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Mamta Kulkarni Vs. Additional Chief Metropolitan Magistrate and ors.

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Court : Mumbai

Decided On : Nov-17-2003

Reported in : 2004(2)MhLj179

Judge : J.G. Chitre, J.

Acts : Indian Penal Code (IPC) - Sections 292, 397, 401 and 482; Code of Criminal Procedure (CrPC) , 1974 - Sections 200 and 204; Constitution of India - Article 226

Appeal No. : Cri. Appln. No. 461 of 1997

Appellant : Mamta Kulkarni

Respondent : Additional Chief Metropolitan Magistrate and ors.

Advocate for Def. : Saste, A.P.P. For respondent Nos. 1 and 2

Advocate for Pet/Ap. : S.N. Vimadalal, Adv.

Disposition : Petition allowed

Judgement :

J.G. Chitra, J.

1. Heard Shri Vimadalal for the petitioner (original accused) in prosecution pending before Additional Chief Metropolitan Magistrate, 9th Court Mumbai, bearing CC

No. 49/S of 1995 and Shri Saste for respondent Nos. 1 and 2 representing the prosecution.

2. The petitioner is assailing the correctness, propriety and legality of the order passed by said Court by which it took cognizance of a complaint presented by respondent No. 3 Shri Shyamrao Shioram Kumble (original complainant) and issued the summons directing the present petitioner to appear before that Court for facing the prosecution for an offence punishable under Section 292 of Indian Penal Code, after taking cognizance of the said complaint so presented before it.

3. The allegations made in the said complaint by Shyamrao Shioram Kumble can be enumerated as mentioned hereunder.

4. He averred that on 22-2-1995, when he was near National College at Bandra, Mumbai, he saw one boy selling newspapers and film magazine styled 'Star Dust'. He further averred that the said magazine was published by a magazine publishing company named Magna Publishing Company Ltd., and it was so being sold on the road and many college students including girls and boys were purchasing the said magazine 'Star Dust' and were commenting sexy remarks towards other girls and women. He purchased the said magazine issue pertaining to the month of March 1995 and when he saw the frontal page of the said magazine, he was shocked by seeing the said page. According to him, the said page was exhibiting photograph of petitioner with half brassiere and bust-half open, which was creating lascivious appeal to the complainant and other persons who were seeing and purchasing the said magazine. The petitioner, as alleged by Shri Shyamrao Shioram Kumble, had kept her abdomen open and was wearing short and was putting her both thumbs inside the short below the abdomen and was stretching her sacrum below her abdomen and was showing relevant portion of the body below abdomen.

5. By seeing the said picture, the complainant Shri Shyamrao Shioram Kumble felt that the petitioner was creating the impression that she was going to tear or remove her short. He felt that the said picture was obscene and was lascivious and was appealing prurient interest in the complainant and other persons. He averred further in the said complaint that the said photographs created lascivious

interest in his mind in respect of the petitioner. He averred in the said complaint that there was a sentence printed on the said page which was 'sizzling lust for Mamta'. According to him, this sentence created bad and corrupt effect on him.

6. According to him, the said photograph created lascivious effect on his mind and others also who had seen that photograph. It is his allegation in the said complaint that the petitioner was trying to get more and more publicity by publishing her obscene photos in the said magazine for gaining name and publicity by corrupting the minds of people who read or saw such photographs. Star Dust was being circulated throughout India and, therefore, by seeing such photographs, large number of people must have been so affected in their minds.

7. He alleged that the petitioner, original accused, was giving such photographs for publication to magazine Star Dust and was exhibiting her photographs for the purpose of getting name, publicity and money and by giving such photographs for publication to Star Dust, the petitioner, according to Shri Shyamrao Shioram Kumble, committed the offence punishable under Section 292 of Indian Penal Code.

8. After getting such impression in his mind, he went to Bandra Police Station on 22-2-1995 for lodging a complaint but as police directed him to present the complaint privately in the Court of Metropolitan Magistrate, he presented the complaint in question.

9. At the time of hearing of the petition on admission, this court directed that notice be issued to respondent No. 3 for giving him opportunity of being heard. The concerned department made number of attempts to serve the said notice on respondent No. 3, but, it went in vain. Thereafter, in the interest of justice, this Court directed the Advocate of the petitioner to serve the notice of hearing of this petition on the lawyer of respondent No. 3, which the lawyer of the petitioner did. All these facts reveal that the address which was given by respondent No. 3 in the complaint was not correct address. The said building was not in existence and his whereabouts were not traceable. Thus, the Court thought it proper to hear the petition without waiting for respondent No. 3, as notice on him was dispensed with by previous orders of this Court.

