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Court : Mumbai Aurangabad

Decided On : Mar-07-2016

Judge : N.W. Sambre

Appeal No. : Criminal Application No. 4609 of 2015

Appellant : Bhagirath

Respondent : Vithal and Others

Judgement :

Oral Order:

1. The present application is under section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India. In alternate, it is prayed that the present application be treated as an appeal against acquittal, in view of the provisions of section 378 (4) of the Code of Criminal Procedure.

2. Facts, as are necessary for decision of present matter, are as under:-

The present applicant Bhagirath claims to have filed Regular Civil Suit No.46 of 2011 for permanent injunction against respondents, in relation to certain agricultural land, which is pending on the file of Civil Judge Junior Division, Shrirampur. In the suit, respondents herein filed their written statement at Exh.28 and in paragraph 38 of the same, it is claimed that since 2008 wife of the plaintiff-applicant herein, namely, Suvarna, is a director of Janseva Rural Non-Agricultural

Credit Cooperative society, Belapur (for short society). It is further claimed in the written statement that the said society had indulged into mismanagement.

3. Based on the above referred statement made in paragraph 38 of the written statement, criminal complaint case bearing S.T.C. No.307 of 2011 for prosecuting the respondents for offences punishable under sections 500, 501 read with section 34 of the Indian Penal Code came to be initiated by Suryakant, the real brother of plaintiff Bhagirath, alleging that he being a member of the said society, the defendants have committed an offence by attributing allegations, which, prima facie are defamatory in nature.

4. The complaint came to be registered on 21st June, 2011 as summons trial case.

5. The learned Magistrate, having noticed that there is sufficient ground for proceeding against respondents-accused, issued process on 15th September, 2011.

6. On 11th February, 2015, complainant Suryakant expired, which has prompted the present applicant to move an application Exh.66 claiming to be a person defamed and sought his substitution in place the complainant. The said application came to be objected by the respondents, stating that the rule of succession is not applicable to the proceedings in question and the applicant as a legal representative will not be entitled, as of right, to succeed the complainant. It is also claimed that the allegations of defamation cannot be linked to the applicant and as such, sought dismissal of application Exh.66.

7. Learned Judicial Magistrate First Class, Shrirampur, by an order dated 22nd July, 2015, rejected the application at Exhibit 66 by refusing the prayer of the applicant to substitute the deceased original complainant and further ordered abatement of the complaint, on the ground that the case relates to offences punishable under sections 493 and 496 of the Indian Penal Code. According to the learned Magistrate, in view of law laid down by this Court in the matter of **Balasaheb Keshav Thackeray vs. State of Mah.** and anr., reported in **2003 (1) Mh.L.J. 775**, the applicant cannot claim to be person aggrieved and as such, has

no locus to continue the complaint. It is further observed by the learned Magistrate that defamatory contents were in respect of the director of the society and not against the individual. It is further observed that the legal heir of the complainant has not come forward to pursue the complaint further. As such, present appeal.

8. Mr Tambe, learned Counsel appearing on behalf of the applicant, while trying to make out a case for allowing application Exh.66 for substitution or leave to continue the complaint, would urge that the applicant is also one of the share holders and as such, member of the society against whom and against whose directors the defamatory statement was made. He would submit that the provisions of section 256 of the Code of Criminal Procedure bestow a right in favour of the applicant to continue with the complaint for prosecuting the respondents for offences under the provisions of the Indian Penal Code, as mentioned therein. He would then urge that the law on the issue as regards steps to be taken upon death of complainant is very much spelt out in the judgment of **Ashwin Nanubhai Vyas vs. The State of Mah. and anr.**, reported in **AIR 1967 SC 983 (1)**. According to him, the Code of Criminal Procedure provides for the remedies in case of death of an accused or an appellant, but does not expressly provide for in case of death of a complainant. He then submits that it also does not provide for abatement of inquiries and trials though abatement of appeal is provided in case of death of the accused, pursuant to the provisions of sections 411 (a) (2) and 417 of the Code of Criminal Procedure. He would then submit that in absence of any express provision in the Code of Criminal Procedure, the prosecution needs to be continued at the behest of the present applicant because the action does not come to an end with the death of the complainant. He has also placed reliance upon the judgment of the Apex Court, in the matter of **John Thomas vs. K.k Jagadeesan**, reported in **2001 AIR (SC) 2651**, so as to canvass that phraseology by some person aggrieved as referred to in sub-section (1) of section 199 of the Code of Criminal Procedure includes the present applicant being plaintiff to the original suit and one of the members of the society. According to him, the applicant is entitled to continue the prosecution. In addition, he has also placed reliance upon the judgment of Allahabad High Court in the matter of **Abdul Hakim and anr. vs. State**, reported in **1973 Cri.L.J. 492**, so as to canvass that the words person aggrieved used in section 199 of the Code of Criminal

Procedure cannot be illusory.

