate was of the view that though the accused had suggested that the complainant was a liar, still, according to the learned Magistrate, grievance in that behalf was not made by the complainant in the complaint and hence that would be one reason to hold that the said statement was not defamatory. The learned Magistrate referred to the complainant's letter dated 12-3-1973 and observed that some of the statements mentioned therein are objectionable and indecent. We, therefore, held that they reply to the impugned letter could not be said to be defamatory. The complainant's letter head bears an emblem of Lord Krishna. The accused in his impugned letter advised the complaint to remove that emblem because he had no relationship to the truth. This implied that the complainant was a liar. As regards this aspect, the learned Magistrate observed as follows :

"It is true that it would be necessary to appreciate these statements in assessing whether they are defamatory or not in the context of the entire letter and the entire letter shall have to be read. But it would not be proper to hold accused No. 1 guilty for having written to the complainant to remove the emblem of Lord Krishna as he was a liar. I hope the observations of his Lordship Naik, J., which I have quoted above, would also not incline to lay a rule that whatever stated about the emblem means that the complainant is a liar and in that context should be considered as a defamatory statement in Ex. A."

We stated further that he was going to consider the question whether the various statements were defamatory or not but stating so he has given no reason as to why he held that they were not defamatory per se. As regards the allegation relating to complicity between the builder and the Architects, the learned Magistrate observed that such complicity was not an unknown thing. We observed that there was nothing unusual in it. We further observed that it has been brought on record that M/s. Thakkar and Merchant are the usual Architects of the complainant. On this ground every derogatory statement made by the accused in the impugned letter was found by the learned Magistrate not to be defamatory at all. Even words such as "black mail", "criminal", etc. were found by the learned Magistrate to be not defamatory at all in the context of the nature of the letter, its publication notwithstanding. Taking this general view of the matter, the learned Magistrate held that no offence u/s 499 read with section 500

I.P.C. could be said to have been committed by the accused.

In the alternative, the learned Magistrate also held further that even assuming that an offence of defamation was made out against the accused, still, according to the learned Magistrate, the accused was fully protected by Exception 9 to section 499. According to him, although the statement was an imputation on the character of the complainant, the said statement was made in good faith for the protection of the accused and the society.

Taking this view of the matter, the learned Magistrate passed an order of acquittal in favour of accused No. 1. The order of acquittal in favour of accused Nos. 2 to 5 was also upon certain other reasons. To my mind the order of acquittal passed by the learned Magistrate in favour of accused Nos. 2 to 5 was quite justified having regard to the facts of the case and evidently that is the reason why no appeal has been filed by the complainant against the said order of acquittal in favour of accused Nos. 2 to 5. Since no appeal has been filed against the said accused, it is unnecessary for me to refer to the additional reasons for the learned Magistrate to pass the order of acquittal in favour of the said accused Nos. 2 to 5.

9. While examining the arguments advanced by the learned Advocates in this appeal, I may state at the outset that the fact that a copy of the impugned letter was sent by accused No. 1 to Architect Shri Thakkar is specifically conceded by Mr. Shah, the learned Advocate for the accused. Mr. Shah specifically stated before me even further that the publication of the said impugned letter could also be not denied by the accused. In view of the fact that the copy of the impugned letter was in fact sent by the accused or on behalf of the accused to Architect Shri Thakkar, it is unnecessary for me to examine the evidence led by the complainant to prove the publication of the defamatory letter.

Since the factum of the publication was no longer in dispute, Mr. Rane the learned Advocate for the accused, found his task to be some what simplified. In the context of the proved or admitted fact that there has been publication in respect of the impugned letter, Mr. Rane advanced a two-fold argument. His first contention was that the various statements made in the impugned letter were defamatory per se; and, secondly, he contended that the liability arising out of the operative portion of section 499 read with section 500 I.P.C. was not saved by virtue of any of the exceptions to section 499. We, therefore, contended that the criminal liability of the accused was complete.

For reasons which I will presently discuss, I find that the contention of Mr. Rane is correct and has got to be accepted. But before discussing the law relating to defamation and application of the same to the facts of the accused, it would be appropriate at this stage to set out and examine the arguments advanced by Mr. Shah in defence of the accused.

10. I may state here that Mr. Shah's argument spawned over a substantial length of time. Atleast superficially he appeared unmindful not only of the watch

but also of the calender. Ultimately on 14th April, 1981 he came out firstly with three propositions. On the 16th April, 1981 he proposed to formulate ten points in defence of the accused. But after formulating the points he started discussing them and during that process embarked upon some other points which, according to him, were independent of the ten points formulated by him. His last contention was that this was an appeal against acquittal and according to him the question before me was a pure question of fact and contended that sitting in appeal I should not disturb the finding of fact recorded by the learned Magistrate.

