
(1977) 02 MP CK 0006

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 647 of 1970

Prayagdutt Haripal Prasad Tiwari and another

APPELLANT

Vs

Gajadhar Prasad Mahabir Prasad Tiwari

RESPONDENT

Date of Decision : 19-02-1977

Acts Referred:

Penal Code, 1860 (IPC) — Section 493, 496, 499, 500
Succession Act, 1925 — Section 306

Citation : (1978) ILR (MP) 686 : (1977) JLJ 362

Hon'ble Judges : N.C. Dwivedi, J;C.P. Sen, J

Bench : Division Bench

Advocate : R.K. Pandey, for the Appellant; R.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

C.P. Sen, J.—The appeal is against the acquittal of the respondent for the offence u/s 500, Indian Penal Code, by the Sessions Judge in appeal. The trial Magistrate had convicted the respondent for the aforesaid offence and sentenced him to pay fine of Rs. 500 and to further pay Rs. 200 as expenses to the complainant u/s 546-A of the Code of Criminal Procedure (Old).

2. It is not in dispute that the deceased complainant Prayagdutt Tiwari was a respectable citizen of Balaghat and he had a long standing in the public life. He was a member of Balaghat Municipal Committee for about 15 years, Secretary of Ram Mandir Trust Committee for about 28 years and was a printer and publisher of the weekly paper "Jan Pukar" published from Balaghat. The present complaint was filed by the complainant on the allegation that the respondent published one letter Ex. P. 1 in the Balaghat Times on 27-9-1967 under his signature under the heading "Lokwani". The letter refers to the complainant and the name of the complainant is mentioned in the very first line of the letter. According to the complainant, the imputations made in the aforesaid letter published in the Balaghat Times on 27-9-1967 are defamatory per se as they cast aspersions against the integrity of the complainant and purport to disfigure his image by

depicting him as a dishonest person, hypocrite of the first degree and of having constructed his house by misappropriating the funds of the Trust. The publication was maliciously made and was done with the intention to cause injury to the reputation of the complainant. The respondent in his statement submitted that the imputations were neither false, nor unjustified nor intended to harm the reputation of the complainant nor they were mala fide. According to him, this letter was published in reply to the editorial in Jan Pukar dated 21-9-1967 under the heading "Mr. Poison (Vishdbar Ji)". According to the respondent, there was long standing dispute between the complainant and himself over property because the complainant has been disowning the respondent as his adopted son. After assessing the evidence, the trial Magistrate held that the imputations were defamatory per se, they were not made after due care and caution and were not based on truth. He, therefore, held the respondent guilty u/s 500, Indian Penal Code and sentenced him to pay fine of Rs. 500 or in default to undergo simple imprisonment for six months, and to further pay Rs. 200 as compensation to the complainant u/s 546-A of Criminal Procedure Code. In appeal, the learned Sessions Judge came to the conclusion that the imputations made by the respondent in Ex. P. 1 were protected under exception 9 to section 499, Indian Penal Code. The letter in question creates an impression that the complainant is not so innocent and honest in his private as well as in his public life as he appears to be and he is a man of dual personality. The allegations though made in a sefcastic manner appear to be justified in view of the admission of the complainant that though he was having income of Rs, 10 to 12, thousand per annum, he was not paying income tax and that once he was found guilty for corrupt practice and was disqualified from being a member of the Janpad Sabha as he had done certain printing work for the Janpad Sabha while being a member of the Sabha.

3. The only question that has to be considered is whether the respondent is protected under exception 9 to section 499 of the Indian Penal Code.

4. Before going into the merits of the case, it is first of all necessary to consider the preliminary objection raised by the respondent that the present appeal cannot be entertained because the complainant died before obtaining the special leave from this Court, the special leave could only be granted to the complainant and this appeal could have only been filed by him, u/s 417 (3), Criminal Procedure Code. It is true that the complainant died during pendency of this SLP in this Court against the impugned judgment of the Sessions Judge and while granting special leave this Court kept the question open as to whether the appeal could be pursued by the complainant's son who is appellant No. 2 here in this appeal. Section 417 of Criminal Procedure Code (old) empowered a complainant to apply for special leave for filing appeal in a case instituted on his complaint. Section 198 of the Code provided that prosecution for defamation can only be taken cognisance of an complaint made by the aggrieved person. Admittedly, in the present case, the complaint was lodged by complainant Prayagdutt Tiwari who was the aggrieved person and against whom the imputations were made in

Ex. P. 1. The offence u/s 500 is triable as a warrant case and after recording evidence charge was framed and thereafter further opportunity was given to the respondent for cross-examination of the complainant's witnesses. The trial Magistrate found the respondent guilty for the offence u/s 500, Indian Penal Code. Section 259 of the Code provided that in the absence of the complainant, in a case which can be lawfully compounded or which was not a cognisable offence, the Magistrate may, in his discretion, before the charge has been framed, discharge the accused. It is evident that after the framing of the charge no such discharge order can be passed. Section 495 of the Code provided that after the cognisance is taken any Magistrate trying any case may permit the prosecution to be continued by any other person. It is settled law that the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) does not apply to criminal prosecution. It is equally settled that section 306 of the Indian Succession Act has no application to criminal prosecutions. Hence the death of complainant does not ipso facto terminate a criminal prosecution. Under the Indian law a crime is an offence not against individuals but against the society or the public as such. Once a complaint has been properly instituted and proceeded with, the Courts must punish the offender if the case is proved against him, the death of the complainant has no effect on the proceedings though in some cases the wrong is done strictly to the person of the complainant or where the complaint can be lodged only by specific class of persons.