10. Even after this petition was taken on board for final hearing, neither the respondent No. 3 nor his advocate appeared before this Court. This petition pertains to the year 1997. The petitioner has taken exception to the act of taking cognizance by the concerned Court and issuing the summons of hearing for appearing in the said Court. Section 403 of the Code of Criminal Procedure 1973 (hereinafter referred to as 'Code') provides that save as otherwise expressly provided by this Code no party has any right to be heard either personally or by pleader before any Court exercising its power of revision; but the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader. In the present case, every possible attempt has been made for procuring the presence of either petitioner or his lawyer for affording the opportunity of being heard but in spite of that neither of them appeared before this Court for the hearing. The address of respondent No. 3 is not traceable and he is also not traceable. Shri Vimadalal has made a grievance that respondent No. 3 has filed this complaint for troubling the petitioner unnecessarily. In this context, his incorrect address given in the complaint and his whereabouts are not being traced speak effectively and eloquently against him. The cause of prosecution is being protected by State of Maharashtra being the prosecuting agency and Shri Saste has appeared only for prosecution so far as the present case is concerned. Therefore, this Court does not find any necessity of keeping this petition pending for hearing for uncertain time in the circumstances mentioned above. This Court does not find any necessity of the presence of respondent No. 3 or his lawyer for deciding this petition or enforcing the administration of justice in right spirit. Therefore, this Court does not find his presence necessary in the interest of justice and for hearing and decision of this petition, in the interest of justice.

11. Shri Vimadalal, counsel appearing for the petitioner, pointed out towards annexures in the nature of photographs from newspapers, magazines. They are photographs of women photographing them for advertisement. They are from newspapers (1) 'Bombay Times'; (2) 'Mid Day'. (3) 'Femina'. By pointing out these photographs, Shri Vimadalal submitted that the photograph in question is very much sober in comparison to those photographs. Shri Saste submitted that comparison with the photograph would not save the petitioner from the prosecution because all those photographs are similar in nature but different in

shades and grades.

12. Shri Vimadalal submitted that when the petitioner has averred about purchase of the said magazine, the education level in society was upto good considerable height and the persons who were to read said magazine were almost coming from highly educated strata of the society and being it so, they were not likely to be carried away by such lascivious impression and feelings. He pointed out that the students both gents and ladies, the members of society both gents and ladies were not likely to be impressed by seeing that photograph because they had by their education acquired the control over their minds. He submitted further that the allegations made by Shyamrao Shivram Kumble are vexatious and mischievous because if at all he was to see that photograph, being a social worker, he was able to control his mind and was not likely to be so mislead or damaged in his feelings. Shri Vimadalal submitted that the learned Magistrate should have kept all these things in view before deciding to take the cognizance of the complaint and had he been careful in it, he would not have been able to conclude that this was a fit case in which the cognizance was to be taken and the process was to be issued.

13. Shri Vimadalal submitted that even prima facie reading of the complaint, viewing of the said photograph does not allow anybody to come to the conclusion that prima facie case of commission of an offence punishable under Section 292 of Indian Penal Code has been made out. He submitted that it being so, the actress like petitioner who is always busy, should not have beensummoned to face the said prosecution. At this juncture, he pointed out thatthough the Complainant Shyamrao Kumble was knowing the name of thepublisher, for mischievous intention, for oblique motive, he did not decide toimplead the publisher and photographer as co-accused. Dropping them from thearray of the accused, is itself speaking about the oblique motive of thecomplainant in filing of this complaint. He urged that said point be alsoconsidered while deciding this petition.

14. Shri Saste submitted that the learned Magistrate has rightly taken a decision to issue the process by seeing the said photograph and contemplating the impact which it would create in the minds of members of public at large. He prayed for dismissal of this petition.

15. Shri Vimadalal placed reliance on some judgments, namely, (1) Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra and Ors., reported in : 1970 CriLJ1273 , (2) O.P. Lamba and Ors., v. Tarun Mehta and Ors., reported in , (3) Himmat Singh and Ors. v. Bhagwana Ram and Ors., reported in .

16. In the matter or Shri Chandrakant Kalyandas Kakodkar (supra) which is generally known as 'Shama' case, the Supreme Court held that it is the duty of the Court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not over-look the influence of the book on the social morality of contemporary society. 'The concept of obscenity would differ from country to country depending on the standard of morals of contemporary society. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any reference to sex in what is written whether that is the dominant matter would be to require author to write books only for the adolescent and not for the adults.' The standards of contemporary society in India are also fast changing. If a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. What one has to see is whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect. Any of the impugned passages which have been held by the Court as offending Section 292, Indian Penal Code, cannot be said to pervert the morals of the adolescent or be considered to be obscene.

17. In the matter of Lamba's case (supra), the Supreme Court observed that obscenity of a picture can hardly be decided by oral evidence. The surrounding circumstances such as the pose, posture, the suggestive element in the picture and last of all the person or persons in whose hands it is likely to fall should be considered. Though grant of a certificate by the Board of Film Censors does not bar the Court from examining the question of obscenity it raises rebuttable presumption that the picture is not offensive. Where the smudged and

indecipherable publication of face of a woman either by itself or read with the name of the film together with love printed alongside did not tend to invade or deprave and corrupt public morale through over-sex and the film itself was not stated as being offensive the offence under Section 292 Penal Code was held not made out.

18. The Supreme Court further observed in the said judgment that where the Magistrate has already expressed, though prima facie, in the light of the contents of the complaint and the evidence produced that the offence was made out and that the accused deserved to be proceeded against, they cannot reasonably be expected to convince the Magistrate even before recording further evidence in the case that the charge against them is groundless and seek release under Section 245(2) of Criminal Procedure Code and in the circumstances they could invoke Section 482 of the Code.

19. Section 292 of Indian Penal Code reads:--

'[(1) For the purpose of Sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or where it comprises two or more distinct items the effect of and one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]'

Sub-section (2) provides that 'Whoever--

(a) Sells, lets to hire distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) .....

(c) .....

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section.'

20. Therefore, so far as the present complaint is concerned, there is no doubt that the said magazine Star Dust was to be put to circulation for sale and was so exhibited for sale and it was having petitioner's said photograph on frontal page of it. But that alone would not make the petitioner liable for punishment from committing the offence punishable under Section 292 or would not make her liable to face the prosecution for the said offence. Even prima facie it will have to be considered whether that picture happens to be obscene as contemplated by Section 292 as indicated by the observations of the Supreme Court in 'Shama's case and O. P. Lamba's case.

21. In Chandrakant Kalyandas Kakodkar's (Shama's) case the said Chandrakant Kakodkar was prosecuted for offence punishable under Section 292 of Indian Penal Code on account of obscenity in the said novel styled as 'Shama'. The question arose whether those sentences were lascivious or were appealing to the prurient interest of the readers which consisted of the adolescents. Supreme Court after examining the said work as a whole concluded that it was not so. Supreme Court pointed out that it has to be considered so in context with the society which is reading that work. It is to be kept in mind that where the persons who are reading that work would be having the feeling as contemplated by Section 292 of Indian Penal Code. In O. P. Lamba's case Supreme Court pointed out in the same way and took the same view. It pointed out that its impact is to be considered keeping in view the persons in whose hands the said matter is to circulate.

22. 'Star Dust' is printed in English. The class of readers is well conversant with English. It impliedly means that it is always the highly educated strata of the society and the matured minds who completed the education in English to a certain grade. The said issue of 'Star Dust' is having the photograph of the petitioner Mamta Kulkarni in only bra. It shows that she might have been dressed either in short or even in full pant - Jean also. It is true that there is a caption

'sizzling!' 'Why men lust for Mamta and why women hate her !'. But at the same time it is having the photograph of one male person (probably cine actor) and a sentence has been printed near the said photograph. 'The return of the superbrat!.' Below that a sentence has been printed 'Salman's stinging reply to his rivals!' Below that sentence, there is another photograph of female cine actress and near that photograph a sentence has been printed 'Kajol admits at last!' and at the bottom there is a sentence printed 'Yes, my parents met Ajay's family!' That is all.

23. Shri Vimadalal submitted that it is absolutely sober in comparison to what has been printed in 'Mid Day', 'Bombay Times' and 'Femina' and what is being telecasted. He submitted that the society is changing fast and it was a changed society altogether when Shyamrao Kumble, according to his case, purchased the issue of 'Star Dust' pertaining to March 1995. He submitted that it cannot be called obscene and a photograph which is creating lascivious appeal or prurient interest in the minds of the members who are likely to read it. Shri Saste made his best to counter these submissions.

