

Deepchand Vs. Sampathraj

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Court : Karnataka

Decided On : Mar-24-1969

Reported in : AIR1970Mys34; 1970CriLJ260; (1969)1MysLJ606

Judge : B.M. Kalagate, J.

Acts : [Evidence Act, 1872](#) - Sections 105, 126, 128, 146, 146(3), 147, 148 and 149; [Indian Penal Code \(IPC\), 1860](#) - Sections 499 and 500; [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 435 and 439

Appeal No. : Criminal Revn. Petn. No. 306 of 1968

Appellant : Deepchand

Respondent : Sampathraj

Advocate for Def. : P.S. Devadas, Adv.

Advocate for Pet/Ap. : M.V. Devaraju and ;A. Shamanna, Advs.

Judgement :

ORDER

1. The petitioner was the accused in C. C. 3227, of 1966 in the Court of the Additional First Class Magistrate, Bangalore. The respondent herein filed a complaint against the petitioner accused for an offence under Section 500 of the Indian Penal Code.

2. The facts leading to the complaint may be briefly stated as follows:--The complainant and the accused are both businessmen. The accused was involved in what is known as Gold Control Order case wherein the complainant was examined as a witness in support of the prosecution. During the course of cross-examination of the complainant, learned Counsel Sri Chandra Kumar who appeared for the accused in that case put the five questions mentioned in the complaint. According to the complainant, those questions were put at the instance of the accused with a view to harm the complainant's reputation and standing in the business community of Bangalore and also with intent to lower his character. He further alleged that the imputations made by the accused against him are all absolutely false and were made deliberately to damage and harm the complainant's moral, social and business reputation and the imputations conveyed by those questions are per se defamatory. Therefore the accused is liable for punishment under Section 500 of the Indian Penal Code.

3. The learned Magistrate, on the evidence adduced before him found the accused guilty of the offence and convicted him of the offence punishable under Section 500 of the Indian Penal Code and sentenced him to undergo simple imprisonment till the rising of the court and to pay a fine of Rs. 500 or in default of payment of fine, to undergo simple imprisonment for a further period of two months.

4. Against the said order, the accused preferred an appeal in the Court of the II Additional District and Sessions Judge, Bangalore, challenging his conviction and sentence. The learned Sessions Judge agreeing with the conclusion reached by the learned Magistrate, confirmed the conviction and sentence imposed on the accused and dismissed the appeal. It is the correctness and legality of this order that is challenged in this petition under Ss. 435 and 439 of the Code of Criminal Procedure.

5. Mr. Devaraju, the learned counsel for the petitioner submitted that the imputation made fell within the Ninth Exception to Section 499 of the Indian Penal Code and if so, there is no defamation. He also contended that the information conveyed to the Advocate by the accused were professional communications and their disclosure is not permissible under Section 126 of the Indian Evidence Act.

The five questions that were put to the complainant were as follows:

'1. In 1949-50 have you done the business of opium smuggling

Ans: No.

2. Is it a fact that you were involved in a opium smuggling case in 1949-50 and you were under remand for 15 days?

Ans: It is absolutely incorrect.

3. In 1949-50 you were not doing the business of smuggling the cloth from the running train at Marwad?

Ans: No.

4. Was there not a case at that time regarding the smuggling in which you were involved?

Ans: I was a mere witness.

5. I put it to you that because there was a warrant against you, you came away to Bangalore from Rajasthan?

Ans: It is not correct.'

From the above questions it is clear that the imputation made against the complainant was that he was doing the business of opium smuggling and that he was involved in a opium smuggling case in 1949-50: it is also clear that the imputation conveyed by the third question was that the complainant was doing the business of smuggling of cloth from, running train and from the fifth question, that he has come to Bangalore from Rajasthan because there was a warrant against him.

6. Not much discussion is necessary to find that the imputation conveyed by these questions is per se defamatory.

7. These questions were put in open Court and made public. The Courts below were in my opinion, right in coming to the conclusion that the imputation conveyed by the questions was per se defamatory. Therefore, the two questions that arise for consideration are, whether the imputation conveyed by the above questions fall within the Ninth Exception to Section 499 of the Indian Penal Code and whether they are privileged communications which cannot be disclosed without the express permission of the client under Section 126 of the Indian Evidence Act.

8. Now, the Ninth Exception to Section 499, Indian Penal Code, reads 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 any other person, or for the public good.'

At this stage it would be appropriate to refer to Section 146 of the Indian Evidence Act which permits lawful questions to be put in cross-examination. It is provided that when a witness is cross-examined, he may, in addition to the questions referred to in that Section, be asked any question which tends to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. Thus, it would be seen that it is perfectly open to a lawyer to put questions to a witness in cross-examination in order to shake his credit by injuring his character and the mere fact that the answer to such questions may directly or indirectly tend to criminate the witness is no justification to refuse to answer such questions.

It is also pertinent to note the provisions of Section 149 of the Indian Evidence Act which provides that no question referred to in Section 148 ought to be asked, unless the lawyer asking it has reasonable grounds for thinking that the imputation which it conveys is well founded. Thus, the effect of the provisions of Sections 146 and 149 is that though it is permissible for a lawyer to put a question in cross-examination of a witness to shake his credit by injuring his character, nonetheless, the lawyer must be satisfied that there are reasonable grounds for thinking that the imputation which it conveys is well founded.

