

Abhik Sarkar and anr. Vs. State and anr.

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Court : Kolkata

Decided On : Mar-17-2004

Reported in : (2004)3CALLT363(HC),2004CriLJ2937

Judge : Asit Kumar Bisi, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Section 482; ;Indian Penal Code (IPC) - Section 292; ;[Evidence Act, 1872](#) - Section 105

Appeal No. : Crl. Rev. No. 1591 of 1994

Appellant : Abhik Sarkar and anr.

Respondent : State and anr.

Advocate for Def. : Ashim Kumar Roy, Adv. for Respondent No. 2

Advocate for Pet/Ap. : Joymalya Bagchi and ;Sabyasachi Banerjee, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

Asit Kumar Bisi, J.

1. The instant application Under Section 482 of the Code of Criminal Procedure has been preferred by the petitioners seeking quashing of the proceeding being

Case No. C-796 of 1993 corresponding to T.R. No. 35 of 1994 pending in the Court of the Ld. Judicial Magistrate, First Court, Alipore, South 24-Parganas. Petitioner No. 1 Sri Abhik Sarkar is the editor, Ananda Bazar Patrika and Petitioner No. 2 Sri Pabitra Kumar Mukherjee is the publisher and printer, Ananda Bazar Patrika Ltd. The facts anterior to filing of the application Under Section 482 of the Code of Criminal Procedure may briefly be narrated thus. On 7-5-93 a petition of complaint was filed by the complainant presently O.P. No. 2 Sri Sourendra Nath Basu an Advocate practising at Alipore Judge's Court against the present petitioners alleging commission of an offence Under Section 292 of I.P.C. As per the case of the complainant he is a regular subscriber and reader of Ananda Bazar Patrika and also a reader of the Sports World. On 6-5-93 at about 6.30 A.M. the complainant was shocked and surprised to find a nude photograph of Boris Becker along with a nude lady published on the second page of Ananda Bazar Patrika. It has been alleged in the petition of complaint that the complainant being an experienced Advocate and well aged person felt that the photographs of a renowned player like Boris Becker published on 6-5-93 at Ananda Bazar Patrika and Sports World, Volume 14, Issue 15 dated 5th May, 1993 have a great impact on the society as the same is very much against the customs and culture and the complainant felt that for the benefit of the society such sorts of publication and photography should be banned and the petitioners deliberately and intentionally published those photographs which are obscene in nature within the meaning of Section 292 of I.P.C. and the said obscene photographs so published would have bad impact upon the teenagers.

2. The learned S. D. J. M., Alipore took cognizance of the offence on the complaint and after examination of the complainant upon oath found prima facie case Under Section 202 of I.P.C. against both the petitioners arraigned as accused in the said case and issued summons against them on 10-5-93. Thereupon both the petitioners appeared before the learned S. D. J. M., Alipore and filed a petition Under Section 205, Cr.P.C. praying for dispensing with their personal attendance. By the order dated 19-1-94 the learned S.D.J.M., Alipore allowed the said petition and subsequently transferred the case to the Court of the learned Judicial Magistrate, First Court, Alipore for disposal. Thereafter the petitioners filed an application before the learned Judicial Magistrate praying for dropping of the

proceeding. It has been alleged inter alia in the said petition that the photograph in question was published in 'stern' which was the biggest news Magazine of Germany and circulation had been made in India with the knowledge, consent and approval of the customs department and also that of external affairs, Government of India and the photograph in question and the news had been collected from the said magazine and reproduced in the Sports World and since the authorities concerned did not raise any objection in this regard, the same could not be termed as obscene and the petitioners were entitled to get the benefit of Section 79 of I.P.C. It has been further averred by the petitioners in the said petition that circulation of the said foreign magazine containing the news item and the photographs in question is not banned in India and the same had already been exhibited for view to the general public and collection of the said photograph from the said magazine together with the news item and printing and publication of the same in this country cannot be challenged as obscene in any way. By his order dated 16-4-94 the learned Judicial Magistrate rejected the said petition whereupon being aggrieved the petitioners have preferred the present application Under Section 482 of the Code of Criminal Procedure praying for quashing of the proceedings.