5. The consensus of judicial opinion of different High Courts seem to be that the death of the complainant does not cause abatement of criminal proceedings [Muhammad Thahir v. Shaik Dawood A I R 1921 Mad. 278, Hasara Singh v. Emperor A I R 1922 Lah. 227, Muse v. Emperor A I R 1924 All. 666, Mahomed Azam Vs. Emperor, , U Mo Gaung v. U. Po Sin A I R 1924 All. 666, Anand Rao v. Badi A I R 1932 Nag. 72, Ali Dar v. Mohd. Sharif A I R 1966 J. and K. 60, Subbamma v. Kannappachari⁸ and Abdul Hakim v. State⁹]. This Court in Nathu Jeorakhan Vs. Sheopal Kuppa and Others, , has held that once the proceedings have been allowed to be instituted by the Court, the condition of the real aggrieved person being alive till the decision of the trial has not been imposed for continuing the trial. The Supreme Court in Ashwin Nanubhai Vyas Vs. State of Maharashtra and Another, has held: --

Death of aggrieved person after filing of complaint--What happens on death of complainant in a case started on complaint has to be inferred generally from provisions of Code--There is no provision in Criminal Procedure Code or Chapter 18 thereof about acquittal or discharge of accused on failure of complainant to attend, which is deliberate departure from Chapters on trials of summons and warrant cases, suggesting that Magistrate should proceed with committal enquiry although complainant is absent--Bar of section 198 is removed when aggrieved person files complaint and his presence throughout trial is not necessary -- Though Court cannot substitute a new complainant, it has power u/s 495 to authorise conduct of prosecution by any person--Held, committal enquiry of

accused, who was charged under sections 493 and 496 of Indian Penal Code did not abate on account of complainant's death after filing of complaint and that mother of complainant could be allowed to conduct the prosecution.

The Supreme Court in another case while considering the effect of the death of complainant during pendency of appeal against acquittal has held as under in *Khedu Mohton and Others Vs. State of Bihar*, :--

An appeal u/s 417 can only abate on the death of the accused and not otherwise. Once an appeal against acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact that the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other.

Therefore, in the present case the death of the complainant after filing of SLP did not result in abatement of the appeal. His son, the appellant No. 2, has been substituted and he can validly prosecute the appeal after having obtained the special leave. He having been substituted in place of the original complainant, he is deemed to be the complainant for the purpose of section 417 (3) and, as such, was entitled to file and prosecute this appeal. Even otherwise also, he is as much aggrieved as his father by the imputation made in Ex. P. 1 because by those imputations the reputation of the family is at stake.

6. u/s 499, Indian Penal Code, whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person. Under explanation 1, it amounts to defamation if the imputation would harm the reputation of a dead person and is intended to hurt the feelings of his family. Under explanation 3, an imputation in the form of an alternative or expressed ironically, may amount to defamation. Under 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 interest of the person making it, or of any other person, or for the public good. Therefore, under the ninth exception a person is protected if the imputation is made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good. The Supreme Court in *Kanwal Lal Vs. State of Punjab*, has held that besides the bona fides of the person making the imputation, the person to whom the imputation is conveyed must have a common interest with the person making it which is served by the communication. The Supreme Court in *Chaman Lal Vs. The State of Punjab*, has held that in order to establish good faith and bona fide it has to be seen where there are reasons to accept the version that the accused acted with care and caution and finally whether there is preponderance of probability that the accused acted in good faith. The Supreme Court in *Sukra Mahto Vs. Basdeo Kumar Mahto and Another*, has held that in order to claim good faith in prosecution for defamation accused must show that

before making alleged imputation he had made enquiry with due care and attention and that he was satisfied about the truth of that imputation. Emphasis is on enquiry, care and objective satisfaction. Though in *M, Singh v. State of Punjab* A I R 1970 S C 1372, the Supreme Court has held that the degree of proof that has to be offered by the accused is not the same which the prosecution has to discharge to prove the case beyond reasonable doubt.

7. First of all it is necessary to consider the imputations made in the letter of the respondent Ex. P. 1, which was published in the *Balaghat Times* on 27-9-1967. The respondent mentioned that he had the opportunity to go through the article of his father Prayagdutt Tiwari under caption "Vishadharji" in his weekly paper *Jan Pukar* dated 21-9-1967. The respondent was amused and intrigued to read that the complainant was struggling all his life against dishonesty and treachery. The respondent recollected that it is just like a green grocer quarrelling in the market place or a eumuch is preaching over celibacy. The respondent knows his father through and through and he was the hyppocrite number 1 and he was taking protection under religion. There was great conspiracy lying behind the simultaneous constructions of Ram Mandir along with the construction of the house of the complainant. A jackal cannot be a lion by simply putting on the skin of a lion. The house of cards built by the complainant would be destroyed in no time and the complainant would be exposed at every square of public road. It is the sincere advice of the respondent that during the last days of his life the complainant should seriously take to religion and forget about the worldly affairs. The imputations are unmistakably regarding the complainant and this fact has also not been denied by the respondent. By his publication the respondent wanted to show that the complainant was a dishonest person and he had constructed his house by misappropriating the funds and materials of the public Trust. No evidence has been led by the respondent to show that he made such imputation after satisfying himself about the truth of this fact after due enquiry.