9. But what is contended before this Court by the learned counsel for the petitioner Mr. Devaraju is that the communications made by a client to his lawyer are professional communications and are protected from disclosure unless their disclosure is permitted either by the client expressly or under the provisions of Section 128 of the Evidence Act.

To me, it appears that the privilege stated in Section 126 of the Evidence Act is not an absolute privilege as claimed but is only a qualified one. This proposition receives support from the illustrations to Section 126 itself. If it was an absolute privilege as claimed, then no witness whether male or female would be safe in a Court of law when he or she is under cross-examination.

10. It is true that law gives power to the court to protect witnesses, but then, if the question is put the damage is done. It is therefore, reasonable to state that though under Section 146(3) of the Evidence Act the lawyer is entitled to put questions to shake the credit of a witness by injuring his or her character, there must be some reasonable ground for thinking that the imputation conveyed by the question is well founded.

11. Mr. Devaraju, in support of his contention that the privilege under Section 126 is an absolute one, relied upon the decision in *Palaniappa Chettiar v. Emperor*, 1935 Mad WN 460. The Order of the Court is so brief that it is difficult to find out the reasons for stating that the privilege under Section 126 is an absolute one and a lawyer is not at liberty to disclose the communications made to him during the course of his employment. According to the learned Judge, all communications are privileged and are protected from disclosure. With respect, this statement is clearly unsupportable in view of the illustrations to Section 126 which make it clear that it is not all professional communications that are privileged and are protected from disclosure.

12. In a subsequent decision of the same High Court in *Ayesha Bi v. Peer Khan Sahib*, : AIR1954 Mad741 the decision in *Palaniappa Chettiar*, 1935 Mad WN 460 came to be considered where the learned Judge was not inclined to accept the proposition stated therein as correct.

13. Section 126 of the Indian Evidence Act provides that no lawyer shall be permitted to disclose any communication made to him in the course, and for the purpose, of the employment as such lawyer by or on behalf of his client unless with the express consent of his client. The communication which is made to a lawyer must be in course, and for the purpose, of employment as such.

In my view, it cannot be said that when a lawyer puts a question on the instructions of his client to a witness in cross-examination which is defamatory in character without there being any reasonable ground it is a communication made for the purpose of the employment as lawyer. A question put to a witness in cross-examination which might injure his character though permissible under Section 146(3) of the Indian Evidence Act with a view to shake his credibility, nonetheless, there must be a reasonable ground for putting a question which is defamatory in character and if there is no basis for putting such questions, then it is difficult to state that such a communication which is defamatory in character is a professional communication and its disclosure is protected under Section 126 of the Indian Evidence Act without the express consent of his client.

14. The trial Court has observed that the lawyer did not claim any privilege under Section 126 of the Indian Evidence Act. Mr. Devadass appearing for the respondent has pointed out that the evidence of P. W. 1, the Advocate, clearly shows that he had not satisfied himself that there were reasonable grounds for thinking that the imputation conveyed by the questions is well founded. This he states is obvious from his admission that he did not show that the imputation conveyed by those five questions was well founded. He states that if the lawyer was in possession of any such document, he would have confronted the witness with such document.

He, therefore, contends that the questions put by the learned Advocate were without any reasonable grounds. In my opinion, the communication by the client to his lawyer to put questions which are defamatory in character to the witness in cross-examination without there being any basis cannot be said to be absolutely privileged and are protected from disclosure without the express consent of the client under Section 126 of the Indian Evidence Act. Since the imputation

conveyed by the questions is per se defamatory the accused is liable for conviction.

15. But the accused has, as already stated also relied on the Ninth Exception to Section 499 of the Indian Penal Code. The Court below has held that the accused cannot justifiably claim protection under the Ninth Exception_ to Section 499 of the Indian Penal Code.

16. Mr. Devaraju for the petitioner has drawn my attention to a decision of the Supreme Court in H. Singh v. State of Punjab, : 1966 CriLJ82 wherein the scope of the Ninth Exception to Section 499 of the Indian Penal Code came to be considered. Since the accused has relied upon the exception it is for him to prove that his case falls under that exception. The Supreme Court has, in that decision, stated that the burden of proof by the accused who relies on an exception is not the same which ordinarily lies on the prosecution to prove its case, but it has clearly stated that the accused must show that he has acted in good faith and by the test of probabilities his evidence establishes his case.

17. From the evidence on record, I am of the opinion that both the Courts below were right in coming to the conclusion for the reasons stated, that the accused was not entitled to the benefit of the Ninth Exception to Section 499 of the Indian Penal Code.

18. It was next contended by Mr. Devaraju that the accused can be convicted only as abettor and not as a principal offender. That is a proposition which cannot be accepted. Such a submission was made in Ayesha Bi's case, : AIR1954 Mad741 referred to above where his Lordship rejected that contention by observing that there is no meaning in stating that defamation cannot be committed by a proxy through the mouth of his Vakil.

19. In the result, for the reasons stated above, I confirm the conviction and sentence passed by the Court below and dismiss this revision petition.

20. Petition dismissed.