9. Per contra, Mr Jagtap, learned Counsel holding for Mr V.D. Sapkal, learned Counsel appearing on behalf of respondents no.1, 2, 4 to 8, would urge that the learned Magistrate has rightly rejected the application pursuant to the provisions of section 256 of the Code of Criminal Procedure. He would then submit that if the law laid down by this Court in the matter of Balasaheb Keshav Thackeray (supra) is taken into account, the present applicant has no locus whatsoever to continue with the complaint, particularly in the background of the basis on which the summons trial case came to be initiated. According to him, just because the applicant is a member of the society, that does not by itself give him a right to prosecute the complaint further, after the death of original complainant. Learned Counsel has placed reliance upon certain observations of this Court in the said judgment, so as to point out that the prosecution of the complaint at the behest of the applicant is not tenable as he cannot be said to be coming within the ambit and meaning of the words some person aggrieved as referred to in sub-section (1) of section 199 of the Code of Criminal Procedure.

10. According to him, the present proceedings, as such, are liable to be dismissed.

11. With the assistance of learned counsel on either side, I have perused the entire record. The relevant provisions, which are required to be reproduced here below, are sections 199 (1) and 256 of the Code of Criminal Procedure. Section 199 (1) reads thus :-

199. Prosecution for defamation -

(1) No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code (45 of 1860), except upon a complaint made by some person aggrieved by the offence:

Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court,

make a complaint on his or her behalf.

Section 256 of the Code of Criminal Procedure reads thus:-

256. Non- appearance or death of complainant -

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub- section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

12. Plain reading of the alleged defamatory pleading depicts that, same are alleged (defamatory) attributions against the society. The summons trial case for prosecuting the respondents for an offence of defamation was initiated on a basis of complaint of original complainant Suryakant being a member of the said society, as according to him the members are integral part of the society and as such, according to the complainant, members were also defamed. It is also required to be noted that the learned Magistrate has taken cognizance of the same and has issued process. Suryakant admittedly has expired on 11th February, 2015, which has prompted the present applicant to file an application Exh.66, stating therein that he could be a person covered within the meaning of some person aggrieved as referred to in sub-section (1) of section 199 of the Code of Criminal Procedure and sought his substitution to original complainant. The learned Magistrate found the applicant to be not a person who could be said to be a person competent under sub-section (1) of section 199, so as to fall in the category of some person

aggrieved , merely on the basis of being a member and not a director of the society.

13. In the above referred background, if the submissions as were made are analyzed in right perspective, it is required to be noted that the prosecution for defamation could be brought into action through a complaint as is provided under sub-section (1) of section 199 of Chapter XIV of the Code of Criminal Procedure. Sub-section (1) as reproduced herein above, speaks of initiation of such prosecution upon presentation of a complaint by some person aggrieved by the offence.

14. The applicant claims to be the brother of the deceased complainant Suryakant. The applicant is also a member of the said society since 10th January, 2002, as appears from the share certificates held by him. He had not initiated the complaint for offences punishable under sections 499 and 500 of the Indian Penal Code as were invoked by Suryakant at the relevant time. Although the applicant is real brother of Suryakant, yet he is not claiming to have any right to continue the prosecution based on his relation with Suryakant, but on the basis of his status as a member of the society against which the alleged defamatory statements are claimed to have been made. In my opinion, the applicant cannot have any right to seek continuation of the proceedings initiated by deceased Suryakant, particularly when he (applicant) cannot be covered within the meaning of words some person aggrieved , as provided in sub-section (1) of section 199 of the Code of Criminal Procedure. The reason for the above referred conclusion is that the applicant himself claims to be merely a member and not the director or any office bearer of the society. Some person aggrieved , at the most, could be a director or a person specifically authorized by the society to initiate proceedings for defamation, which is not a case of the present applicant. I am fortified in my view by law laid down by this Court in the matter of Balasaheb Keshav Thackeray (supra).