11. I will first enumerate the points urged by Mr. Shah one after the other:

His first contention was with reference to the previous conduct of the complainant himself. In this connection he referred to the complainant's letter dated 12-3-1973. Reading copiously the contents of the letter dated 12-3-1973 Mr. Shah contended that the letter by itself was not defamatory of the accused but the impugned letter was in reply to the said letter dated 12-3-1973 and his contention was that in the context of the said of letter dated 12-3-1973 the impugned letter not a defamatory letter. His next contention was that Exceptions 7, 8 and 9 to section 499 fully protect the accused. These were the three points raised by Mr. Shah on 14th April, 1981 practically ad nauseum. On the next day, on 16th April, 1981, he came to the Court fresh with additional points. He started by relying upon the judgment of the Supreme Court in Harbhajan Singh Vs. State of Punjab, but realising that the authority was squarely against him rather than in his favour he proceeded to formulate what he thought were the ten points showing that the prosecution had failed to make good its case. The ten points that were formulated by him were as follows :

- i) The complainant was not maintainable in view of the contest terms and in view of the fact that consideration had passed pursuant to the said consent terms.
- ii) In fact there is no breach of the consent terms on the part of the accused. Hence the complaint is not maintainable.
- iii) The onus of proving the breach of the consent terms was upon the complainant and no evidence was led by the complainant for proving the breach.
- iv) In the context of the factum of the consent terms it must be held that the offence, if any, was already compounded even before the date of the complaint.
- v) The statements objected to do not constitute defamation. They are not defamatory per se.
- vi) The impugned letter has got to be examined in the light of the earlier correspondence between the parties and particularly the letter dated 12-3-1973. Seen in that light, it will be found that the statements are not defamatory.
- vii) Even before invoking the exception to section 499, it was necessary to consider whether any mens rea existed.
- viii) The accused had a right to retaliate and the impugned letter reflected only

the relations. The retaliations was a part and parcel of the right of the accused to defend himself and the society from the accusations made by the complainant in the letter dated 12-3-1973.

ix) Exceptions 7, 8 and 9 to action 499 were complete answer to the complaint.

x) Assuming that the accused was required to offer some explanation, it is not necessary for the accused to establish truth in respect of the imputation made by him in the impugned letter. It is enough if he say down a sufficient foundation for his bona fide belief that the statements made by him are true.

12. While expanding the above points, Mr. Shah also suggested other points, which may be numbered as 11th point. This point, related to the consent terms which contained an arbitration clause. Contention, therefore, was that the complainant was precluded from filing the complaint without resorting to arbitration in the first instance. Mr. Shah also relied upon Clause 13 of the consent terms which stated that moneys were agreed to be paid by the society subject to the defendants-accused carrying out their obligations mentioned in the consent terms. This clause was relied upon for contended that if the accused has not made full payment to the complainant as stipulated by the consent terms, it was because the complainant himself had not performed his obligations under the consent terms. The long and short of the argument was that there was, therefore, no breach of the consent terms on the part of the accused and in the absence of any such breach, refiling of the complaint was illegal.

13. I will refer to the arguments advanced by Mr. Shah, in support of the above points in due course. But at this stage it may be noticed that the points obviously overlap each other. Upon analysis it is found that points Nos. 1 to 3 made on 16-4-1981 really form the first point. The first two points raised on 14-4-1981 and point Nos. 5, 6 and 8 mentioned above all together form the second point. Point No. 7 mentioned above relating to mens rea is the third point. Point No. 8 mentioned above is the fourth point. Point No. 3 urged on 14-3-1973 relating to Exceptions 7, 8 and 9 to section 499 is the same as point No. 9 mentioned above and can be numbered as the fifth point. Point Nos. 10 and 11 are really independent points and can be numbered as point Nos. 6 and 7. The last point urged by Mr. Shah relating to the scope of jurisdiction in appeal against acquittal can be numbered as point No. 8. I will deal wit each of the above points in the order named.

14. The first point is that the consent terms divested the jurisdiction of the Criminal Court from entertaining the complaint. The substance of the contentions is that the complaint has in fact been compounded between the complainant and the accused and the consent terms dated 10-3-1973 constituted this composition. The proposition formulated by Mr. Shah was that compounding of the complaint can take place even before the complaint is actually filed. In the instant case the complaint was filed, or rather refiled on 27-10-1974. But the compounding had taken place, according to him in respect of this complaint on

10-3-1973 when the consent terms were filed as per which consent terms the previously filed complaint was to be got dismissed by the complaint. Mr. Shah's contention was that even if there was a breach of the consent terms the effect that the complaint was already compounded could not be wiped out, with the result that an offence which was already compounded could not be the subject-matter of a fresh complaint. In the alternative the contention was that even assuming that a second complaint could be filed, still it could not be filed unless the breach of the consent terms on the part of the accused was proved and the onus of proving the same was upon the complainant and not upon the accused. In other words, according to him, it was not for the accused to prove that he had performed his part under the consent terms; it was for the complainant to prove that the accused had committed breach of the consent terms. Mr. Shah contended that no such evidence was led by the complainant and hence the Magistrate had no jurisdiction to entertain the complaint at all.