3. Mr. Joymalya Bagchi the learned Advocate for the petitioners has contended at the outset that along with the application for dropping of the proceeding the documents were submitted to show that Germany's Sports Magazine 'Sterm' dated 7th April, 1983 had not been banned in India and since the said magazine was not banned the petitioners were justified in law to reproduce the picture contained in the said magazine in their own publications and such justification in law is embodied as a general exception contained in Section 79 of I.P.C. He has drawn my attention to the copy of the letter dated 20th July, 1993 addressed by the Assistant Editor, Sports World to the Collector, Calcutta Customs and copy of the letter dated 4-10-93 sent by the Deputy Collector of Customs to the Assistant Editor, Sports World. Copies of both the letters have been kept on the lower Court records. It has been contended by Mr. Bagchi on behalf of the petitioners that Section 11 of the Customs Act inter alia empowers the Central Government to prohibit partially or absolutely import of any goods in India for the purpose of maintenance of public order and standards of decency or morality and the

aforesaid document placed before the learned Magistrate being an official communication on behalf of a public authority clearly establishes the fact that importation of the said foreign Magazine 'Stern' containing the allegedly offending picture had not been prohibited in India. It has been further argued by Mr. Bagchi that the issue of justification of law emanates from absence of any legislative interdiction to the entry of the allegedly offending picture in India or to its being used in India and such absence of legislative interdiction is evident from the document which is a public document within the meaning of Section 74 of the Indian Evidence Act. As argued by Mr. Bagchi, the learned Magistrate ought to have taken into consideration the said public document communicating non-existence of legislative interdiction in the matter and should have dropped the proceeding. He has drawn my attention to Section 79 of I.P.C. and submitted that since the petitioners were justified in law to publish the said photograph Section 292 of I.P.C. has got no manner of application in this case. He has cited *Raj Kapoor v. Laxman* reported in : 1980 CriLJ436 in this regard.

4. Mr. Bagchi the learned Advocate for the petitioners has further contended that general exception and/or other exceptions ought to be taken into consideration by the learned Magistrate at the stage of issuance of process. In this context he has placed reliance on the decision of the Supreme Court in *Vadilal Panchal v. Duttatraya Dulaji, Ghadigaonkar* reported in : [1961]1SCR1 . It is his contention that the said publication falls within the ambit of exception engrafted in Section 292 of I.P.C. as well as exception in Section 4(a)(i) of the Indecent Representation of Woman (Prohibition) Act, 1986. It has next been urged by Mr. Bagchi that the Magisterial discretion in issuing process Under Section 292 of I.P.C. is to be considered in the light of the overall impact of the article and the photograph alleged to be offending and in the instant case publication of the photograph alleged to be offending and the article published in the Sports World and publication of the same photograph in Ananda Bazar Patrika clearly reveal that overall impact of the same is to report a matter/object of general concern in the form of a bold protest made by a famous sportsman Boris Becker against a most pernicious practice namely apartheid. It has been argued by Mr. Bagchi that the photograph alleged to be offending is to be judged in its proper perspective and the same squarely falls beyond the penal amplitude of the relevant provisions of

the Code and the learned Magistrate ought to have declined to issue summons or should have dropped the proceeding. It has been further argued by Mr. Bagchi that the learned Magistrate failed to consider that a famous sports man like Boris Becker was in fact shown in the said photograph with a black model and the said picture in the backdrop of the overall impact of the article cannot have any corrupting and depraving effect on the mind of an average individual. Further contention of Mr. Bagchi is that the allegedly offending picture cannot be termed as obscene inasmuch as nudity per se is not obscene and the picture is neither suggestive nor provocative in any manner whatsoever. As contended by him, the protest lodged by a leading sports man against apartheid is reflected in the said picture where, as mentioned hereinabove, Boris Becker was shown with a black model. He has further urged that while exercising his discretion Under Section 204 of the Code of Criminal Procedure the learned Magistrate misdirected himself and did not consider the settled principles of law delineating the parameters of the alleged offence and the exception engrafted therein as evident from the uncontrovertible materials placed before him. In this context he has cited *M/s. Pepsi Foods Ltd. v. Special Judicial Magistrate* reported in AIR 1998 SC 128 : (1998 Cri LJ 1).