24. 'Obscenity' is a relative term. What would be obscene to a group of society would not be so to other. A person who does not have a smell of education may not also feel a particular photograph as obscene because in such group of society generally women move with a bra like article of dress to cover the breasts. Being familiar with that type of dress, they may not feel obscenity about which Section 292 of Indian Penal Code speaks about and of which Shri Shyamrao Kumble is sensitive. The converse will also be the same because the group of extra high society also generally does not bother about such dresses. Amongst them, number of women dress themselves in such way when they visit the swimming pools in the midst of male members of the society, may be their relatives or may not be so. Question arises of that group of the society which is in between. The conservative people may not be talking about such pictures or such photographs. But that is also not always true because a classic literature of none else but 'Kalidas' happens to be well read in the middle class society also. Famous drama as 'Meghdootam' is embodied with number of sentences describing the beauty of the residents of 'Avantika Nagari' which 'Megh' (cloud) was likely to see while passing through for carrying the message of 'Yaksha' meant for his wife, who was

required to be abandoned by him for his duty, to his place of residence. That description is definitely sensitive. But that is accepted and tolerated by society. Not only that but acclaimed as a classic work of literature. Can it be called obscene by any means? The answer will be eloquently 'No'. Even in European countries there were debates favourable and unfavourable, over D. H. Lawrence's work 'Lady Chatterley's Lover'. It also passed through the test of public debate. Number of other classics in Sanskrit, in English, in Marathi, in Hindi and other provincial languages, in Urdu, in Arabic, in Pharsi touch this aspect of 'woman' which is connected with love, romance and sex. Therefore, everything which is touching these aspects cannot be called to be obscene out and out. It is to be remembered that even according to ancient Hindu Culture 'Human life' is revolving around four important pillars (1) 'Dharma', (2) 'Arth', (3) 'Kaam' and (4) 'Moksh'. Out of these four important pillars, the pillar of 'Kaam' touches this aspect around which the complaint presented by Shyamrao Rumble is revolving.

25. A reasonable tolerance is the main criteria which is to be considered in respect of a point of obscinity. Whether the object, work, photograph or the work of literature is obscene or not would be importantly depending on as to how the society can tolerate it. How the society accepts it and as to what is being circulated, what is being tolerated, what is being read, what is being talked in the society near about the same time would be creating annoyance in the minds of its members. Even in the year 1995 the movies which were passed by the Censor Board were having pictures more higher in grade than the present one which is in question. Wearing a bra which was known in ancient literature as 'Kanchuki' would not make a picture by itself obscene. Though bald statement has been alleged by Shri Shyamrao Kumble, it is not clear from the picture by itself whether Mamta Kulkarni was wearing short, it could be a trouser. It could be a Jean or it could be a long pant also. There is no substance in the allegation of Shri Shyamrao Kumble. There is no documents nor anything else to show that Mamta Kulkarni was showing that she was intending to undress; that she was intending to take down the said bottom wearing. Even it is not showing that she was to expose her lee-ward region of the body. It is said that human mind is very imaginative and inventive. More busy mind more imagination. The obscenity always depends on the way of thinking of the person, who either condemns it or praises it. It depends

upon how his mind is perceptive to it. Said picture shows that Mamta is casual in her approach while putting her both thumbs on the top portion of the said bottom wearing. It does not necessarily exhibit that she is putting down the said wearing further down. In fact as the picture shows, it is at proper level of the body.

26. The obscenity has to be considered keeping in view the parallel articles. Shri Vimadalal submitted that the pictures or exhibitions, more higher in grade are being telecast from television. He pointed out number photographs from 'Bombay Times', 'Mid Day' and even 'Femina'. 'Femina', as submitted by Shri Vimadalal, is the magazine generally read by ladies and it is meant for ladies as its title indicates. Even 'Femina' issue, a copy of which has been produced at two places by Shri Vimadalal, shows the picture quite high in grade. If seen in comparison the pictures which are being published in 'Mid Day' and 'Bombay Times' are more in shades and grade. Those pictures are used for advertising. Even such pictures and models are exhibited in TV advertisements. Even movie pictures are also more in grade than the picture in question.

27. Another point which is to be considered is whether a common man would be annoyed by seeing the picture in question. The answer would be reasonably no. Even prima facie, making oneself acquainted with the pace with which the society is moving at present, and was moving in the year 1995 also, the society was tolerant after being educated and being acquainted with number of other things. Education has made the members of the society to view such work with proper and reasonable approach. Now, the trend is to take out the art and the skill of an artist from it. The Court cannot forget this aspect while examining the point connected with such an issue. So far as the present picture is concerned, it cannot be said to be annoying a common and reasonable man.

