

Shybimon Vs. Haridas

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Court : Kerala

Decided On : Mar-22-2010

Reported in : 2010(2)KLT158

Judge : V. Ramkumar, J.

Acts : Evidence Act - Section 105; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 193, 499, 500 and 501; ;Code of Criminal Procedure (CrPC) - Sections 195(1), 202, 203 and 204

Appeal No. : Crl. R.P. No. 2918 of 2009

Appellant : Shybimon

Respondent : Haridas

Advocate for Def. : R. Azad Babu, Adv. and; C.M. Nazar, Public Prosecutor

Advocate for Pet/Ap. : B. Pramod, Adv.

Judgement :

ORDER

V. Ramkumar, J.

1. The revision petitioner who was the complainant in a private complaint filed as C.M.P. No. 2480 of 2009 before the J.F.C.M.I., Cherthala, alleging offences

punishable under Sections 500 and 501 I.P.C. against the 1st respondent herein, challenges the order dated 20.8.2009 passed by the Magistrate dismissing the complaint presumably under Section 203 Cr.P.C. after recording the sworn statement of the complainant.

2. Eventhough the accused to whom no process was issued by the Magistrate, has no right to be heard in this revision, since the revision petitioner had made the accused a party respondent and also since this Court ordered notice to him, I also heard Advocate Sri Azad Babu on behalf of the 1st respondent/accused.

The Background Facts:

3. The facts leading to the filing of the aforesaid complaint can be summarised as follows:

A) O.S. No. 555 of 2008 before the Munsiff's Court, Cherthala was a suit filed by the complainant's mother Kaumari and the complainant against the 1st respondent herein (accused) and his wife seeking a declaration of the right of easement over a way and also for consequential injunction. There was an interim prohibitory injunction granted by the Civil Court in favour of the complainant and his mother.

B) Alleging that the interim injunction was violated by the defendants by causing obstructions to the way in dispute the plaintiffs filed a petition for an interim mandatory injunction. Eventhough the said application as opposed, the Civil Court allowed the application. Accordingly, an interim mandatory injunction was granted and the same was implemented and the status quo ante was restored.

C) The defendants filed an application before the Civil Court to vacate the orders of interim prohibitory as well as mandatory injunction. That application was supported by an affidavit filed by the 1st defendant (1st respondent) herein. According to the complainant, paragraphs 4, 5 and 9 of the said affidavit contained defamatory allegations against the complainant. I am only quoting the opening portion of paragraph 9 of the said affidavit which reads as follows:

Translation

The second plaintiff (revision petitioner herein) is a thief and a lecher who cannot be permitted to set his foot on the courtyards of houses where ladies of honour and self esteem reside. He is an immoral and anti-social person who has amassed wealth undeservingly through illicit distillation, bootlegging etc. and carries on in the company of such elements. He is a criminal who is prepared to commit any heinous act.

D) Eventhough the complainant sent a lawyer notice to the accused requesting him to withdraw the false imputations made against the complainant, he has not only acceded to the said request but has also caused a reply notice to be sent through his lawyer reiterating his stand and raising untenable contentions. Thereupon the complainant filed the aforesaid private complaint before the Criminal Court alleging that the 1st defendant/1st respondent has committed the offence of defamation as defined under Section 499 I.P.C. and punishable under Sections 500 and 501 I.P.C.

ARGUMENTS FOR THE ACCUSED

4. Advocate Sri.AzadBabu, the learned Counsel appearing for the 1st respondent/accused made the following submissions before me in support of the impugned order dismissing the complaint:

The mere filing of an affidavit before the Civil Court after giving a copy of the same to the complainants' counsel will not amount to 'publication' for the purpose of Section 499 I.P.C. Even assuming that the statements in the affidavit are defamatory, as rightly observed by the Court below, those statements enjoy absolute privilege since they were made in the course of judicial proceedings. (Vide Gopalankutty Nair v. Sankunni Ezhuthassan 1971 KLT 393 F.B.). There is no evidence available at present to show that the imputation in question has lowered the reputation of the complainant in the estimation of others as required under Explanation 4 to Section 499 I.P.C. In any view of the matter, the statement in question may fall under the Fourth, Fifth or Ninth Exception to Section 499 I.P.C. so as to take it out of the offence of defamation. Moreover, as was held by the Madras High Court in Gurubasayya v. Siddalingappa : AIR 1940 Mad. 677, the complaint ought to have been filed by the Civil Court.

5. I am afraid that I find myself unable to agree with the above submissions made on behalf of the accused. The learned Magistrate has also substantially based his order on the aforementioned grounds.

6. 'To publish' means to make known to others or to communicate to a third person. (See Webster's Comprehensive Dictionary - International Edition). Publication will be complete if after making or printing the defamatory statement, it is made available to the public. (Vide Collector of Central Excise v. New Tobacco Co. and Ors. : (1998) 8 SCC 250. Publication includes pleadings, affidavits etc. which are filed in Courts. (In Re Ajay Kumar Pandey, Advocate 1997 (1) KLT 13 (C. No. 17) SC : (1998) 7 Supreme 473. The filing of an affidavit is publication. An affidavit is not a secret document. It forms part of the Court records and is available to and accessible by the Public. (See J.R. Parashar, Advocate and Ors. v. Prasant Bhushan, Advocate and Ors. : 2001 (3) KLT SN 60 (C. No. 79) SC : (2001) 6 SCC 735. Once a statement is filed in a Court of law such statement can be taken as published (See Prabhakaran v. Gangadharan : 2006 (2) KLT 122.