8. The complainant has duly proved that Ram Mandir buildings were constructed in 1953, while the complainant's house was constructed in 1967. According to the complainant, the Ram Mandir Trust is a Public Trust and its accounts are duly audited annually and placed before the trustees for approval. These accounts are duly checked by the Registrar of Public Trusts. Nothing has been brought out during the cross-examination of the complainant to show that the complainant had, in any way, defalcated the funds of the Trust. The statement of the complainant has been corroborated by Shri Waiker, Advocate (P. W. 4) and, according to him, the accounts of the Trust are duly audited every year and approved by the trustees, he never found any irregularity in the accounts maintained by the complainant. Therefore, this imputation of misappropriation was not made in good faith by the respondent and it has also not been proved as has been held by the learned trial Magistrate. The respondent could have been protected under exception 9 to section 499, if he was able to show that before making the imputation he had made enquiry with due care and attention and that he was satisfied about the truth of that imputation. Unless this was proved,

the respondent was not entitled to protection under this exception. The learned Sessions Judge was in error in giving benefit of this exception to the respondent simply because he inferred that the appellant has not been paying income tax though he was liable to pay the same as his income was between ten to twelve thousand per annum. No question was asked to the complainant regarding the source of his income. If the income was from agriculture, the same was not taxable under the Income Tax Act and question of paying income tax did not arise. This question was not at all in issue in the case and whether the complainant was liable to pay income tax has not been elicited in his cross-examination. Similarly, because the complainant was unseated for corrupt practice from being a Member of Janpad Sabha would not go to show that he was a dishonest person. The complainant had done certain printing work on behalf of Janpad Sabha while he was a Member and, therefore, he was unseated. This was a technical offence which does not go to show that the complainant was a dishonest person.

Lastly, the Sessions Judge held that the complainant dishonestly denied the fact that the respondent was his adopted son and that there has been some tampering in the letter Ex. D. 2 written by the complainant to his brother. This question was also not in issue in the case and whether the respondent was the adopted son or not can be adjudicated by the civil Court. This letter Ex. D. 2 has not been produced from the custody of the complainant and it cannot be said that he had tampered with the letter. Suffice it to say that the respondent himself has been representing to be the son of one Mahavir Prasad Tiwari and not of the complainant as is evident from the certified copies of the complaint Exs. P. 3 and P. 4. The Sessions Judge has also jumped to a conclusion that the complainant was a dishonest person because he was also attending to his press business from the office of the Trust. There is no evidence that the press of the complainant is located in the office of the Trust. On the other hand, the complainant, has deposed that he has taken another adjacent block on rent. Simply because the complainant was attending to his press business while sitting in the Trust office, does not mean that he was, in any way, misusing the property of the Trust. While devoting his time for the affairs of the Trust, the complainant was not expected to neglect his business. Clearly, the conclusions reached by the Sessions Judge are palpably wrong and are based on erroneous view of law [*Khedu Mohton v. State of Bihar* (supra)]. The Sessions Judge erred in holding that the imputations in Ex. P. 1 are not defamatory per se and are by way of sarcasm. A bare reading of Ex. P. 1 shows that the imputations have been made with the intention to defame the complainant and malice is proved because of the strained relations between the complainant and the respondent. The complainant has deposed that he has been defamed by these imputations and his statement has been corroborated by Shri Waikar Advocate (P. W. 4). The self serving statement of the respondent that the imputations are not defamatory, nor maliciously made carries no weight. His 2 defence witnesses Shambhu Nema (D. W. 1) and Radhakishan Tiwari (D. W. 3) have given evasive replies and admitted that they

have not carefully read the letter Ex. P. 1. Therefore, their assertion that on casual reading of Ex. P. 1 they did not find anything objectionable or defamatory in the letter, are obviously made to oblige the respondent. Nema, however, has admitted that the imputations in Ex. P. 1 are foolish. Under the circumstances, the learned trial Magistrate was justified in coming to the conclusion that the imputations made in Ex. P. 1 are perse defamatory and maliciously made with the intention to defame the complainant and he has, in fact, been defamed.

9. Accordingly, the appeal is allowed, the order of acquittal of the Sessions Judge is set aside and the order of the trial Magistrate convicting the respondent u/s 500 of the Indian Penal Code is affirmed. However, looking to the fact that the prosecution is going on since 1967 and the complainant is no longer alive, we reduce the sentence of fine from Rs. 500 to Re. 1 only but the order regarding payment of compensation of Rs. 200 u/s 546-A of the Code of Criminal Procedure is confirmed.