In support of these said contentions Mr. Shah relied upon three authorities. The first one is the judgment of the Madras High Court in *Kumarswami v. Kuppaswami* AIR 1919 Mad 879. It was held in that case that: "once a composition has been effected, the matter is at an end and person injured cannot effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the accused's allegation that the offence was compounded out of Court and to direct an acquittal under the section, if it so finds." This authority is cited in support of the proposition that the earlier composition bars even a subsequent complaint. This proposition is no doubt supported by the said authority. For laying down this proposition, the Madras High Court referred to and relied upon the judgment of the English Court in *Keir v. Leeman* 1844 (6) Q.B. 308. But what it actually held in the case before itself, is somewhat significant. After referring to the said English authority, the Court observed as follows :

"The exact point we have to consider here was not before the learned Judges in that case, but the proposition seems to imply that a composition of an offence of a particular description would not be the less valid because it took place before any complaint was laid in Court. Then the exception to section 214, Penal Code, exempts from the provisions of sections 213 and 214 cases of compounding of offences which may be lawfully compounded. If the contention submitted on behalf of the prosecution in this case were sound, the compounding of particular offences dealt with under sections 213 and 214, Penal Code, would be no offence if the compounding took place before the charge was laid. It seems to me that this would be an tenable proposition. On the facts, however of this case, I am not satisfied that the Sub-Divisional Magistrate, "quite clearly realized whether there was a completed agreement or composition" within the meaning of section 345 Criminal P.C. It appears that there was an arbitration and the arbitrator decided after some parley that accused No. 1, was to pay to the complainant Rs. 300/-. It is argued on behalf of the complainant that he did not accept this composition and had not even agreed to the arbitration. The Sub-Divisional

Magistrate does not seem to have arrived at a clear conclusion on these points. A further question arises as to whether Rs. 300/- was to be actually paid before there was any completed composition within the meaning of section 345; or whether the complainant was satisfied with the promise of the accused to pay that amount.

The amount was not actually paid before the complaint was lodged in Court. Unless it is found that the compounding was completed before the complaint was made, any incomplete agreement would not amount to an actual acquittal within the meaning of the law. I may say, speaking for myself, that I should ordinarily be very reluctant to interfere in a case of this nature. But there is no finding of the appellate Magistrate on the subject of the charges under sections 323 and 355, Penal Code, the acquittal of these charges being based merely on an alleged composition. The facts found are not enough to show that the Sub-Divisional Magistrate had in this connection quite clear before his mind's eye the elements which would be necessary for a complete and valid composition. I would, therefore, set aside the order acquitting the accused of the charges under sections 323 and 355, I.P.C. and remit the appeal to be re-heard and disposed of by the appellate Magistrate on these charges in the light of the above observations."

I will refer to the significance of these observations presently. At this stage it is enough to point out that the above authority is clearly unhelpful for the accused. The authority does not lay down the proposition that if a composition takes place earlier a subsequent complaint cannot be filed even if the accused does not perform his part under the compromise.

15. The next authority is the judgment of a learned Single Judge of the Nagpur High Court in AIR 1940 181 (Nagpur) The ratio of the said case is correctly stated in the Head Note which runs as follows :---

"Where a document of compromise regarding offence capable of being compounded without the permission of the Court is signed by the parties who have understood its contents, it is incompetent for any party to it to withdraw from it. Since the compromise has the immediate effect of acquittal, so as to deprive the Magistrate of his jurisdiction to try the case, the subsequent withdrawal from it by any party can neither effect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case."

It will be seen that even this authority is totally unhelpful to the accused. It is nobody's case that the complainant has resiled from or withdrawn from his promise that he gave while signing the consent terms. It cannot be said that after taking advantage of the consideration that he received as per the consent terms he is going back upon the stipulation contained in the same not to refile the complaint. His case is that the accused has not paid him the amount stipulated under the consent terms. As will be presently pointed out it is no longer in dispute before me that out of the amount to be received by the

complainant from the society a sum of Rs. 3500/- is not yet received by the complainant from the society. No doubt some excuse was being advanced by Mr. Shah in connection with the non-payment. Contention was raised that a large amount is due by the society from the complainant. Admittedly, however, the society has received possession of the building from the complainant and no suit has yet been filed by the society against the complainant for recovery of the so called dues although more than 6 years have elapsed. Contention of Mr. Shah is that the amount of Rs. 3500/- receivable by the complainant from the society shall have to be adjusted against the dues receivable by the society from the complainant. Obviously what he means to say is that the liability of Rs. 3500/- which is admitted and crystalised liability is to be adjusted against the liability which arises out of a mere right to sue. To my mind it is clear that there has been a breach of the consent terms on the part of the society itself. If this is so, the judgment of the Madras High Court in Kumarswami's case (supra) in fact helps the complainant and not the accused. Moreover the judgment of the Nagpur High Court in Mt. Rambai's case (supra) cannot be said to apply to the facts of the case having regard to the position mentioned above.

The third authority relied upon by Mr. Shah is also the judgment of the Nagpur High Court in Godfrey Meeus v. Simon Dular AIR 1950 Nag 91. It is really unnecessary to set out the facts in the said case and the principle laid down therein. In substance it follows the same principle laid down in Mt. Rambai's case referred to above. As a matter of fact both the above authorities have been strongly relied upon in the said judgment. The principle is that once the offence is compounded the Magistrate is deprived of his jurisdiction to entertain a complaint based upon the allegations which were the subject-matter of the compromise. In the case before the Nagpur High Court it was proved that the accused had performed his part under the compromise and hence it was held that the Magistrate was deprived of his jurisdiction to entertain the complaint. In the instant case that position is totally absent. This is common feature of all the above mentioned authorities as juxtaposed against the present case which I am dealing. These authorities are, therefore, of no use to the accused at all.