7. If a party to a judicial proceeding is prosecuted for the criminal offence of defamation in respect of a Statement made in such judicial proceeding either on oath or otherwise, his criminal liability must be determined by reference to the provisions of Section 499 I.P.C. alone. The English Common Law doctrine of absolute privilege can be set up as a defence only in a suit for damages under the Law of Torts. No such privilege is recognized by the Indian Penal Code beyond the limits of the Exceptions embodied in Section 499 of the Indian Penal Code. The said provision together with its Exceptions forms a complete Code in itself with regard to the criminal liability of a person accused of the offence of defamation. Every defamatory statement not coming within any of the 10 Exceptions to Section 499 I.P.C. is punishable under Section 500 I.P.C. The Court cannot engraft thereupon any further exceptions derived from the Common Law of England or based on grounds of public policy. (See also Haji Ahmad Hussain v. State : AIR 1960 All. 623 : 1960 CrI.L.J. 1296). Ordinarily, the question as to whether the statement in a given case falls under any of the ten Exceptions to Section 499 I.P.C. will have to be decided only after trial and the burden to bring the libel or slander under any of those Exceptions is, by virtue of Section 105 of

the Indian Evidence Act, on the accused. The accused may discharge the said burden by means of preponderance of probabilities. (See Chinnakuttan Nair v. Kumaran Nair 1963 KLT 845; Jose v. Thaiikappan 1963 KLT 1071; Chandrasekhara Pillai v. Karthikeyan ILR 1964 Ker. 31; Dasgupta v. State of West Bengal 1968 KLT 21 C. No. 41 SC and Narayanan v. Gangadharan 1982 KLT 378.

8. As mentioned earlier the English Common law doctrine of privilege is a defence available in a suit for compensation for defamation under the Law of Torts. Privilege is of two kinds - absolute and qualified. In cases of qualified privilege it is the occasion which protects the man who speaks out his mind fully and frankly without any fear of consequences. No action under the civil law will lie in respect of a false and defamatory statement even if made with express malice if such statement is absolutely privileged. Instances when such statements enjoy the immunity of absolute privilege are when made in the course of-

i) Parliamentary proceedings.

ii) Judicial proceedings

iii) Military and Naval Proceedings

iv) State Proceedings (Eg. Communications relating to State matters made by one Minister to another or to the Crown, a report made by a Police Officer to a Magistrate under Section 202 Cr.P.C. etc.)

(Vide pages 294 and 295 of the Law of Torts-- Ratanlal and Dhirajlal - 25th Edition.) Gopalakrishnan Nair v. Sankunni Ezhuthassan (supra) and Daniel v. Hymavathy Amma 1985 KLT 574 are authorities which elucidate the nature and extent of absolute privilege. It is pertinent to note that going by the ratio in Daniel's case (Supra) even under the civil law of defamation, if the offending statement was absolutely irrelevant or was made de hors the matter in hand or had no reference to the matter under inquiry, such statement cannot enjoy the status of absolute privilege.

9. In cases of qualified privilege, it is not enough if the plaintiff shows that the offending statement was false and defamatory, but the plaintiff will have to further prove that the statement was made with express malice.

(1) Communications made-

i) in the course of legal, social or moral duty

ii) for self protection

iii) for protection of common interest

iv) for public good

and

(2) reports of Parliamentary and judicial proceedings and proceedings at public meetings etc.

are instances of qualified privilege if the communications or reports are made without malice (Vide Law of Torts (supra) - pages 294 to 304).

10. Paragraphs 8 in Narayanan's case (supra) 1982 KLT 378 will indicate that actual loss of reputation need not be proved. An accused person, as in this case, who takes shelter under Exception 9 to Section 499 I.P.C. will have to show that the imputation was made in good faith. In order to claim good faith the accused must show that before making the imputation he had made inquiries with due care and attention and that he was satisfied about the truth of the imputation made by him. (Vide Sukra Mahto v. Basucleo Kumar : AIR 1971 SC 1567).

11. : AIR 1940 Mad. 677 relied on by the learned Counsel for the 1st respondent cannot obviously apply to the facts of the present case. In the Madras case the private complaint though styled as one alleging defamation was really one involving the commission of an offence punishable under Section 193 I.P.C. If so, by virtue of Section 195(1)(b)(ii) Cr.P.C. the Court alone could have figured as the complainant.

12. The result of the foregoing discussion is that none of the reasons mentioned by the Court below constitutes a valid ground for dismissal of the complaint. The learned Magistrate who had taken cognizance of the offence should have issued process to the accused under Section 204 Cr.P.C. The impugned order dismissing the complaint is set aside. C.M.P. No. 2480/2009 will stand restored to file and shall be assigned an appropriate number and shall be dealt with in accordance with law. This Court shall not be taken as having made any observation on the merits of the case.

In the result, this Crl.R.P. is allowed as above.

Dated, this the 22nd day of March, 2010.

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