5. Mr. Ashim Kumar Roy the learned Advocate appearing for O.P. No. 2/Complainant has drawn my attention to Section 105 of the Indian Evidence Act which lays down that when a person is accused of any offence, the burden of proving of existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances. It has been argued by him that if the petitioners want to take benefit of any of the exceptions to which Section 202 of I.P.C. does not extend, the burden of proving the existence of circumstances bringing the case within any of such exceptions is upon them and unless such burden is discharged, the Court shall presume the absence of such circumstances. It is his further contention that the decision of the Supreme Court in *Vadilal Panchal* (1960 Cri LJ 1499) (supra) as cited by Mr. Bagchi has no manner of application in the facts and circumstances of the case since in the aforesaid case the Supreme Court has not decided the scope of Section 105 of

the Indian Evidence Act and only quoted the observations of the High Court with regard to the same. Mr. Roy has cited *Union of India v. Dhanwanti Devi* reported in : (1996)6SCC44 the Supreme Court has held that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. It has been urged by Mr. Roy that the decision of the Supreme Court in the case of *Vadilal Panchal* (supra) does not at all negate or nullify the proposition that in view of Section 105 of the Indian Evidence Act the plea that the case comes within any of the exceptions in the Indian Penal Code must always be proved by a person accused of any offence by adducing evidence in the course of trial.

6. In the case of *Vadilal Panchal* (1960 Cri LJ 1499) (supra) that the question which arose for consideration before the Supreme Court was whether or not the High Court was right in its view that when a Magistrate directed an enquiry Under Section 202 of Cr. P.C. for ascertaining truth or the falsehood of a complaint and received a report from the enquiring officer supporting a plea of self-defence made by the person complained against, it was not open to the Magistrate to hold that the plea was correct on the basis of the report and the statements of the witnesses recorded by the enquiring officer. The Supreme Court was of the view that the High Court was in error in holding in the said case that as a matter of law it was not open to the learned Magistrate to come to the conclusion that on the materials before him no offence had been made out and there was no sufficient ground for proceeding further on the complaint. So far as the provisions of Section 105 of the Indian Evidence Act are concerned the Supreme Court quoted the observation of the High Court and did not make any finding on the scope of Section 105 of the Indian Evidence Act. In my view the decision of the Supreme Court in the case of *Vadilal Panchal* (supra) does not render any assistance to the petitioners in the present case.

7. Mr. Roy the learned Advocate for O.P. No. 2 has cited two decisions of the Supreme Court viz. *Harbhajan Singh v. State of Punjab*, : 1966 CriLJ82 and *Sewakram Sobhani v. R.K. Karanjiya*, : 1981 CriLJ894 . The said two decisions

were rendered by the larger Bench of the Supreme Court comprising three Hon'ble Judges.

8. In the case of Harbhajan Singh (supra) : 1966 CriLJ82 the Supreme Court has pointed out that ninth exception to Section 499 of I.P.C. provides that it is not defamation to make an imputation on the character of another, provided the imputation be made in good faith for the protection of the interest of the person making it, or for any other person, or for the public good. The Supreme Court has further held that there is no doubt that the requirements of good faith and public good have both to be satisfied and so the failure of the appellant to prove good faith would exclude the application of the Ninth Exception in his favour even if the requirement of public good is satisfied.

9. In the case of Sewakram Sobhani (supra) : 1981 CriLJ894 the Supreme Court has held as follows :--

'Several questions arise for consideration if the Ninth Exception is to be applied to the facts of the present case. Was the Article published after exercising due care and attention? Did the author of the article satisfy himself that there were reasonable grounds to believe that the imputations made by him were true? Did he act with reasonable care and a sense of responsibility and propriety Was the article based entirely on the report of the Deputy Secretary or was there any other material before the author? What steps did the author take to satisfy himself about the authenticity of the report and its contents? Were the imputations made rashly without any attempt at verification? Was the imputation the result of any personal ill will or malice which the author bore towards the complainant? Was it the result of any ill will or malice which the author bore towards the political group to which the complainant belonged? Was the article merely intended to malign and scandalize the complainant or the party to which he belonged? Was the article intended to expose the rottenness of a jail administration which permitted free sexual approaches between male and female detenus? Was the article intended to expose the despicable character of persons who were passing off as saintly leaders? Was the article merely intended to provide salacious reading material for readers who had a peculiar taste for scandals? These and several other questions

may arise for consideration, depending on the stand taken by the accused at the trial and how the complainant proposes to demolish the defence. Surely the stage for deciding these questions has not arrived yet. Answers to these questions at this stage, even before the plea of the accused is recorded can only be a priori conclusions, 'Good faith' and 'public good' are, as we said, questions of fact and matters for evidence. So. the trial must go on.'