16. Equally important is another aspect of the matter. In the instant case it cannot be really said that there has been compounding of the offence at all. I have already set out Clause 14 of the consent terms in extenso and stipulations contained in the said clause make it clear that the offence was not compounded finally at all. All that was agreed at the time of the consent terms was that the complaint which was pending before the Magistrate at that time was not to be pursued by the complainant for the time being and liberty was specifically reserved to the complainant to refile the complaint if there was any breach on the part of the accused to perform his part of the contract contained in the consent terms. To my mind, therefore, it is futile on the part of Mr. Shah to contend that there has been a final compounding of the offence.

The next aspect of Mr. Shah's contention in this behalf need not detain us very

long. Contention is that the onus to prove that there has been a breach on the part of the accused is upon the complainant and that he has not discharged the said onus. I may state here that this appeal was adjourned from time to time to enable Mr. Shah to satisfy the Court that his client or the society had paid to the complainant all the moneys as per the consent terms. I may state here that Mr. Shah made a clear statement before the Court that out of the amount payable by the society to the complainant a sum of Rs. 3000/- was not paid by the society to the complainant not only within the period stipulated by the consent terms but even till this date. No doubt there is a justification offered for the non-payment but that does not change the fact that the moneys receivable by the complainant from the society and the accused, in order to debar him from filing the complaint, have not been received by the complainant fully till this date.

17. Apart from this factual position I cannot accept Mr. Shah's contention that the onus of proof relating to the breach of the agreement is upon the complainant. To my mind it was the accused who wants to bar the jurisdiction of the learned Magistrate in the matter of entertaining the complaint. It is, therefore, he who has to prove all the facts which oust the jurisdiction of the Court. No evidence was led by the accused in the lower Court to prove that he had performed all his obligations contained in the consent terms. From whatever stand point one may view it, to my mind Mr. Shah's first point has got to be rejected.

18. The second point urged is that the impugned letter was just a retaliation of the complainant's own previous letter dated 12-3-1973. It was just a case of tit for tat and it was all quits, if one may summarise the contention. I have already pointed out above that the learned Magistrate was delightfully impressed by this argument. I find no legal justification for the same. In the first place I find nothing in the letter dated 12-3-1973 which can be said to be defamatory of the accused. But the more important point is that the letter was written by the complainant to the accused only. The gist of the offence or defamation is its publication. It is an admitted fact that the letter dated 12-3-1973 was a matter between the complainant and the accused only. It had never gone to any third party. Moreover, even Mr. Shah frankly stated, may he harped upon that fact, that the letter dated 12-3-1973 was not defamatory. It is, therefore, difficult to find any justification for a defamatory letter dated 28-3-1973. But apart from that aspect of the matter it is not the law of our country that commission of one offence justifies the commission of a retaliatory offence. If the complainant had indulged in defamation of the accused and if the accused had hit back it may be that different considerations might arise, particularly in the matter of sentence. But in the instant case there is no defamation indulged in by the complainant. The argument of retaliation, apart from being unacceptable in law, is devoid of any basis.

19. The third point relating to mens rea also need not detain us very long. In fact Mr. Shah himself was not in a position to expound upon the said point. Beyond

referring to the absence of mens rea he did not expound the point at all. The question of mens rea is really irrelevant in this case. What section 499 I.P.C. deals with is the result of the adverse effect upon the reputation of the party aggrieved. So far as the perpetrator of the effect is concerned, the mens rea is irrelevant except to the extent of prevalence of good faith. But the good faith is to be coupled with the necessity of protection of self interest or public interest and all this ultimately boils down to the question as to whether the accused can invoke any of the Exceptions to section 499. The question of mens rea cannot be considered independent of the said question. The argument relating to mens rea is, therefore, of fallacious argument.

20. The fourth point is already dealt with by me above partly. The point is that the impugned letter was by way of retaliation and by way of a defence of the society's rights. I have already pointed out that retaliation is not justified and the right to defame the accused even to protect the society is not justified unless the accused can invoke one or the other of the Exceptions to section 499.

21. This brings me to the 5th point which is really the important point to be examined in this case. The point is that the accused is entitled to invoke all the three Exceptions 7th, 8th and 9th to section 499. I have already pointed out above that so far as the learned Magistrate was concerned he had rejected the plea of the accused relating to Exceptions 7 and 8, but had accepted his contention relating to Exception 9. Mr. Shah, however, insisted that the accused was entitled to protection under all the three said exceptions.

Exceptions 7 and 8 need not detain us very long at all. A mere perusal of the said exceptions would show that they were wholly irrelevant so far as the admitted facts of the present case the concerned. Exception No. 7 is as follows:

"Seventh Exception---It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates."

Even Mr. Shah did not contend that the accused had any authority over the complainant empowering to censure the complainant. It was not possible for Mr. Shah to point out how Exception 7 would apply.

Exception 8 runs as follows :

"Eight Exception.---It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation."

Even Mr. Shah did not contend that the accused had any authority over the complainant empowering to censure the complainant. It was not possible for Mr. Shah to point out how Exception 7 would apply.

Exception 8 runs as follows :

"Eighth Exception.---It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation."

Even in this case it is not the contention of Mr. Shah that architect Shri Thakkar had an authority over the complainant with respect to the subject matter of the various imputations. As a matter of fact it is the case of the accused that the architect was an accomplice of the complainant and both of them formed a mutual aid society for helping themselves with the funds of the society. This being the position it is impossible to conceive of any good faith on the part of the accused when he published the accusations in question to the architect. If there was any case where good faith was inconceivable this was the case. The impugned letter shows wrath and not good faith. The 8th Exception is, therefore, totally irrelevant.

21. This brings us to the 9th Exception. The learned Magistrate has placed heavy reliance upon this exception to hold that the accused is saved by the same. The 9th Exception runs as follows :

"Ninth Exception.---It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good."

The learned Magistrate has held that the accusation was made by the accused against the complainant before the architect in order to protect himself and the society from the complainant. I must state here that if the accused had not complained against the architect also perhaps it could have been contended with some justification that the 9th Exception was attracted. But in that case it could be said that it was the feeling of the accused that the complainant was deceiving the society and protection in that behalf was being sought by the accused from the architect. In that case both good faith as well as the desire of protection of self-interest could have been spelt out. But in the instant case the fact is that the accused himself treats the architect and the builder on the same par. Both of them are alleged to be conspiring with each other to do down the society. In these circumstances it is necessary to find out whether any good faith could be said to be conceivable. Good faith has been defined by section 52 I.P.C. as follows :

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

I asked Mr. Shah to state as to what due care and attention the accused observed when the copy of the impugned letter has been sent by him to the architects. The act that constituting the offence in this case is the making of the defamatory statement coupled with the publication of the same. In neither of the acts is any due care or attention to be found. It is not enough that the accused believed in what he stated in the impugned letter. The due care and attention

becomes relevant not only in his belief. Due care and attention has reference to the act of the commission of the offence. Due care and attention has to be shown when the statement is made and also when it is published. Even assuming that the accused believed every syllable of the statement made by him to be true and correct, still his act of sending a copy of the letter to the architects is nothing but a reckless and irresponsible act thoroughly devoid of any due care and attention. In this view of the matter even Exception 9 is inapplicable.

22. In order to invoke the said Exception 9 the learned Magistrate has relied upon the judgment of the Supreme Court in Chaman Lal Vs. The State of Punjab, I may state here that Mr. Shah himself did not rely upon this authority and this was evidently so because far from helping the accused it goes against him. As a matter of fact I am quite surprised that the learned Magistrate should have relied upon the same. This is what the Supreme Court has observed in connection with good faith, which is the essential ingredient of Exception 9 :---

"In order to establish good faith and bona fide it has to be seen first the circumstances under which the letter was written or words were uttered; secondly, whether there was any malice; thirdly, whether the accused made any enquiry before he made the allegations; fourthly, whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the accused acted in good faith."

It is difficult to find any justification for relying upon the above observations to hold that the instant case the copy of the impugned letter was sent by the accused to Architect Shri Thakkar in good faith.

23. The next-point urged by Mr. Shah need not detain us very long at all. His contention is that truth in the allegation contained in the impugned letter was sufficient justification and when the accused was required to establish the said truth it was not necessary for him to establish it to the hilt. According to him it was enough if he laid down a sufficient foundation for his bona fide belief that the statements made by him were true. According to Mr. Shah, there was enough evidence on record to prove that the complainant had got the bills wrongfully approved from the architects and had recovered the moneys from the society on the strength of the said bills even though the amount had not till then become due to the complainant or the society. The contention is that under the original agreement the complainant was entitled to receive his bills only after certain minimum work, not before. The fact that such premature bills were passed by the architects showed the conspiracy between the two to relieve the society of its precious funds. To my mind this entire approach is basically erroneous. If a statement is defamatory per se, truth is no defence to the defamation except in the case of Exception No. 1. I may state that not even Mr. Shah was able to lay the claim to the protection of Exception No. 1 of section 499. Moreover the agreement itself is replete with so many conditions and provisions, that it is impossible to take the view that the certificates given by the architects in connection with the bills sent by the complainant were not justified. The evidence

led by the accused by production of the bills in question is hopelessly inadequate to prove the point at all. It is, therefore, impossible to accept the said point raised by Mr. Shah.

24. The seventh point urged by Mr. Shah refers to the arbitration clause. Clause 13 contained in the said consent terms to arbitration. Contention is the if there was any dispute relating to Clauses 5 and 6 of the consent terms, that matter was to be referred to the arbitration. It is difficult to see how an arbitration clause in an agreement could bar a criminal proceeding. Whether criminal proceeding is barred or not could perhaps be examined in the context of the provisions of Clause 14 of the consent terms and that aspect has already been examined by me above. The arbitration clause in the contract could not have any effect upon a criminal prosecution relating to defamation which was not the subject-matter a Clauses 5 and 6 of the consent terms at all.

Likewise the argument relating to Clause 13 is of no avail. The argument is that the amount was to be paid by the society to the complainant in consideration for the complainant carrying out his obligation under the consent terms. Such a stipulation is not relevant to the question a to whether the liability incurred by the accused on account of the offence of defamation committed by him was wiped out or not. To my mind the argument is misconceived.

25. Before dealing with Mr. Shah's last contention relating to this Court's power in appeal against acquittal, I will deal with Mr. Shah's argument relating to the operative portion of section 499. Mr. Shah did not put it in the words in which I am couching the point. But this contention can be summarised by stating that before going to the question as to whether the accused was entitled to invoke any of the exceptions or not, the Court has to go to the operative portion of section 499 to ascertain whether any offence contemplated by the said operative portion of section 499 was committed or not. In other words what he implied was that the words in the impugned letter were not defamatory per se. According to him, the words such as "extortion of moneys" "black-mailing" and the words to the effect that the complainant was a criminal and a liar were not defamatory per se. I will presently point out that on the previous occasion this Court had been required to consider this question and this Court had observed that they appear to be defamatory per se. Mr. Shah, however, contended that they were not defamatory per se because they had to be read in the context. In other words Mr. Shah once again went back to his pet theory that the words used in relation could not be defamatory. In this connection he placed heavy reliance upon the judgment not of any other High Court but of the lower Court itself. The learned Magistrate had observed that the complainant had used strong and indecent words in his letter dated 12-3-1973 addressed to the accused and he had observed that the impugned letter was an equal and opposite reaction to the said letter. Mr. Shah adopted this line of reasoning. I may, however, state that when the learned Magistrate as also Mr. Shah say that in the context of the letter dated 12-3-1973 the impugned letter dated 28-3-1973 constituted no defamation what

is really meant is that there was justification for the defamation. Now, retaliation is no justification for defamation. If any justification is to be found to any defamation. It must be found in one or more of the ten exceptions carved out of section 499. Once it is held that the kind of defamation practised by the accused does not fall in any of the exceptions, no amount of justification would be of any help to the accused.

26. This brings me to my own examination of the statements made by the accused in the impugned letter. They have been subjected to examination by this Court on the previous occasion and this Court indicated its unequivocal impression that they were defamatory per se. Technically this impression does not finally conclude the question so far as the lower Court was concerned and technically the learned Magistrate was right in holding that the previous judgment of this Court was to meant to be binding upon the learned Magistrate, but as I will presently point out, what the learned Magistrate has lost sight of is that the judgment of the High Court does not only decide the question inter parts, it also expounds the law and so far as the exposition of law contained in the previous judgment of Naik, J., was concerned, that was binding upon the learned Magistrate. I will presently point out that the learned Magistrate has thus committed a two-fold error. The defamatory character of these statements has been whisked away by him by trying to locate some kind of justification for those defamatory statements in the previous correspondence between the parties; and secondly he cannot be said to have strictly followed the path of judicial discipline when he declined to follow the law expounded by this Court in its judgment in the previous criminal revision application.

27. The statements objected to are already culled out above. In paragraph 6 of the impugned letter it is suggested that the complainant practised coercion upon the members of the society with a view to get appointed the architects of the complainant's choice. It is further suggested that this was done with a view to get false certificates from the architects. But the accused does not stop there. He positively suggests that the complainant is a criminal and that he has had a life style of a criminal coupled with the stupidity not to break the same. In paragraph 9 of the impugned letter there is a positive statement made that the complainant practised duress upon the members of the society and made them sign certain agreement suitable for the evil methods resorted to by the complainant. Even more serious and positive allegation is made that on the strength of those signatures, the complainant had been black-mailing the office-bearers of the society.

In paragraph 10 of the impugned letter there is clearly perceptible innuendo that the complainant is a liar.

In paragraph 11, again, no room is left for any doubt what the accused suggests. The chinese proverb which is quoted indicates the clear suggestion that the complainant should be kicked by foot.

It is impossible to find any statements more defamatory than these. It is impossible to find any statement defamatory per se if the above ones are not defamatory per se. On the previous occasion, in these very proceedings, a learned Single Judge of this Court just perused the statements and felt scandalised and observed in so many words that they are defamatory per se. I find it impossible to see how any other view could be possible. The test for determining whether the statements are defamatory per se or not can be only one; the only test is to look at them and to introspect upon the immediate impression. There is no other test conceivable. If the statements are defamatory per se, they are defamatory per se. There is no further argument possible on that point.

28. The learned Magistrate was of the view that in the complaint the complainant had specifically referred to certain objectionable statements in the impugned letter but had not referred to the statement imputing liar's character to the complainant as a defamatory statement. The learned Magistrate, therefore, held that even if that statement was defamatory per se, still the complainant would not be entitled to make any grievance about the same during the trial.

I see no justification for this view as well. In the complaint grievance is made not only about the few statements which are specifically set out. The entire impugned letter itself is complained about as one being defamatory. In fact in para 15 of the complaint it is specifically stated as follows :

"The reading of the letter as a whole (which is correct rule of interpretation) will show that the following propositions are borne out".

Certain propositions of law relating to defamation and pertaining to impugned letter are thereafter set out. Reading the said paragraph as a whole, there is no room left for doubt that every objectionable statement in the letter is complained about. This is made further clear by the statements made in the above paragraph. This being the position, to my mind the learned Magistrate was in serious error in ignoring certain objectionable part of the complaint on the spacious and untenable ground that they were not specifically referred to in the complaint.

29. Once it is found that the statements are defamatory per se all that is required to be ascertained is as to whether the accused is entitled to justify the said statements by availing of the provisions contained in any of the exceptions to section 499. In the lower Court, Exceptions 7 to 10 were relied upon by the accused. It is, however, conceded before me that Exception 10 could not have any application, nor any attempt is made even to suggest remotely that any of the Exceptions Nos. 1 to 6 are available to the accused. As pointed out above only Exceptions 7 to 9 are relied upon by Mr. Shah for the accused. But I have pointed out above that Exceptions 7 and 8 do not apply at all and so far as Exception 9 is concerned, the basic requirement of good faith is so conspicuously absent in the instant case that the accused cannot avail of the said exception as

well.

30. I may make it clear that even these objectionable statements would have perhaps perfectly been immune from criminal liability u/s 499, if the accused had communicated these views even in the above language only to the complainant. As stated above, the gist of the offence is the publication. It is the publication of such defamatory letters that the law looks askance at. What did the accused achieve by publishing the defamatory letter ? This is the question that law asks. If the answer is that some recognised personal benefit is achieved by the accused, or if the publication is for the public good, the law takes to exception to the publication. In such a case truth is not the answer. Even the publication of a true statement of a person may be defamatory if it does not fall in Exception No. 1 and is neither in the interest of the person making it nor for the public good. An attempt was made to bring home to me the fact that the statements were true statements. I may unhesitatingly say that the truth is not established in this case at all. But assuming that the truth was established, truth is no defence to defamation except when the case falls in Exception No. 1 to section 499.

The law recognises that normally the world at large does not take pains to verify the truth or correctness of the allegations. Once damage to the reputation is done, it stands done. No amount of revelation of false character of the allegation repairs completely the damaged reputation.

Our law recognises that the image of his own in the eyes of others is one of the super most values that every person cherishes. The law gives no right to any other person to tarnish that image, unless such tarnishing operation is necessary for any other person in his own interest or in the interest of public good. This being the position, publishing of even truth may be, on occasions, defamatory. Contrary-wise publication of even that which is not strictly true may not amount to defamation in certain cases. The accused may make bona fide enquiry about certain acts committed by the complainant. He might have taken all possible care to verify the correctness of his own statement and he might pass on that information quite in good faith to some other person with a view to safeguard the interest of the public at large. It might turn out ultimately that his information was incorrect. This is a case where what he has published is not the truth; but still in such a case he has committed no offence. It will be thus seen that publication of truth may be offence in certain cases, whereas publication of that which is not strictly true may not be an offence. I am advisedly eschewing the word falsehood. The word "falsehood" suggests an incorrect statement made by the person knowing full well that it is incorrect. If such an incorrect statement is made with the knowledge of its incorrectness, then it can never be said to have been made in good faith. That is why I did not choose the word falsehood. I do not say that a false statement would ever be immune from the mischief of section 499. But an untrue statement would certainly be immune provided it is either made in self-interest or for public good. This is the scheme of the entire section 499 read with all its exceptions and explanations. To my mind the

accused falls in none of the exceptions and falls squarely in the operative portion of section 499. The offence on his part is, therefore, complete.

31. So far as the previous correspondence is concerned, to my mind it is totally irrelevant in the instant case for deciding whether the impugned letter is defamatory or not. In the instant case the previous letter dated 12-3-1973 is admittedly not defamatory; but what is more important is that it was never published. I repeat that if the impugned letter was not sent to the Architect but was sent strictly to the complainant only without giving an opportunity to anybody else to handle the same before it reached the complainant, probably no offence would have been committed. The accused may have some justification to tell the complainant personally as to what he thought about his *modus operandi* and about his collusion with the Architect. But he cannot trumpet it to the world at large. The quintessence of the offence of defamation lies in its publication without the justifications contemplated by exceptions to section 499.

32. The argument that Shri Thakkar was the usual Architect of the complainant and hence any publication made to him would not be conducive to any damage is to my mind misconceived and so is the fact that the letter contains allegations against Thakkar as well. In the first place it is the principle of the thing, not the actual fact whether the particular person who has received the defamatory letter had allowed the same to be processed further or not. The above argument is also susceptible to many answers. For example Shri Thakkar is not the proprietor of this firm. He has got a partner. The said partner is bound or is at least likely to gain knowledge about the defamatory statements contained in the impugned letter. There is nothing on record to show the nature of the relationship between Thakkar and his partner. Thakkar's partner may communicate the defamatory contents of the letter to others. Alternatively the said partner may himself form adverse opinion against the complainant and in the eyes of the said partner the image of the complainant may be tarnished. Moreover, Thakkar who has been getting work and giving work to the complainant may himself revise his opinion by virtue of the allegations made by such responsible person as the accused against the complainant. To my mind, therefore, the argument that the publication in the instant case is not conducive to damage is misplaced. The argument may have relevance so far as the sentence is concerned. The argument is irrelevant on the question of the liability.

33. In para 13 of his judgment, which is incidentally too long a paragraph, the learned Magistrate has located innocence even in the objectionable statements by resorting to strange logic. I have stated above that the innuendo of criminality of the accused is patently discernible in the letter. The learned Magistrate, however, has stated in paragraph 13 of his judgment as follows :

"It must be remembered that so far there is not even a smell in the writing of accused No. 1 that the acts which are imputed against the complainant are the offences or that he is a criminal in committing those offences."

Regarding the chinese proverb which is quoted, the justification that the learned Magistrate gives is that it is after all a simile. To my mind that logic is strange. There is scant justification for holding that the defamation becomes less so because it is made in an ornate language replete with similes and metaphors.

The learned Magistrate has further found that when allegation of coercion and duress are made against a contractor or builder, he should find nothing defamatory in the same. It was proved that the agreements were executed by the society with the accused upon the advice of the Solicitors. The learned Magistrate goes on to argue that many agreements executed with the help of Solicitors are ultimately found to have been executed under duress. To my mind this entire reasoning is extremely objectionable and it smacks of the intentness on the part of the learned Magistrate to exculpate the accused, come what may.

33-A. The learned Magistrate's view relating to application of Exception 9 is also unjustified. It was necessary for the learned Magistrate to apply his mind to the question as to what good faith the accused could claim. It may be that the accused was acting in his own interest as also in the interest of the society as a whole, but what is required by Exception 9 is not only the element of self interest but it has got to be coupled with good faith and nothing can be said to have been done in good faith unless it has been done with due care and attention. The learned Magistrate has observed that the accused must have bona fide believed these statements. In the first place there is no material on the record to justify this view. In the first place there is no material on the record to justify this view. In the second place, and this is more important no person is entitled to make defamatory statements against another person merely because he believes them to be true. Making statement in a rash manner without any purpose may itself reflect want of good faith. Recklessness is the antithesis of good faith. In the instant case statements are evidently made with a view to ventilate the accused's acrimony towards the complainant. Such a ventilation of acrimony rules out good faith. Ventilation of such acrimony is nothing but malice. The judgment of the Supreme Court in Chamanlal's case (*supra*) was relied upon by the learned Magistrate for arriving at the conclusion relating to existence of good faith. The said authority was rightly not relied upon by Mr. Shah. I have already quoted the relevant portion of the said judgment which shows that far from supporting the case of the accused it goes a long way to prove has criminal liability.

34. The last point raised by Mr. Shah is even less acceptable. His contention is that the question whether the accused was guided by good faith or not is a question of fact and sitting in an appeal against acquittal I should not interfere with the judgment of the learned Magistrate based upon such finding of fact. In the first place it is doubtful whether it should be said that the question of good faith is a pure question of fact; but assuming that it was a question of fact this is clear case where the learned Magistrate has given a patently erroneous finding relating to question of good faith. The power of the High Court in an appeal

acquittal is not so restricted that even patent findings of fact have got to be connived at by the Court. Mr. Shah relied upon two judgments of the Supreme Court. The first one is the judgment in Khem Karan and Others Vs. The State of U.P. and Another, and the other is the judgment in Muluwa and Others Vs. The State of Madhya Pradesh, I have carefully examined both the authorities and I find that neither of them has any application whatsoever to the facts in the present case. The judgment of the Supreme Court in Khem Karan's case makes it clear that the Appellate Court is untrammelled in its power to re-evaluate the evidence. The following observations of the Supreme Court make it clear that the judgment lays down the rule of law very much different from what Mr. Shah would like to have in the present case :

"Further neither more possibilities nor remote probabilities nor mere doubts which are not reasonable can without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony. If a trial Court's judgment verges on the perverse, the Appellate Court has a duty to set the evaluation right and pass a proper order."

35. Differing from the view taken by the lower Court, I am of the opinion that the accused is clearly guilty of the offence u/s 499 read with section 500 of the Indian Penal Code for having indulged in defaming the complainant as alleged by him in his complaint. There then remains question of sentence.

So far as this question of sentence is concerned, I am of the view that the accused is a respectable person. To my mind this is not a case calling for deterrent sentence at all. Sentence of fine of Rs. 100/- will, therefore, meet the ends of justice.

36. This appeal, is, therefore, allowed. The order of acquittal passed by the learned Magistrate in favour of original accused No. 1 is hereby set aside and accused No. 1 is convicted of the offence u/s 500 I.P.C. and is sentenced to pay a fine of Rs. 100/- or in default to undergo simple imprisonment for 15 days.

Time is given to the accused till 20th June, 1981 to pay the fine.