In my opinion, it will be appropriate to refer to paragraph 12 of the said judgment, which reads thus :-

12. As pointed above, the alleged defamatory statements do not relate to the Congress Party or Congressmen as a class but they relate to two leaders of the

said Party. According to respondent No. 2 the defamation of the said leaders is the defamation of all the Congressmen and that he being one of the Congressmen, is entitled to file the complaint. Assuming for a moment that the alleged Statements attributed to the petitioner are defamatory of the Congressmen as a class, still in view of the following decisions, it cannot be said that the complainant is entitled to file the complaint. In *M.P. Narayana Pillai v. M. P. Chacko*, 1986 Cri.L.J. 2002 the facts were that; an article consisting some derogatory statements pertaining to the Syrian Christian community as a whole was published. The statements were to the effect that the Syrain Christian girls working abroad are engaged in prostitution for livelihood. That Syrain Christian ladies are being sent to nunneries on account of the financial incapacity of their parents to give them away in marriage, and that Mother Theresa who is considered to be a living Saint of Christian community is doing missionary work for publicity alone. It was held that under Section 499 explanation II imputations against an association or collection of persons can be defamatory only if such persons are definite and determinable body. Only if there is a definite association or collection of persons capable of being identified it could be said that the imputation against it affects all of them and any member of the class can say that the imputation is against him also personally so as to entitle him to file a complaint for defamation. It was held that the Syrain Christian Community is an unascertainable body of persons, and therefore, no member of that body could say that he was individually defamed on account of the imputations. In the said case reference is made to the decision in *Krishnaswami v. C. H. Kanaran*, 1971 Ker LT 145 wherein it was held that the Marxist Community Party as a collection of persons as such was an unascertainable body. Similarly in *Rai Kapoor v. Narendra Desai*, (1974) 15 Guj LR 125 there were imputation made against the Bhangl community in general. It was held that the imputation would not amount to defamation because they were not directed against the particular group or members of that community which could be identified. It was observed;

"There was no imputation against the complainant as an individual. If he felt that as a member of the Bhangi community, he was defamed, that would not entitle him to maintain a prosecution for defamation unless the imputation was against him personally".

The alleged imputations in the present case, which are claimed to be defamatory, are against the society and its directors and not members. The applicant is neither a director nor a person holding any authority on behalf of the society to continue the prosecution through the complaint filed by Suryakant, who as well was not a director but merely a member. 15. Apart from above, it is required to be taken note of, in a criminal proceedings prosecution could be continued only if, it is noticed that the allegations made in the complaint, if taken to be true, establishes prima facie case for commission of offences in question and in the interest of justice permission to continue prosecution is required. In the present case, the fact remains that even if the contents of the criminal complaint are taken to be true at its face value, still I have already held that the applicant does not fall within the ambit and meaning of some person aggrieved, having regard to the fact that though at the inception of the complaint he was a member but was not a complainant. He was never a director of the society. He cannot be considered to be person who directly or indirectly was defamed as imputations were never directed against him. Apart therefrom, it is in the interest of justice also, the case at the behest of the present applicant does not warrant continuation, particularly in the light of what has been observed herein above.

16. The applicant though has relied upon the judgment in the matter of Abdul Hakim (supra), it is required to be noted that in the said matter the offence was under section 500 of the Indian Penal Code and it was the son of the original complainant who had sought continuation of the proceedings after the death of his father, who was original complainant and had claimed to have been defamed. Such does not appear to be the case in hand. As such, reliance upon the judgment in the matter of Abdul Hakim (supra) is wholly misplaced.

17. Though learned counsel for applicant has relied on the case of Ashwin (supra), which deals with the procedure to be adopted in case of death of complainant, it is required to be noted that in the said case offences were under sections 417, 493 and 496 of the Indian Penal Code. In the said matter, it was a case of the complainant Kusum that the accused went through a sham marriage with her before a person who posed himself as an officer from the office of the Registrar for Marriages and abandoned her and married another woman. In the said matter, the

complainant died of heart attack and it is the mother of the complainant, who had sought substitution as a fit and proper person to pursue the complaint. The Magistrate in that case allowed the substitution which was upheld by the High Court. The Apex Court, while dealing with the right of such person has held that there is no express bar under the provisions of the Code of Criminal Procedure to grant substitution, however, what is required to be established is whether such person is covered within the meaning of some person aggrieved . Similar appears to be the approach of the Apex Court in the matter of John Thomas (supra), wherein an institution was claimed to have been defamed and the Court noticed that at the behest of the institution the proceedings could be brought by a person who need not be a person defamed. In my opinion, on facts, both the judgments are not applicable to the instant case, particularly when the applicant cannot be said to be falling within the meaning of some person aggrieved as provided under sub-section (1) of section 199 of the Code of Criminal Procedure.

18. In that view of the matter, in my opinion, the view expressed by the learned Magistrate is a proper view, being based on the right and locus of the present applicant. The order impugned, therefore, does not warrant any interference. Thus, Criminal Application fails and stands dismissed.

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