28. Another point which is to be considered is whether a person has himself exposed to the feeling of annoyance or whether he has been compelled to go to such an end of annoyance. One who purchases a book or a magazine which includes such pictures, cannot make a complaint of being annoyed, because he has voluntarily undertaken the work of viewing particular magazine. A person purchasing a book or magazine, or newspaper, cannot make a complaint by

seeing some pictures out of it. A person who purchases books for attending certain concert, cannot be permitted to complain of annoyance on account of that concert. The simple reason is that he exposed himself for that. Like that, Shyamrao Kumble when purchased that issue, he exposed himself for viewing that picture on the frontal page of 'Star Dust' and decided to read it. This aspect cannot be forgotten by the Court while dealing with his complaint even at the initial stage.

29. Shri Vimadalal has submitted that the complaint of Kumble is not a bona fide one as he claims. It cannot be said that he is doing social work by filing the said complaint. He pointed out that Kumble's address is not traceable. He argued that had he been genuine in his persuit, he would have given his correct address in the complaint. This Court finds substance in this submission. In addition to that, Kumble has not prosecuted the publisher and the photographer of the said magazine 'Star Dust'. A person who photographed Mamta Kulkarni has not been arrayed as an accused by Shyamrao Shioram Kumble. A person who published the said photograph on the frontal page of 'Star Dust' has also not been arrayed as an accused. Shri Shyamrao Kumble has not given any explanation for that in his complaint. He has not explained as to why he was so generous in relieving them and not bringing them to the action of law, when he decided to bring Mamta Kulkarni to that possibility of punishment. Here smells some other motive or object behind filing the said complaint only against Mamta Kulkarni, the present petitioner.

30. When the complaint is presented before a criminal Court, it is the duty of such criminal Court to apply its judicial mind to the facts averred in the complaint and to acquaint itself with the realities of the life qua averments made in such complaint. It has to consider the averments made in the complaint, reasonably, dispassionately. It cannot be permitted to allow itself to be too sensitive or too touchy. It has to inform itself as to how society behaves in a reasonable way in its normal course of day to day affairs. Too strict, too conservative, too sensitive, too touchy approach cannot be taken in such cases when number of articles, works of literature are studded with such material.' It has to inform itself that now a days even educationists are having a strong idea of providing sex education at college and school level. Society does not now think to hide the things of normal behavior

of human beings. Therefore, too conservative approach cannot stand the test of time. It would be going too away from normal human life. Law emerges from social need and societal feelings.

31. The learned Magistrate did not consider the present complaint with reasonable approach with the normal human behavior in the society and, therefore, he committed the error of taking cognizance of the said complaint and deciding to issue a process against the present petitioner.

32. In Madhavrao Jiwaji Rao Scindia and Anr. v. Sambhajirao Chandrojirao Angre and Ors. reported in : 1988 CriLJ853 the Supreme Court has observed that when the Court comes to a conclusion that there is no substance to proceed in the trial, the Court should not hesitate in taking the appropriate decision and discharge the accused indicted in such prosecution even at initial stage. Same view has been taken by the Supreme Court in the matter of State of West Bengal and Ors. v. Swapan Kumar Guha and Ors., case reported in : 1982 CriLJ819 . When there is no case for going to trial, there is no point in asking the person to abandon his daily pursuit of life and to attend the Court. Keeping in view the large number of cases being filed daily in the Courts, a person cannot be asked to sit for hours together waiting for his turn of hearing. He has to face a toiling time in such waiting. He has to face number of hardships including engaging a lawyer by paying handsome fee. The litigation expenditure is also increasing day by day. The person should not be required to face such ordeal unnecessarily. Therefore, if a Court can legitimately come to a conclusion that there is no case for going to the trial even at initial stage, such prosecution needs to be dismissed, dropped and such accused needs to be exonerated even at initial stage. It can also be done even after process has been issued and the Court has been called on to give a verdict after considering all the material brought to its notice by such an accused.

33. This Court finds that this is an appropriate case in which petition should be allowed and the prosecution in question should be dropped, quashed by using the powers conferred on this Court by provisions of Sections 397, 401 and 482 of the Code as well as Article 226 of the Constitution of India.

34. Thus, the said prosecution stands quashed. The present petitioner-accused in the said prosecution stands exonerated.

35. Parties be given ordinary copy of this judgment duly authenticated by the Private Secretary/Sheristedar of this Court.

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