10. Mr. Roy the learned Advocate for O. P. No. 2 has cited *Balraj Khanna v. Moti Ram*, : 1971 CriLJ1110 the Supreme Court has observed that it is needless to state that the question of applicability of the exceptions to Section 499, I.P.C. as well as all other defences that may be available to the appellants will have to be gone into during the trial of the complaint. Mr. Bagchi the learned Advocate for the petitioners has contended that the said decision of the Bench of two Hon'ble Judges of the Supreme Court runs counter to the decision of the Bench of three Hon'ble Judges of the Supreme Court in the case of *Vadilal Panchal* (1960 Cri LJ 1499) (supra). But on careful consideration I find that the facts and circumstances of the case of *Vadilal Panchal* (supra) are quite different from the case of *Balraj Khanna* (supra). Furthermore, I find that the view as expressed in the case of *Balraj Khanna* (supra) is identical with the views of the respective Benches of three Hon'ble Judges of the Supreme Court in the case of *Harbhajan Singh* (1966 Cri LJ 82) (supra) and *Sewakram Sobhani* (1981 Cri LJ 894) (supra) as mentioned above.

11. Mr. Bagchi the learned Advocate for the petitioners has cited the case of *Raj Kapoor* (1980 Cri LJ 436) (SC) (supra) where the Board of Censors, acting within their jurisdiction under the Cinematograph Act and on an application made and pursued in good faith, sanctions the public exhibition of the film *Satyam Sivam Sundaram*. It is in such context in the case of *Raj Kapoor* (supra) : 1980 CriLJ436 the Supreme Court has held that if, as here, the Board of Censors, acting within their jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbour and are protected because Section 79 of I.P.C. exonerates them at least in view of their bona fide belief that the certificate is justificatory. It is obvious that the facts and circumstances of the said case have no manner of application to the

case on hand for the plain reason that in this case there is no statutory authority to sanction circulation and publication of the photograph in question alleged to be obscene in the Newspaper and the Sports Magazine. In the instant case if the plea is taken by the petitioner that the publication of the said photograph is justified as being for the public good and the act of such publication was done in good faith, such plea is required to be proved by the petitioners in view of Section 105 of the Indian Evidence Act since good faith and public good are questions of fact and matters for evidence as enunciated by the Supreme Court in the case of Sewakram Sobhani (1981 Cri LJ 894) (supra).

12. Mr. Bagchi has cited Samaresh Bose v. Amal Mitra, reported in 1985 SCC (Cri) 523 : (1986 Cri LJ 24). In the said case the question which arose for consideration was whether or not a Bengali Novel 'Prajapati' written by Samaresh Bose and published in the popular Bengali journal 'Desh' was obscene. Various factors were considered for objective determination of the matter and the concept of obscenity was dealt with elaborately in the said judgment. The Supreme Court held that the said novel was not obscene and did not offend Section 292 of I.P.C. The Supreme Court set aside the judgment and order of conviction and sentence passed by the learned Courts below and acquitted the author and publisher of the charges framed against them. Mr. Bagchi has also cited Buddhadev Bose v. State of West Bengal, reported in (1974) 78 Cal WN 469 which relates to publication of the Bengali book 'Rat Bhore Bristhi' written by Buddhadev Bose. The Division Bench of this Court held that the said book was written in lyrical style by a powerful writer and the vulgar episodes or the indecent picture depicted in a few incidents, practically paled into insignificance when the book was read as a whole. The Division Bench held that the said book was not obscene and set aside the order of conviction and sentence passed by the learned trial Court. It is manifestly clear that the facts and circumstances of the respective cases of Samaresh Bose (supra) and Buddhadev Bose (supra) where ultimately the said respective books were not found to be obscene for which the orders of conviction and sentence passed by the learned Courts below against the respective authors and publishers concerned were set aside have no manner of application to the case on hand and the said two decisions cannot help the present petitioner in any manner whatsoever. In this case the proceeding which the petitioners seek to quash has

been initiated on the basis of the complaint containing allegations of publication and circulation of obscene photograph of Boris Becker and a lady in the newspapers and the sports magazine and the trial is yet to commence.

13. For the foregoing reasons I find no reason to quash the impugned proceeding being case No. 796/93 corresponding to T. R. 35 of 1994 pending before the learned Judicial Magistrate, First Court, Alipore, South 24-Parganas. The application Under Section 482 of the Code of Criminal Procedure is accordingly dismissed. Interim order passed by this Court stands vacated. I make it clear that such order of dismissal of the application will not debar the petitioners from raising the same plea before the learned trial Court at appropriate stage of trial and it is for the learned trial Court to adjudicate upon this aspect of the matter at proper stage without being influenced by any observation of this Court.

14. Let a copy of this judgment along with L.C.R. be sent down to the learned Court below forthwith.

15. Xerox certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible.