

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 8885 of 2017**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE J.B.PARDIWALA**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No
	Circulate this judgement in the subordinate judiciary.	

ROHINI SINGH, D/O LATE MR. M.B.SINGH & 6....Applicant(s)

Versus

STATE OF GUJARAT & 1....Respondent(s)

Appearance:

MR. MIHIR JOSHI, LD. SR. COUNSEL with MR S M VATSA, ADVOCATE for the Applicant(s) No. 1 - 7

MR. S.V. RAJU, LD. SR. COUNSEL with MR SIDDHARTH H DAVE, ADVOCATE for the Respondent(s) No. 2

MR. MITESH AMIN, LD. PUBLIC PROSECUTOR Assisted by Mr. DHARMESH DEVNANI, APP for the Respondent(s) No. 1

**CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA**

Date : 08 /01/2018

**CAV JUDGMENT**

1. A person is identified by his name. His name may have no value to society but would be precious to the person concerned. A good name is better than great riches. Shakespeare's Othello, Act III, Scene 3, 167:

*"Good name in man and woman, dear my lord, Is the immediate jewel of their souls; Who steals my purse, steals trash; 'tis something, nothing; 'T was mine, 'tis his, and has been salve to thousands, But he that finches from me my good name, Robs me of that which not enriches him, And makes me poor indeed."*

2. The Laws of defamation aims at protecting the name and goodwill of a person in the society.

3. By this writ application under Article 226 of the Constitution of India, the writ applicants-original accused persons, have prayed for the following reliefs;

*"(I) To admit and allow this application:-*

*(II) To quash and set aside :-*

*(a) Complaint dated 09.10.2017 filed by complainant, namely, Jay Amitbhai Shah in the Hon'ble Court of Ld. Additional Chief Metropolitan (Court No-13), CMM Court Complex, Gheekanta, Ahmedabad.*

*(b) Order dated 24.10.2017 below Exh.1 in Criminal Inquiry No.4918 of 2017 passed by the Hon'ble Court of Ld. Additional Chief Metropolitan (Court No.13), CMM Court Complex, Gheekanta, Ahmedabad of taking*

*cognizance of the impugned complaint for offences under Section 500 read with Section 114 of the I.P.C.*

INTERIM-PRAYER

*III) During the pendency, further consideration and final disposal of the present Application, be pleased to stay the further proceedings in C.C. No.65552 of 2017, pending before the Hon'ble Court of Ld. Additional Chief Metropolitan (Court No.-13), CMM Court Complex, Gheekanta, Ahmedabad.*

*IV) Be pleased to pass such other order as deemed fit in the interest of justice."*

4. The facts giving rise to this writ application may be summarized as under:

4.1 The respondent No.2-original complainant lodged a private complaint in the court of the learned Metropolitan Magistrate, Court No.13 at Ahmedabad against the writ applicants herein for the offence of defamation punishable under section 500 of the IPC read with sections 34 and 109 of the IPC. In the complaint, the complainant has also alleged criminal conspiracy punishable under section 120(B) of the Indian Penal Code. The complaint reads as under;

*"1. That the complainant is a young, independent and educated entrepreneur holding a degree of Bachelor of Technology (B. Tech) from the reputed Nirma University at Gujarat. The complainant enjoys excellent reputation in society in general and the business community in particular, being a self-made and honest businessman. The complainant is also actively involved in several social and cultural activities. The complainant is also Joint Secretary of the Gujarat Cricket Association ("GCA") and a member of the Finance Committee of the Board of Control for Cricket in India ("BCCI"). The complainant is highly respected amongst his business colleagues, members of society and general public on account of the*

*business acumen, temperament and independent business ability of the complainant. The complainant also commands respect amongst the general public and cricket lovers. of India and globally on account of the other public and activities of the complainant and the complainant holds a very high reputation of being an upright and honest individual in the society.*

*2. That the present complaint pertains to the following article:*

*i) article dated 08.10.2017 titled "The Golden 'Touch of Jay Amit Shah" (hereinafter referred to as "the defamatory article"), published in "The Wire" being an online news portal (hereinafter referred to as "The Wire");*

*2.1 The complainant submits that it has further shockingly and surprisingly come to the knowledge of the complainant that the accused have willfully and fraudulently tampered with the critical evidence, the defamatory article itself and the accused have in collusion and conspiracy with each other caused the original version of the defamatory article to disappear and have caused a fabricated reworded and edited version of the defamatory article to be published in place of the original version of the defamatory article on The Wire. The complainant submits that these acts of the accused further amount to other serious criminal offences committed by the accused, having gained knowledge that the complainant was approaching the Courts of law to protect the rights of the complainant and additionally amount to interference in the judicial process itself. The complainant submits that the complainant does not know the full extent of the tampering and fabrication committed by the accused and the complainant reserves his right to initiate appropriate action against the accused for the above acts and offences committed by the accused as well as the other acts and offences committed as brought out or made known to the complainant and the same is being brought on record before this Hon'ble Court only with a view to highlight the malafides and lack of any good faith by the accused.*

*A copy of the original version of the defamatory article is annexed with the present complaint and it may be treated as part and parcel of the present complaint. A copy of the tampered and fabricated version of the defamatory article is also annexed along with the present complaint.*

*3. That the accused No.1 is the author of the defamatory article. That the accused Nos. 2 to 4 are the Founding Editors of The Wire. That accused No.5 is the Managing Editor of The Wire as found on the "About Us" webpage of The Wire. That accused Nos. 2 to 5 are responsible for the content published on The Wire including the defamatory article. That accused No. 6 is the Public Editor of The Wire as found on the "Contact Us" webpage of The Wire and is responsible for proper journalism ethics at The Wire. That the accused No. 7 is the owner and publisher of The Wire. That the "About Us" webpage of The Wire contains details of various Editors and Consultants who are involved with The Wire; however, the complainant has included those individuals as accused who have an ostensible close nexus to the defamatory article. That the complainant does not have the complete address and details of each of the accused and the complainant craves leave to amend the present complaint and provide further details if so needed.*

*31 That it is also the specific case of the complainant that the defamatory article is a well-thought out, well-planned and well-executed conspiracy against the complainant and other dignitaries mentioned in the defamatory article and the complainant craves leave to produce further details on record regarding the involvement of other accused in the conspiracy and common intention as and when made known to the complainant.*

*4. That the complainant is filing this complaint against the accused for the offences of defamation and their acts of abetment and in furtherance of a common intention to defame the complainant and to tarnish the reputation of the complainant. That the accused have, by words intended to be read, made and published imputations concerning the complainant, intending to harm, and/or knowing and/or having reason to believe that such*

*imputations can harm, the reputation of the complainant and the words have in fact harmed the reputation of the complainant. That the defamatory article is scandalous, frivolous, misleading, derogatory, libelous and consists of several defamatory statements against the complainant. That the defamatory article is a character assassination of the complainant without any verification, authenticity and/or even reasonable due diligence and the palpably false and malafide defamatory article has been published in The Wire so as to be visible to millions of people and affect the reputation of the complainant at large.*

*5. That the accused purposely and malafidely addressed a questionnaire ("said questionnaire") to the complainant at around 1 am on Friday, the 6<sup>th</sup> of October 2017 and practically no time was give to the complainant and he was asked to respond by 6 pm on the same day and it was further stated that if the complainant did not respond within this unreasonably short period of time, the accused would write that the complainant did not respond. That such unreasonableness, bordering on a threat, clearly highlights the malafides of the accused and the lack of good faith on the part of the accused in seeking to execute their predetermined conspiracy of defaming the complainant. That the email with the said questionnaire was sent from an unknown email address and was addressed with a generic subject line "Questions" leading to a strong possibility of the email actually getting delivered to the Spam folder and/or being missed due to the generic subject line. That the complainant was traveling at the relevant point of time; however, fortuitously, the complainant was able to go through the email in haste, brief his lawyer regarding the same and despite being fully aware, based on the tenor of the email, that the accused had intended to defame the complainant and that the said questionnaire was an empty formality and that the accused would ignore the clarifications and responses, if any, to the said questionnaire and would publish the defamatory statements irrespective, the complainant bonafidely sent across a detailed factual response ("said response") to the accused by around 2 am on Saturday, the 7<sup>th</sup> of October 2017 clarifying and correcting the incorrect, malafide and defamatory statements cobbled together by the accused in the form of the said questionnaire.*

*That despite knowing the true and correct set of facts, as pointed out succinctly and clearly by the complainant, the accused willfully and malafidely ignored the same and published the defamatory article showing the complainant in a negative light, keeping in line with their well-thought out conspiracy to defame the complainant. That the contents of the defamatory article is hearsay/rumours and the entire fallacious and malafide "so-called" reasoning is based on rudimentary errors and the same was very much within the knowledge of the accused prior to authoring and publishing the defamatory articles. That the denigration is made just to criticize the complainant and it is opprobrium and is only to smear the reputation of the complainant. A copy of the email with the questionnaire dated 06.10.2017 and a copy of the email with the reply to the questionnaire dated 07.10.2017 are annexed along with the present complaint.*

*6. That in the light of the above, not only is the defamatory article untrue but it is per-se defamatory on a bare perusal of the defamatory article itself. That however, more importantly, the defamatory article is further calculatedly designed with a misleading and defamatory headline and title designed to defame the complainant even without a detailed perusal of the defamatory article and/or even without clicking on the link and reading the defamatory article in its entirety. That a bare perusal of the title of the defamatory article would highlight that the sole purpose of the same was to tarnish the reputation of the Complainant.*

*7. That the malafides of the accused as well as the fact that the accused have not acted in good faith and are clear from the following facts:*

*I) The response to the said questionnaire sought from the complainant was a sham which is evident from (1) unreasonable time given to respond and (2) not conducting further inquiry based on the said response which was in the form of a detailed reply and clarification given by the complainant showing that the allegations levelled in the said questionnaire are baseless.*

*II) Though allegations are made against Mr. Jitendra Shah in the defamatory article, no questionnaire was sent to*

*Mr. Jitendra Shah and no response was invited from him.*

*iii) Though the profit / loss for the financial year ("FY") 2012-13, FY 2013-14 and FY 2014-15 is highlighted, but deliberately the profit / loss for FY 2015-16 is not highlighted correspondingly since the accused were aware that the complainant suffered a loss in the concerned company to the tune of approximately Rs.1.5 crore and since the same would not suit the conspiracy of the accused, only the increase in turnover in FY 2015-16 is correspondingly shown to make it a spicy and selling story at the cost of the reputation of the complainant which clearly shows that intention was not to get out the truth and/or for any public good and/or in good faith but only to create a sensational story to ostensibly get higher viewership and connected benefits of the same. This is also evident from the "Key highlights" of the defamatory article which talk of turnover and do not reflect the loss incurred in FY 2015-16.*

*iv) The accused have further willfully and malafidely de-linked the net profit and gross turnover for the same financial year into two different unconnected paragraphs and have purposely sought to misrepresent direct and clear financial information in a manner best suited to further defame the complainant by suggesting that there is a sudden and unexplained jump in the turnover of the concerned company of the complainant without any explanation and thereafter highlighting a sudden and unexplained closure of business due to losses deliberately not pointing out that the loss of approximately Rs. 1.4 crores was in connection with the very turnover of Rs. 80.5 crores for the same financial year.*

*v) That the accused have in fact sought to represent that the loss of approximately Rs.1.4 crores has taken place in the financial year pertaining to October 2016 which is a deliberate false statement.*

*vi) That the accused have deliberately and falsely mentioned that Reserves and surplus jumped to Rs. 80.2 lakh from Rs.19 lakh whereas the Reserves and surplus have reduced to minus Rs. 80.2 lakh from Rs. 19 lakh clearly highlighting the malafide mis-representation of facts to suit the story sought to be used by the accused*

*vii) That on the very first page and even before the article starts, an unconnected photograph of the*



*marriage reception of the complainant with the Hon'ble Prime Minister and Shri Amit Shah (the father of the complainant and the President of the Bharatiya Janata Party, a political party in India) is published along with the complainant in a crude and malafide attempt highlighting the pre-planned conspiracy of the accused to defame the complainant as it is evident from the reading of the article and also what is stated hereinafter.*

*Viii) The Question No. 7 of the said questionnaire reads as under;*

*That the reply to the Question no. 7 of the complainant which is admittedly served upon the accused before publication of the article in question reads as under:*

*"The LLP has not taken any funding / loan from Kalupur Commercial Co-op. Bank Ltd. Only a Non Fund based Working Capital facility in the form of Letter of Credit (LC) upto Rs. 25 crores has been sanctioned and is availed from time to time. This facility has been secured on usual banking terms which include hypothecation of the goods purchased under the LC, cash margin of 10% and collateral security of a property belonging to Mr. Jay Shah's father and another property of Kusum Finserve (Purchased on 5<sup>th</sup> April, 2014 through a duly executed purchase deed) which is duly reflected in the financial statement of April, 2014 to March, 2015.*

*In fact, the goods purchased under LC are stored at the Warehouse / port under CM (Collateral Manager) arrangement and goods are allowed to be lifted from the warehouse only on the basis of PAY & PICK, meaning thereby, upon deposit of the full amount of the goods sought to be lifted, in a Fixed Deposit. The bank issues Delivery Order after receiving full payment and then goods are released from the custody of the CM. The bank receives payments before the retirement of LC on its due date resulting in this being a non-funded and no risk facility for the bank".*

*Though the corresponding reply in the said response of the complainant is in two detailed paragraphs which clearly exhibits a completely honest banking transaction, only one paragraph is quoted in the defamatory article and the second paragraph which is material has been deliberately withheld.*

ix) That Question No. 11 of the said questionnaire reads as under;

*“11) Can you describe your LLP’s dealings with Sajjan Jindal controlled JSW?”*

*That the corresponding reply of the complainant in the said response reads as under:*

*‘It may be noted that LLP has no dealing with JSW or any company controlled by Mr. Sajjan Jindal’.*

*That this entire line of questioning and reply has been deliberately withheld and not published malafidely, since the very intention on the part of the accused was to publish only the defamatory content.*

x) That Question No. 9 of the said questionnaire reads as under;

*“9) There is another loan of Rs.10 crores and 35 lakhs taken from IREDA. The loan was taken for setting up a 2.1 MW wind energy plant in Madhya Pradesh. According to industry experts, a 2.1 MW costs a fraction of the loan sought and granted. Why was such a high loan taken for such a small project?”*

*That the corresponding reply of the complainant in the said response is as under;*

*‘The loan taken from IREDA for setting up a 2.1 MW wind energy plant is based on the equipment prices prevailing at that point of time as per industry standards (approx Rs. 14.3 crores) and duly appraised and sanctioned in the normal course of business. The outstanding loan as on 30-06-2017 is Rs. 8.52 crore and interest and repayment of loan are regular.’*

*That despite the clear response, the accused did not await the response from IREDA to confirm the same and continued with the baseless, malicious, derogatory and defamatory allegations in the article.*

xi) That it is pertinent to note that pursuant to the news

received by the accused that the complainant was going to rightfully and legally initiate action against the accused, the accused subsequently as an afterthought changed the article inter alia tried linking the full text of the said response to a link within the defamatory article clearly highlighting the malafides of the accused and the conspiracy behind non-linking of the same earlier.

xii) That the details of an alleged breaking story of an unconnected matter of an allegation of corruption against Robert Vadra is sought to be linked to the baseless, false and malicious allegations against the complainant and the bonafides of the accused are sought to be illegally established and deliberately defaming the complainant.

That above facts also clearly highlight a predetermined conspiracy hatched by the accused to defame the complainant. That the conduct of the accused shows that the accused have made and published the defamatory article with a malicious intention, mens rea and malafide object without any proof and only with a view to besmirch the reputation of the complainant. That such statements are irresponsible, reckless and scandalous made purely with a view to tarnish the name, image and reputation of the complainant in the eyes of public. That such statements are made without any basis or truth and only with malafide, mischievous and scandalous intent to increase the viewership of the accused by making such false, sensational and scandalous statements made in the article with unconnected photographs designed to damage the reputation of the complainant. That it is therefore evident that the accused have willfully and deliberately, and with a malafide intention to damage the reputation of the complainant, and tarnish the image of the complainant in the eyes of the public at large, made and published the defamatory article.

8. That the complainant craves leave to refer to, and rely upon, the defamatory article, as an integral part of the present complaint, to point out the per-se defamatory portions in the defamatory article and the defamatory nature of the defamatory article in its entirety. That the defamatory article read in its entirety makes it crystal clear that the defamatory article has been published with the sole intention of harming the reputation of the complainant and the words used are made and published

*in a deliberate and intentional manner with the knowledge that the same would defame the complainant. That the tenor of the defamatory article clearly suggests that the defamatory article has been made and published with a clear intention to defame the complainant by imputing that there has been a dramatic increase in the business of the complainant, not on account of business acumen and capabilities of the complainant including other factors but because of extraneous reasons as indicated in the defamatory article. The defamatory article is also intended to create cheap publicity which is consequential to the defamatory statements contained in the defamatory article suggesting a drastic increase in turnover and drastic increase in revenue with a view to malign and lower the reputation of the complainant. That the complainant craves leave to refer and reply upon the defamatory article which is part and parcel of the complaint to substantiate the averments in this regard."*

4.2 According to the complainant, the article published by the accused persons contains the following imputations, which could be termed as *per se* defamatory in nature. The imputations are reproduced herein below;

*"i) The title of the defamatory article "The Golden Touch of Jay Amit Shah"*

*ii) BJP president Amit Shah's son, Jay Shah, has seen a dramatic increase in some of his businesses since Narendra Modi became prime minister.*

*iii) Turnover of a company owned by Shah's son increased 16,000 times over in the year following election of PM Narendra Modi*

*iv). Revenue from company owned by Amit Shah's son jumped from just Rs 50,000 to over Rs 80,00,00,000 in a single year*

*v). Firm of Amit Shah's son, whose business is chiefly*

*stock trading, turns to windmill generation with PSU loan*

*vi. Do a story on Amit Shah's son's 'honest, legal, bonafide' businesses and 'he shall reserve right to prosecute you', his lawyer warns The Wire.*

*vii) The turnover of a company owned by Jay Amitbhai Shah, son of Bharatiya Janata Party leader Amit Shah, increased 16,000 times over in the year following the election of Narendra Modi as prime minister and the elevation of his father to the post of party president*

*viii) In 2014-15, it showed a profit of Rs 18,728 on revenues of only Rs 50,000 before jumping to a turnover of Rs 80.5 crore in 2015-16.*

*ix) The astonishing surge in Temple Enterprise's revenues came at a time when the firm received an unsecured loan of Rs 15.78 crore from a financial services firm owned by Rajesh Khandwala, the samdhi (in-law) of Parimal Nathwani, a Rajya Sabha MP and top executive of Reliance Industries.*

*x). One year later, in October 2016, however, Jay Shah's company suddenly stopped its business activities altogether, declaring, in its director's report, that Temple's net worth had "fully eroded" because of the loss it posted that year of Rs 1.4 crore and its losses over earlier years.*

*xi). On Friday, however, Shah's lawyer, Manik Dogra, sent in a response with a warning that criminal and civil defamation proceedings would be launched in the event of "any slant or imputation which alleges or suggests any impropriety on his part".*

*xii) The internal sub-heading- **"The shifting fortunes of Temple Enterprise"***

*xiii). Khandwala's daughter is married to Parimal Nathwani's son. Ahmedabad-based Nathwani heads the*

*Gujarat operations of Reliance Industries and has operated for years at the intersection of business and politics. He is an independent member of parliament from the upper house. His re-election to the Rajya Sabha in 2014 was supported by BJP legislators in Jharkhand.*

*xiv) It is not clear what Shah's lawyer meant by 'adverse market conditions', for the year the LLP was formed was also the year Khandwala's firm lent Rs 15.78 crore to Shah's company and the latter went onto book revenues of Rs 80.5 crore.*

*xv). The internal sub-heading - **"After the boom, the bust"***

*xvi) What does appear a little abnormal, however, is that the firm, whose revenues jumped from just Rs 50,000 to over Rs 80 more in a single year (FY 2015-16) stopped its business activities last year.*

*xvii). The internal sub-heading - **"From stock trading to power generation"***

*xviii). While the main business of the firm is trading in stocks, its ROC filings reveal it is involved in diversifying into a completely unrelated field: it is setting up a 2.1 megawatt windmill plant worth Rs 15 crore in Ratlam, Madhya Pradesh.*

*xix). The internal sub-heading — **"Loans from a cooperative bank, and a PSU"***

*xx). What is not clear are the parameters by which a partnership whose primary business, according to Shah's lawyer, is "trading in stocks and shares, import and export activities and distribution and marketing consultancy services" decided to apply for and get a loan sanctioned for a 2.1 MW wind energy plant despite lacking any experience in the infrastructure or electricity sector.*

xxi) *The internal sub-heading - “**From Shah's lawyer, a threat**”*

xxii) *While replying to The Wire's questions on behalf of his client, Jay Shah's lawyer warned that any story on Jay Shah's business dealings could have adverse legal consequences.*

xxiii) *In 2011, she broke the story of Robert Vadra's business dealings with DLF. “*

4.3 In para-9 of the complaint, it has been stated that the defamatory article published by the accused persons was read by the public at large, and on account of the same, the complainant has suffered a serious injury on his reputation and had to undergo severe agony in explaining the true and correct facts to his well wishers, family members, friends, business associates as well as the persons from the complainant's social and business circle and the general public all over the city of Ahmedabad, the State of Gujarat as also from India and other well wishers around the world.

4.4 The complainant has further stated in his complaint that the defamatory article does not contain fair and accurate information regarding the business of the complainant. The comments made in the defamatory articles against the complainant are full of innuendos deliberately made, which could be termed as wholly unfair and generally disgraceful. It is alleged that the defamatory article cannot be said to have been published for the public good. There is nothing to indicate any good faith on the part of the accused persons in publishing such an article.

4.5 On presentation of the complaint, the same came to be

registered as the Criminal Inquiry Case No.4918 of 2017. The Addl. Chief Metropolitan Magistrate, Court No.13, Ahmedabad recorded the verification of the complainant on oath and thought fit to pass an order of Magisterial Inquiry under section 202 of the Cr.P.C.

4.6 On conclusion of the Magisterial Inquiry, the court concerned thought fit to issue process to the accused persons for the offence punishable under sections 500 read with 114 of the Indian Penal Code. On issue of the process, the proceedings, ultimately, culminated in the Criminal Case No.65552 of 2017.

4.7 The Court, while issuing process to the writ applicants herein for the offence of defamation, observed as under;

**"Order below Exh-1**

(1) *In connection with the complaint filed by the complainant, this court had registered the complaint as a Court Inquiry as per section – 202 of the Cr.P.C. on 9/10/17 and pursuant to the same, the complainant and two witnesses of the complainant are present and documentary evidence list has been produced. Heard Senior Advocate Shri S. V. Raju and Ld. Advocate Shri P. N. Patel for the complainant.*

(2) *The main argument of the Ld. Advocate Shri S. V. Raju for the complainant is that on plain reading of the deposition of the complainant and the witnesses of the complainant on oath and looking to page no. 23 of the documentary evidences and the article on page no.35, it is apparent that the present accused have published the article which leads to the defamation of the complainant. The complainant's witness viz. Jaymin Shah contacted the complainant personally and informed him that defamation is caused and the second witness has also stated in his deposition on oath that he contacted*



*the complainant over the telephone and informed that the complainant has been defamed. Thus, on reading the article the complainant has found that he has been defamed. The persons who have published the article have done the same with a malafide intention or for any other unknown reason and attempted to defame the complainant. Therefore, as sufficient evidence is on record in the present case to issue process against the accused persons, it was prayed that process be issued. Ld. Advocate has further submitted that the exceptions to section 499 of the IPC should not be considered at the time of issuance of process and the accused may in their defence plead the exceptions, but it can be considered during the trial of the case as it is a subject matter of trial. It is also further submitted by the Ld. Advocate that the present complaint of the complainant does not fall within any of the exceptions and looking to the libelous article on page no. 23 and 35 of the documentary evidences, it is prima facie made out that this article has been published with the intention to defame the complainant and therefore, it is requested to issue process. It is further submitted by the Ld. Advocate that accused no.2 to 6 are the editors and they are also responsible and liable and, therefore, it is prayed that process be issued against them also. In support of his submission to issue process against the editors also reliance is placed on the decision of the Supreme Court in the case of Gambhirsinh R. Dokre v/s Falgunbhai Chimanbhai Patel and others reported in 2013(3) SCC, Page no. 697. It is also submitted that it can be decided after the evidence is recorded as to whether the libelous article has been published by the accused persons in good faith and for public good. Moreover, the article on page no. 23 and 35 has been published prima facie defaming the complainant and therefore, as sufficient evidence is available to issue process against the accused persons, it is requested to issue process. In support of his case, he has produced the judgment delivered in the case of Sevakarma Shobhani v/s R. K. Karanjia, Chief Editor, Weekly Blitz and others reported in 1981(3) SCC, page no. 208.*

(3) Thus, considering the entire complaint of the complainant, the documentary evidences produced with the complaint, the deposition of the complainant recorded during the inquiry under Section-202 of Cr.P.C.

and the deposition of the prosecution witnesses and as the ingredients of Section 499 of IPC are prima facie spelt out and as they have committed offence u/s 500 of IPC and as sufficient evidence to issue process against accused persons is produced in this inquiry and while considering the established principles laid down in the judgments produced by complainant as accused persons are editors and as process can be issued against them, looking to these circumstances and while reading the article of defamation published on page no.23 and 35, it appears prima facie that the accused persons have prepared and published such a writeup that can cause defamation and as accused have not sent questionnaire to other director Shri Jitendra Shah and as complainant had sent questionnaire at 01:00 hrs in the night of 06-10-2017 and demanded reply thereof by 06:00 hrs in the evening that means the complainant could not get enough time and desired article causing defamation may get published. Thus, though it was the duty of accused persons to publish the true facts, they did not give sufficient time to the complainant to respond and they have not published true facts such as loss caused to the company of Jay Amin Shah in the year 2015-16 and created complication about turnover and profit and published article which would prima facie defame the complainant and published article of page no.23 and 35 in order to defame the complainant and therefore, it can be stated that they have prima facie committed offence. Therefore, as sufficient evidence has been produced before this Court to issue process as per Section 500 and 114 of IPC against the accused persons, the following final order is passed.

### **ORDER**

- (1) The inquiry is concluded.
- (2) Order is passed to register the complaint of the complainant in the criminal case register.
- (3) Order is passed to issue summons for the offence under sections 500 read with 114 of the IPC against the accused persons and it is ordered to serve the summons by 13-11-2017.

Pronounced in the open Court today on 24<sup>th</sup> October,

2017.”

4.8 Being dissatisfied with the order passed by the Metropolitan Magistrate, Ahmedabad, referred to above, the writ applicants are here before this Court with this writ application praying for quashing of the complaint and the order of issue of process.

## **5. Submissions on behalf of the writ applicants;**

5.1 Mr. Mihir Joshi, the learned senior counsel appearing for the writ applicants vehemently submitted that the Metropolitan Magistrate committed a serious error in taking cognizance upon the complaint and the issue of process to the writ applicants for the offence of defamation punishable under section 500 of the IPC.

5.2 According to Mr. Joshi, even if the entire case put up by the complainant is believed or accepted to be true, none of the ingredients to constitute the offence of defamation punishable under section 500 of the IPC are spelt out. Mr. Joshi submitted that the case is fully covered by explanation-4 to section 499 of the IPC. He submitted that the article in question has, in no manner, lowered the moral character of the complainant. He submitted that the entire article in question is based on the public record. The Metropolitan Magistrate, before taking cognizance and ordering issue of the process to the writ applicants, should have called for the record from the office of the Registrar of the Companies and only after proper examination of the same, ought to have taken an appropriate decision. The principal argument of Mr. Joshi, the learned

senior counsel is that the alleged imputations in the article in question cannot be termed as per se defamatory. The learned senior counsel submitted that assuming for the moment without admitting that the statements in the article in question are defamatory in nature, the same being nothing but the truth, the publication of the same in good faith and in public interest would not constitute the offence of defamation.

5.3 It was further submitted that a public person or a person holding a public office should not be so “thin skinned” or should be rather “thick skinned” so as to complain about the allegations or the averments or the write ups which may take place against him in the media unless they are grossly defamatory per se. The argument proceeded on the footing that the publications may be inaccurate, not fully or substantially true or may be distorted or may be offending the sensibilities of the person against whom such allegations are made or may be to his annoyance but that by itself cannot be a ground to muzzle them altogether.

5.4 Mr. Joshi, the learned senior counsel submitted that the exceptions to section 499 of the IPC can be tested or looked into by the court even at the initial stage. In such circumstances, referred to above, the learned senior counsel submitted that there being merit in this writ application, the same may be allowed and the complaint along with the order of issue of process be quashed.

5.5 Mr. Joshi, the learned senior counsel appearing for the writ applicants, in support of his submissions, has placed reliance on the following decisions;

Sr.No.	Citations	Relevant issue and the paragraph No. relief upon
1	<i>Rajendra Kumar Sitaram Pande v. Uttam</i> reported in (1999) 3 SCC 134	Para-7 Exceptions can be tested even at the initial stage when the exceptions are apparent from the record.
2	<i>Also Shobhana Bharatiya v. NCT</i> , reported in (2007) 144 DLT 519	<p>Paras 27 to 31- When an article reports facts which are matters of record and when there are no defamatory imputations and it merely contains statement of true facts and is published in public interest.</p> <p>Paras 49 &amp; 50- Trial is required when it is not asserted in the news article as to the source/basis of the defamatory article and when it is merely asserted in the article that it is based on true-facts.</p> <p>Paras 56 to 65= impermissibility of prosecution of persons other than the Printer, Publisher and Editor for a defamatory article.</p>
3	<i>Khushboo v. Kanniammal</i> , reported in (2010) 5 SCC 600	<p>Para – 33 Even before examining whether the appellant can claim any of the statutory defences in this regard, the operative question is whether the allegations in the impugned complaints support a prima facie case of defamation in the first place.</p> <p>Paras 43 to 44- Criminal law machinery cannot be set into motion for expressing unpopular opinions.</p>
4	<i>N.J. Nanporia vs. Brojendra Bhowmick</i> , Criminal Revision No.238 of 1971 and 327 of 1971, decided on 23.07.1973 by the Hon'ble Calcutta High Court (D.B.)	Para 6- absence of 'express' malice and guarded, source based quoting or publication was held exempt from a prosecution under S. 500 IPC.
5	<i>Rajesh Rangarajan vs. Crop Care Federation</i> , reported in (2010) 15 SCC 163	Para 2-When the focus of the publication is a matter of public interest or public caution- the intent to defame cannot be inferred.
6	<i>Nishika Properties vs. State of WP</i> , reported in (2013) 3 Cal. Cri. LR 691	Para 46- As long as the record indicates that there was valid justification for this, there would

		<p>be a total absence of the ingredient of malice and in that event, there can be no question of alleging defamation.</p> <p>Para 47- Any sort of allegation with a touch of imputation against any person per se cannot be categorized as "defamation"</p>
7	<p><i>SP Bobati &amp; Others vs. Mahadev Virupaxappa Latti</i>, reported in 2005 Cri. L.J. 692</p>	<p>Para 14- <u>So, it is not defamatory to write and publish about a trade's man that he has ceased to carry on his business, or that his business has been, or is about to be acquired by another firm. Such a statement though likely to injure him in his business, does not reflect either on his private or in his business character or reputation</u></p> <p>Para 15 Thus, to stay that the words are defamatory in respect of his profession or calling, such words must call attention to some quality in the man that would be detrimental or the absence of some quality that would be essential to the successful carrying out of the business or calling in which he is engaged.</p>
8	<p><i>R. Rajagopal @ R.R. Gopal And Others vs. State of Tamilnadu And Others</i>, reported in (1994) 6 SCC 632.</p>	<p>Paras-11 &amp; 16- On Truth-11 and 16</p> <p>Paras 24 &amp; 29- On matters of public record.</p> <p>Paras 19 &amp; 21- On public figures.</p>
9	<p><i>State of Maharashtra v. R.B. Chowdhari</i>, reported in AIR 1968 SC 110</p>	<p>Para 6- The presumption under section 7 of the Press and Registration Act, 1867 cannot be drawn against other persons who had not declared themselves as editors of the newspaper and hence it is fair to leave them out as they had no concern with the publishing of the article in question.</p>
10	<p><i>Vivek Goenka vs. State (NCT of Delhi)</i>, reported in (2009) 109 DRJ 309</p>	<p>Para 14- following the ratio of <i>Shobhana Bharatiya v. NCT</i>, reported in (2007) 144 DLT 519 (paras-51 to 58), quashed the proceedings against persons other than the Printer, Publisher and Editor for a defamatory article.</p>

11	<i>Shobhana Bhartia v. State of Jharkhand, decided on 29.02.2012 by the Hon'ble Jharkhand High Court in Cri. Misc. Application Petition No.1650 of 2011</i>	<i>Ruling out the principle of initiation of prosecution on the basis of vicarious liability.</i>
12	<i>Sardar Nihal Singh vs. Arjan Das, reported in (1983) Cri. L.J. 777.</i>	<i>Para 10 to 13- Non applicability of presumption u/s.7 of the Press and Registration Act, 1867</i>
13	<i>Sardar Bhagat Singh Akali v. Lachman Singh, reported in AIR 1968 SC 269</i>	<i>Paras 5 &amp; 7- The owner's liability will be attracted provided it can be shown that he was responsible for the publication with the necessary intent, knowledge or reasonable belief in the matter.</i>
14	<i>Narayan Singh vs. Rajmal, reported in AIR 1961 MP 12</i>	<i>Para 7- Editor being on leave on the day of the publication is not liable for the offence of defamation.</i>
15	<i>Indian Express Newspapers vs. Union of India, reported in (1985) 1 SCC 641</i>	<i>Para 28- The authors of the articles which are published in newspapers have to be critical of the Government in order to expose its weaknesses. Such articles tend to become an irritant or even a threat to power.....it is therefore, the primary duty of all the national courts to uphold the said freedom and invalidate all laws which interfere with it, contrary to the constitutional mandate.</i>
16	<i>W. Hay vs. Aswini Kumar Samanta, AIR 1958 Cal 269</i>	<i>Para -10 Defamation per se &amp; innuendo</i>
17	<i>Naveen Jindal vs. Zee Media Corporation Ltd., (2014) HCC (Del) 172</i>	<i>Para 19- Public Figures.</i>

6. On the other hand, this writ application has been vehemently opposed by Mr. S.V. Raju, the learned senior counsel appearing for the respondent No.2-complainant as well as by Mr. Mitesh Amin, the learned Public Prosecutor appearing for the respondent No.1-State.

**7. Submissions on behalf of the respondent No.2-**

**original complainant;**

7.1 Mr. Raju, the learned senior counsel vehemently submitted that no error, not to speak of any error of law could be said to have been committed by the Metropolitan Magistrate concerned in taking cognizance upon the complaint and issue of process to the writ applicants for the offence of defamation punishable under section 500 of the IPC.

7.2 Mr. Raju submitted that the court concerned, after a magisterial inquiry under section 202 of the Cr.P.C., has recorded a prima facie finding that there is a sufficient ground to proceed against the accused persons. Once there is a finding of such a nature, the High Court should be very slow and circumspect in disturbing the order of issue of process to the accused persons. Mr. Raju submitted that the article in question does contain imputations which could be termed as defamatory in nature, if not per se defamatory. It was submitted that it is not necessary that to constitute an offence of defamation, the imputations should be per se defamatory. Relying on a decision of the Supreme Court in the case of **John Thomas vs. Dr. K. Jagadeesan**, (2001) 6 SCC 30, Mr. Raju submitted that the only effect of an imputation being per se defamatory is that it would relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the people at large. However, even if the imputation is not per se defamatory, that by itself, would not be sufficient to absolve the publisher, for, the complaining person can establish on evidence that the publication has, in fact, amounted to defamation even in spite of the apparent deficiency. The argument of the learned



senior counsel appearing for the complainant proceeds on the footing that the complaint cannot be quashed at this stage on the ground that the imputations in the article in question were not per se defamatory.

7.3 Mr. Raju, the learned senior counsel appearing for the complainant placed reliance on the averments made in the affidavit filed by the respondent No.2-original complainant for the purpose of opposing the present writ application. The averments made in the affidavit filed by the respondent No.2 reads as under;

*“3. At the outset, I submit that the present petition is required to be rejected in limine on the ground of suppression of material facts. In this connection it is inter alia submitted that the petitioners have deliberately produced the subsequent tampered article at Annexure-C to this petition and projected it to be the original article with a view to mislead this Hon’ble Court. I submit that this has been purposely and deliberately done so as to make a false statement in para 4(1) of the petition wherein it has been stated as follows:*

*“4(1). ..... The said Article also incorporated large portions of the e-mail reply sent by the lawyer of the Respondent –complainant independently, by a weblink in the Article itself, the entire reply of the Respondent’s lawyer was published in the entirety....”.*

*This statement is false to the knowledge of the deponent because the original untampered article which was published did not contain any such link. The article was subsequently amended after coming to know of the fact that the present deponent is going to file proceedings for defamation. In this connection, the deponent craves leave to refer to and rely upon para 2.1 of the complaint, which reads as follows:*

*"2.1 The complainant submits that it has further shockingly and surprisingly come to the knowledge of the complainant that the accused have willfully and fraudulently tampered with the critical evidence, the defamatory article itself and the accused have in collusion and conspiracy with each other caused the original version of the defamatory article to disappear and have caused a fabricated reworded and edited version of the defamatory article to be published in place of the original version of the defamatory article on The Wire. The complainant submits that these acts of the accused further amount to other serious criminal offences committed by the accused, having gained knowledge that the complainant was approaching the Courts of law to protect the rights of the complainant, and additionally amount to interference in the judicial process itself. The complainant submits that the complainant does not know the full extent of the tampering and fabrication committed by the accused and the complainant reserves his right to initiate appropriate action against the accused for the above acts and offences committed by the accused as well as the other acts and offences committed as brought out or made known to the complainant and the same is being brought on record before this Hon'ble Court only with a view to highlight the malafides and lack of any good faith by the accused.*

*A copy of the original version of the defamatory article is annexed with the present complaint and it may be treated as part and parcel of the present complaint. A copy of the tampered and fabricated version of the defamatory article is also annexed along with the present complaint."*

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*I am also annexing herewith copy of the original version of the defamatory article which was annexed with my complaint present before the learned Magistrate and it deliberately has not been produced by the deponent. I, therefore, submit that on this ground alone the present petition is required to be rejected in limine.*

*4. I further submit that if para 7 of my complaint is perused, in ground No.7(vi), I have categorically stated as follows*

*“7(vi) That the accused have deliberately and falsely mentioned that Reserves and surplus jumped to Rs.80.2 lakh from Rs.19 lakh whereas the reserves and surplus have reduced to minus Rs.80.2 lakh from Rs.19 lakh clearly highlighting the malafide mis-representation of facts to suit the story sought to be used by the accused.”*

*I submit that in the original article, at page 3, the accused have made a statement which reads as follows.*

*“Reserves and surplus jumped to Rs.80.2 lakh from Rs. 19 lakh the previous year”.*

*Whereas in the amended tampered article, they have given a totally different version which reads follows:*

*“Reserves and surplus tuned negative to Rs.80.2 lakh from Rs. 19 lakh the previous year”.*

*Thus, in two articles published by the accused themselves, there are different and diametrically opposite versions, which are mutually exclusive. This clearly defeats the bold stand of the accused of the accused which they are trying to raise before this Hon'ble Court of truth. It is, therefore, submitted that to suppress this fact that articles contain falsehoods, the accused have deliberately suppressed and not annexed and produced the original article which would show two contrary and inconsistent versions. Therefore also, I submit that the present petition is required to be rejected in limine.*

*6. I submit without prejudice to the contention that the article published does not contain truth and even if it is assumed without admitting that the imputations are true, it is a sufficient defence for a charge of defamation and that even in such cases the first exception contained in Section 499 of the Indian Penal Code requires an additional requirement of public good which is missing in the present case. In other words, both truth and public good are missing and in any case it is a matter of defence an cannot be considered at the stage of petition under Section 482 CrPC.*

7. *I submit that the article is prima facie defamatory in nature. It has been published with ulterior motives and malafides as demonstrated by me in my complaint more particularly in para 7 of my complaint. It has also lowered my credit in the estimation of others and therefore also, present petition is required to be rejected in limine.*

8. *I state that if the entire article is seen as a whole, it is crystal clear that the article is prima facie defamatory and aspersions and imputation are cast on me suggesting my rise in business and that it is not attributed to my efforts but to other extraneous factors which has in fact lowered my reputation in the estimation of others.*

9. *I submit that assuming without admitting that the article in question is not defamatory per se then also it cannot be a ground for quashing since my credit has been lowered in the estimation of others.*

10. *I state that the petitioners have deliberately not produced two articles relied upon by me at the time of my examination in the Court Inquiry under Section 202 of the CrPC wherein I have produced documents showing the status of all the accused. I state that though those articles show number of person involved with The Wire – Web based news portal, I have only made those persons who controls the selection of the matter i.e. to be published in a newspaper. All the accused other than accused No. 1 – Ms. Rohini Singh, who is author of the article and accused No. 7 – who is the owner, are Editors. Therefore, there is a prima facie presumption that as Editors they are involved in the selection and publishing of the article. Whatever the petitioners have stated in their petition of not being involved is a matter of defence which can be considered only at the stage of trial. Therefore also, the present petition is required to be rejected in limine.”*

7.4 Mr. Raju, in support of his submissions, placed reliance on the following decisions;

(I) **Gambhirsinh R. Dekare vs. Falgunbhai Chimanbhai Patel & Anr.**, (2013) 3 SCC 697;

(ii) **Sevakram Sobhani vs. R.K. Karanjia, Chief Editor, Weekly Blitz & Ors.**, (1981) 3 SCC 208;

(iii) **Subramanian Swamy vs. Union of India, Ministry of Law & Ors.**, (2016) 7 SCC 221;

8. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the complaint and the order of issue of process should be quashed.

**9. Scope of inquiry under section 202 of the Cr.P.C.;**

9.1 Section 202 of the Cr.P.C. reads as under;

*“202. Postponement of issue of process.*

*(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,--*

*(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or*

*(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.*

*(2) In an inquiry under sub- section (1), the Magistrate*

*may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.*

*(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in-charge of a police station except the power to arrest without warrant."*

9.2 An inquiry under section 202 of the Code is not in the nature of a trial for there can be in law only one trial in respect of any offence and that a trial can commence only after the process is issued to the accused. Such proceedings are not strictly the proceedings between the complainant and the accused. A person against whom a complaint is filed does not become an accused until it is decided to issue process against him. Even if he participates in the proceedings under section 202 of the Code, he does so, not as an accused, but as a member of the public. The object of the inquiry under section 202 of the Code is the ascertainment of the fact whether the complaint has any valid foundation calling for the issue of process to the person complained against or whether it is a baseless one on which no action need be taken. The section does not require any adjudication to be made about the guilt or otherwise of the person against whom the complaint is preferred. Such a person cannot even be legally called to participate in the proceedings under section 202 of the Code. The nature of these proceedings is fully discussed by the Supreme Court in two of its cases, i.e., (i) **Vadilal Panchal vs. Dattatraya Dulaji Chadigaonker**, AIR 1960 SC 1113 and (ii) **Chandra Deo Singh vs. Prakash Chandra Bose**, AIR 1963

SC 1430, in which, section 202 of the former Code of Criminal Procedure arose for consideration. The present section 202, being a substantial reproduction of the former section 202, the observations made by the Supreme Court in the two decisions, referred to above, on the nature of the proceedings under that section would have to be accepted as governing the proceedings under section 202 of the present Code.

9.3 Even so, two of the modifications made in the present section 202 (1) deserve attention. In [section 202\(1\)](#) of the old Code where a magistrate decided to postpone the issue of process for compelling the attendance of the person complained against he had to record reasons in writing in support of such decision. That obligation is no longer there under the present section. Secondly, the purpose of holding an inquiry under [section 202\(1\)](#) of the old code was stated to be 'ascertaining the truth or falsehood of the complaint'. Under the new section the inquiry contemplated is for the purpose of deciding whether or not there is sufficient ground for proceeding. The amendment now made brings out clearly the purpose of the inquiry under [section 202](#) even though the words used in the former section had also been understood by the courts in the same way in which the present section is worded. Thus the section has been brought in accord with the language of [section 203](#) which empowers the magistrate to dismiss a complaint if he is of the opinion 'that there is no sufficient ground for proceeding'. The object of the latter change in [section 202](#) is to be found in the 41st Report of the Law Commission which opined thus:

"16.9. [Section 202](#) says in terms that the further

*inquiry or investigation is intended for the purpose of ascertaining the truth or falsehood of the complaint". We consider this inappropriate, as the truth or falsehood of the complaint cannot be determined at that stage; nor is it possible for a magistrate to say that the complaint before him is true when he decides to summon the accused. The real purpose is to ascertain whether grounds exist for 'proceeding further', which expression is in fact used in [section 203](#)'. We think therefore that the language of [section 202](#) should correspond to the language of [section 203](#), and we have accordingly made suitable verbal alterations."*

*(see S.S. Khanna vs. Chief Secretary, Patna, AIR 1983 SC 595)*

9.4 The scope of the inquiry under section 202 of the Cr.P.C. is extremely limited-limited only to the ascertainment whether or not there is sufficient ground for proceeding (i) on the materials placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. As noted above, it is well settled that in the proceedings under section 202, the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not.

9.5 The Supreme Court, in the case of **Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors.**, AIR 1976 SC 1947, has very succinctly explained the true scope of an inquiry under section 202 of the Cr.P.C. I may quote the relevant observations made by the Supreme Court.



*"It is well settled by a long catena of decisions of this Court that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one.*

*In Chandra Deo Singh v. Prokash Chandra Bose(1) this Court had after fully considering the matter observed as follows:*

*"The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under s. 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-s. (1) of s. 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant (1) (1964)1 S. C. R. 639, 648 127 and the statements made before him by persons examined at the instance of the complainant."*

*Indicating the scope, ambit of s. 202 of the Code of Criminal Procedure this Court in Vadilal Panchal v. Dattatrya Dulaji Ghadigaonker and Another(1) observed as follows:*

*"Section 202 says that the Magistrate may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint; in other words,*

*the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify. the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can` be legally called upon to answer; the accusation made against him only when a process has issued and he is put on trial."*

*It would thus be clear from the two decisions of this Court that the scope of the inquiry under [s. 202](#) of the Code of Criminal Procedure is extremely limited-limited only to the ascertainment of the truth or falsehood, of the allegations made in the complaint-(1) on the materials placed by the complaint before the Court. (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that, the accused may have. In fact it is well settled that in proceedings under [s. 202](#) the accused has got absolutely no locus us standi and is not entitled to be heard on the question whether the process should be issued against him or not.*

*Mr. Bhandare laid great stress on the words "the truth or falsehood of the complaint" and contended that in determining whether the complaint is false the Court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant ill support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the*

*matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercise his discretion it is not for the High Court, or even this Court, to substitute its own discretion for. that of the Magistrate or to examine the case on merits with view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under [s. 202](#) of the Code of Criminal Procedure which culminates into an order under [s. 2042 of the Code](#). Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:*

*(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does net disclose the essential ingredients of an offence which is alleged against the accused;*

*(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;*

*(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and .*

*(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.*

*The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.*

*Indeed if the documents or the evidence produced by the accused is allowed to be taken by the Magistrate then an inquiry under [s. 202](#) would have to be converted into a full dress trial defeating the very object for which this section has been engrafted he High Court in quashing the*

*order of the Magistrate completely failed. to consider the limited scope of an inquiry under s. 202. Having gone through the order of the Magistrate we do not find any error or law committed by him. The Magistrate has exercised his discretion and has given cogent reasons for his conclusion. Whether the reasons were, good or bad, sufficient or insufficient, is not a matter which could have been examined by the High Court in revision. We are constrained to observe that the High Court went out of its way to write a laboured judgment highlighting certain aspect of the case of the accused as appearing from the documents filed by them which they were not entitled to file and which were not entitled in law to be considered.”*

9.6 Thus, the Supreme Court in the above referred decision made it very clear that if the Magistrate has exercised his discretion and has given cogent reasons for his conclusion, then the High Court should not go into the question whether the reasons are good or bad, sufficient or insufficient.

9.7 At the same time, it is equally true that allowing the criminal proceedings to continue, when the pre-summoning of the evidence does not make out any offence, would tantamount to the abuse of the process of the Court. Indisputably, the judicial process should not be an instrument of oppression or needless harassment. The court should be circumspect and judicious in exercising its discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of a private complainant as vendetta to harass the persons needlessly.

9.8 In the case of **P.S. Meherhomji vs. K.T. Vijay Kumar & Ors.**, (2015) 1 SCC 788, the Supreme Court observed in para-15 as under;

*“So far as the complaint alleging the offence under section 499 IPC is concerned, if on consideration of the allegations the complaint is supported by a statement of the complainant on oath and the necessary ingredients of the offence are disclosed, the High Court should not normally interfere with the order taking cognizance.”*

9.9 In ***Dhanalakshmi vs. R. Prasanna Kumar***, (1990) Supp SCC 686, a three judge Bench of the Supreme Court held as under;

*‘Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide, frivolous or vexatious. in that event there would be no justification for interference by the High Court.’*

9.10 In *Chand Dhawan vs. Jawahar Lal*, (1992) 3 SCC 317, the Supreme Court, while considering the power of the High Court under section 482 Cr.P.C. and quashing the criminal proceedings, observed that when the High Court is called upon to exercise its jurisdiction to quash the proceedings at the stage of the Magistrate taking cognizance of the offence, the

High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of court or not.

9.11 In *Radhey Shyam Khemka vs. State of Bihar*, (1993) 3 SCC 54, the Supreme Court, again, held:

*“The complaint made by the Deputy Secretary to the Government of India to the CBI mentions different circumstances to show that the appellants did not intend to carry on any business. In spite of the rejection of the application by the Stock Exchange, Calcutta, they retained the share moneys of the applicants with dishonest intention. Those allegations were investigated by the CBI and ultimately chargesheet has been submitted. On basis of that chargesheet cognizance has been taken. In such a situation the quashing of the prosecution pending against the appellants only on the ground that it was open to the applicants for shares to take recourse to the provisions of the [Companies Act](#), cannot be accepted. It is a futile attempt on the part of the appellants, to close the chapter before it has unfolded itself. It will be for the trial court to examine whether on the materials produced on behalf of the prosecution it is established that the appellants had issued the prospectus inviting applications in respect of shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or misappropriated the same. That exercise cannot be performed either by the High Court or by this Court. If accepting the allegations made and charges levelled on their face value, the Court had come to conclusion that no offence under [the Penal Code](#) was disclosed the matter would have been different. this Court has repeatedly pointed out that the High Court should not while exercising power under [Section 482](#) of the Code usurp the jurisdiction, of the trial court. The power under [Section 482](#) of the Code has been vested in the High*

*Court to quash a prosecution which amounts to abuse of the process of the court. But that power cannot be exercised by the High Court to hold a parallel trial, only on basis of the statements and documents collected during investigation or enquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed. "*

9.12 In **Mushtaq Ahmad vs. Mohd. Habibur Rehman Faiz**, (1996) 7 SCC 440, the Supreme Court observed;

*'Having perused the impugned judgment in the light of the complaint and its accompaniments we are constrained to say, that the High Court exceeded its jurisdiction under [Section 482](#) Cr.P.C. in passing the impugned judgment and order. It is rather unfortunate that though the High Court referred to the decision in *State of Haryana Vs. Bhajan Lal* (1992 Supp. (1) SCC 335) wherein this Court has enumerated by way of illustration the categories of cases in which power to quash complaint or FIR can be exercised, it did not keep in mind - much less adhered to - the following note of caution given therein :-*

*"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."*

9.13 Having considered the scope of the inquiry under section 202 of the Cr.P.C. and the powers of this Court under Article 226 of the Constitution of India or section 482 of the Cr.P.C to quash the proceedings, I proceed to consider whether the complaint, prima facie, discloses commission of the offence

of defamation punishable under section 500 of the IPC.

10. **Offence of defamation;**

10.1 Section 499 of the Indian Penal Code reads as under;

*“499. Defamation.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.*

*Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.*

*Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.*

*Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.*

*Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.*

*Illustrations*

*(a) A says—“Z is an honest man; he never stole B's watch”; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within*



*one of the exceptions.*

*(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation unless it fall within one of the exceptions.*

*(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.*

*First Exception.—Imputation of truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.*

*Second Exception.—Public conduct of public servants.—It is not defamation to express in a good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.*

*Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further. Illustration It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending a such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharges of the duties of which the public is interested.*

*Fourth Exception.—Publication of reports of proceedings of Courts.—It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.*

*Explanation.—A Justice of the Peace or other officer*

*holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.*

*Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.*

#### *Illustrations*

*(a) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest". A is within this exception if he says this is in good faith, in as much as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.*

*(b) But if A says—"I do not believe what Z asserted at that trial because I know him to be a man without veracity"; A is not within this exception, in as much as the opinion which he express of Z's character, is an opinion not founded on Z's conduct as a witness.*

*Sixth Exception.—Merits of public performance.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.*

*Explanation.—A performance may be substituted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.*

#### *Illustrations*

*(a) A person who publishes a book, submits that book to the judgment of the public.*

*(b) A person who makes a speech in public, submits that speech to the judgment of the public.*

*(c) An actor or singer who appears on a public stage, submits his acting or signing in the judgment of the public.*

*(d) A says of a book published by Z—"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind". A is within the exception, if he says this in good faith, in as much as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.*

*(e) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine". A is not within this exception, in as much as the opinion which he expresses of Z's character is an opinion not founded on Z's book.*

*Seventh Exception.—Censure passed in good faith by person having lawful authority over another.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.*

#### Illustration

*A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a school-master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.*

*Eighth Exception.—Accusation preferred in good faith to authorised person.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect*

to the subject-matter of accusation.

### Illustration

*If A in good faith accuse Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, and child, to Z's father—A is within this exception.*

*Ninth Exception.—Imputation made in good faith by person for protection of his or other's interests.—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 of any other person, or for the public good.*

### Illustrations

*(a) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty". A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.*

*(b) A, a Magistrate, in making a report of his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.*

*Tenth Exception.—Caution intended for good of person to whom conveyed or for public good.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good."*

## 11. Defamation-introduction, meaning and definition:

11(a.i). The word defamation is derived from the Latin term 'Diffamare'. Semantics or Etymology of the Latin word

'Diffamare' provides that it means 'Spreading evil report about someone'. Thus, defamation is nothing but spreading evil and causing damage to reputation of another. A man's reputation is the enjoyment of good opinion in the minds of other right thinking members of the society generally. Self esteem is different from reputation, to say self esteem is not defamation. Jurist Blackstone has added that "Every man is entitled to have his reputation preserved inviolate". So, the right to have reputation involves right to have the reputation inviolate and intact. Thus, defamation is a catch-all term for any statement that hurts someone's reputation. Written defamation is called "libel," and spoken defamation is called "slander" under common law. In common law, defamation is a civil wrong, rather than a criminal wrong. (Vide *Bannett Coleman & Co. Ltd. vs. K. Sarat Chandra & Ors.*, 2016 (5) ALT 174)

Defamation is defined by Parke B. in *Parmiter v. Coupland* as 'A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule'

The definition of defamation, so recommended by the Faulks Committee in England in 1975 is: 'Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally'.

As per Salmond, 'the wrong of defamation lies in the publication of a false and defamatory statement about another person without lawful justification'.

According to Underhills, 'a statement becomes

defamation, if it is made about another without just cause or excuse, whereby he suffers injury to his reputation and not to his self-esteem'.

Underhills considers defamatory statement as 'one which imputes conduct or qualities tending to disparage or degrade any person, or to expose him to contempt, ridicule or public hatred or to prejudice him in the way of his office, profession or trade'.

Blackburn and George defined defamation as 'the tort of publishing a statement which tends to bring a person into hatred, contempt or ridicule or to lower his reputation in the eyes of right thinking members of society generally'.

Winfield defines defamation, as the publication of statement which tends to lower a person in the estimation of right thinking members of society, generally, or which tends to make them shun and avoid that person.

To quote Mr. Odger from his book on defamation, 'No man may disparage or destroy the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a jus in rem, a right absolute and good against the entire world. Words which produce, in any given case, appreciable injury to the reputation of another are called defamatory, and defamatory words if false are actionable.'

In the English case-Scot v. Sampson, 1882 9 QB 491- Justice Cave has defined defamation in simplest way as 'a false statement about a man to his discredit'. This definition is smaller yet it encompasses everything about

the concept.

11(a.ii). Defamation law aims to strike, a balance between allowing the distribution of information, ideas, and opinions, and protecting people from having lies told about them. It's a complicated area of law as on the one hand, people should not ruin others' lives by telling lies about them; but on the other hand, people should be able to speak freely without fear of litigation over every disagreement, insult or mistake. Political and social disagreement is important in a free society and we obviously don't all share the same opinions or beliefs. For instance, political opponents often reach opposite conclusions from the same facts, and editorial cartoonists often exaggerate facts to make their point. (Vide *Bannett Coleman & Co. Ltd.* (supra)).

11(a.iii). To constitute "defamation" under Section 499 of the IPC, there must be an imputation and such imputation must have been made with intention of harming or knowing or having reason to believe that it will harm the reputation of the person about whom it is made. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of complainant, irrespective of whether complainant actually suffered directly or indirectly from the imputation alleged-as held in *Jeffrey J. Diermeier v. State of West Bengal*, 2010 3 ALT(Cri) 8 Criminal Appeal No. 1079 of 2010)- 14 May, 2010. (vide *Bannett Coleman & Co. Ltd.*(supra)).

11(a.iv). What the victim must prove to establish defamation as per some generally accepted rules is, if you believe you are or have been "defamed," to prove it you usually have to show

there's been a statement that is all of the following: published, false, injurious and unprivileged. Let's look at each of these elements in detail. (vide *Bannett Coleman & Co. Ltd.*(supra)).

1. First, the "statement" can be spoken, written, pictured, or even gestured. Because written statements last longer than spoken statements, most courts, juries, and insurance companies consider libel more harmful than slander.

2. "Published" means that a third party heard or saw the statement, i.e. someone other than the person who made the statement or the person the statement was about. "Published" doesn't necessarily mean that the statement was printed in a book. It just needs to have been made public through television, radio, speeches, gossip, or even loud conversation. Of course, it could also have been written in magazines, books, newspapers, leaflets, or on picket signs.

3. Defamatory statement must be false, otherwise it's not considered damaging. Even terribly mean or disparaging things are not defamatory if the shoe fits. Most opinions don't count as defamation because they can't be proved to be objectively false. For instance, when a reviewer says, "That was the worst book I've read all year," she's not defaming the author, because the statement can't be proven to be false.

4. The statement must be "injurious", since the whole point of defamation law is to take care of injuries to reputation, those suing for defamation must show how their reputations were hurt by the false statement. For example, the person lost work; was shunned by neighbours, friends, or family members; or was harassed by the press. Someone who already had a



terrible reputation most likely won't collect much in a defamation suit.

5. Finally, to qualify as a defamatory statement, the offending statement must be "unprivileged." Under some circumstances you cannot sue someone for defamation even if they make a statement that can be proved false. Lawmakers have decided that in these and other situations, which are considered "privileged," free speech is so important that the speakers should not be constrained by worries that they will be sued for defamation. Lawmakers themselves also enjoy this privilege. They aren't liable for statements made in the legislative chamber or in official materials, even if they say or write things that would otherwise be defamatory.

11(b.i). Types of defamation: Defamation may be committed in two ways viz., (i) speech, or (ii) by writing and its equivalent modes. The English common law describes the former as 'SLANDER' and the latter as 'LIBEL'. Slander is a false and defamatory statement by spoken words or gestures tending to injure the reputation of another. Apart from differences in form, the libel differs from slander in its procedure, remedy and seriousness. Slander may be the result of a sudden provocation uttered in the heat of the moment, while the libel implies grater deliberation and raises a suggestion of malice. Libel is likely to cause more harm to the person defamed than slander. Because there is a strong tendency everywhere, on the part of most people to believe anything they see in print. In general slander is actionable only on proof of special damage, but in exceptional cases slander is actionable per se or without

proof of special damage. Words which are not defamatory in their ordinary sense may, nevertheless, convey a defamatory meaning owing to the circumstances in which they are spoken. Such words are actionable if it is proved that would be understood as defamatory by the persons to whom they were published.

In common law, a libel is a criminal offence as well as a civil wrong. But slander is a civil wrong only; though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene or as being a solicitation to commit a crime or being a contempt of court. Though under the common law of England distinction is made between the two in various aspects, but, in India no such distinction has been made. Under the Indian Penal Code, both libel and slander are criminal offences. (vide *Bannett Coleman & Co. Ltd.*(supra)).

11(b.ii). In English Common Law, reputation is the most clearly protected and is remedied almost exclusively in civil law by an award of damages after trial by a jury. However, the Law of Defamation like many other branches of tort law aims at balancing the interests of the parties concerned. These are the rights that a person has to his reputation vis-a-vis the right to freedom of speech. The Law of defamation provides defences to the wrong such as truth and privilege, protecting right of freedom of speech. (vide *Bannett Coleman & Co. Ltd.*(supra)).

11(b.iii). Defamation is a ground on which a constitutional limitation on right of freedom of the expression, as mentioned Article 19(2), could be legally imposed. Thus the expression 'defamation' has been given constitutional status. The law of

defamation does not infringe the right of freedom of speech guaranteed by article 19(1)(a). It is saved by Article 19(2). It is so saved, as it was included as one of the specific purposes for which a reasonable restriction can be imposed. The law relating to the tort of defamation, from the point of view of distribution of legislative power, would fall under 'Actionable wrongs' mentioned in Entry 8 of the Concurrent List in the Seventh Schedule to the Constitution of India. Criminal law also falls under the Concurrent List. (vide *Bannett Coleman & Co. Ltd.*(supra)).

11(c). Essentials of Defamation: An obvious question arises about essentials of defamation under Indian Law. Because, whenever defamation is agitated before any Civil Court, the proof has to travel around certain essentials. Therefore, it becomes necessary to try to enlist those essentials or requisites constituting defamation as civil wrong. (vide *Bannett Coleman & Co. Ltd.*(supra)).

***There are in general four essentials of the tort of defamation, namely-***

- a. There must be a defamatory statement.
- b. The defamatory statement must be understood by right thinking or reasonable minded persons as referring to the plaintiff.
- c. There must be publication of the defamatory statement, that is to say, it must be communicated to some person other than the plaintiff himself.
- d. In case of slander either there must be proof of special damages or the slander must come within the serious classes

of cases in which it is actionable per se.

Defences: With the proof of publication of defamatory material, plaintiff must be deemed to have established his case, unless the defendant pleads either of defences open to him.

Following are the defences available in an action of civil liability in the case of defamation-

a. Defence of justification of truth: The truth of a defamatory words is pleaded with a complete defence in Civil proceedings and for that reason even though the words were published spite to be and maliciously. A publication based on verifiable facts can extinguish liability for defamation. It negatives the charge of malice and it shows that plaintiff is not entitled to recover damages too.

b. Defence of fair comment: A fair and bona fide comment on a matter of public interest is not libel. For the purposes of the defence of fair comment on a matter of public interest such matters must be (a) in which the public in general have a legitimate interest, directly or indirectly, nationally or locally, e.g. matters connected with national and local government, public services and institutions and (b) matters which are at public theatres and performances of theatrical artists offered for public entertainment but not including the private lives of public performers. (vide *Bannett Coleman & Co. Ltd.*(supra)).

## 12. **Gist of offence of defamation;**

12.1 The gist of the offence of defamation is the publication of

the defamatory matter. Although, the gist of the offence of defamation lies in the dissemination of the harmful imputation, it is not only the publisher, but also the maker thereof is liable for the offence. The gist of the offences of defamation lies in lowering down the reputation of the person concerned or his family in the estimation of others.

### **13 Effect of per se Defamatory Imputation;**

13.1 There is a thin line of distinction between an imputation which could be termed as per se defamatory and an imputation which may not be per se defamatory. This distinction has been very well explained by the Supreme Court in the case of John Thomas (supra). In para-10 of the judgment, the Supreme Court observed as under;

*'The only effect of an imputation being per se defamatory is that it would relieve the complainant of the burden to establish that the publication of such imputations has lowered him in the estimation of the right-thinking members of the public. However, even if the imputation is not per se defamatory, that by itself would not go to the advantage of the publisher, for, the complaining person can establish on evidence that the publication has in fact amounted to defamation even in spite of the apparent deficiency. So the appellant cannot contend, at this stage, that he is entitled to discharge on the ground that the imputations in the extract publication were not per se defamatory.'*

13.2 The meaning of the words "defamatory per se" and their definition, scope and effect have been copiously discussed in Clerk and Lindsell on Torts (Tenth Edition). At page 711 of the said book it is stated that:

*"Language is defamatory on the face of it, either when the defamatory meaning is the only possible meaning, or*

*when it is the only natural and obvious meaning."*

*At page 712 it is stated that:*

*"Language is ambiguous where it is equally capable on the face of it of two meanings, the one defamatory and the other innocent. The imputation that the plaintiff is "foresworn" is ambiguous. It imputes the taking of a false oath, but the oath may have been in a judicial proceedings or it may not. In the latter alternative the words are not actionable per se, in the former they are (Holt v. Scholefield (1796) 6 T.R. 691) (A)... So if it is said of a person that he has set his house on fire, it may be an allegation of a felonious act, or merely of a foolish and careless act. The words are ambiguous and of themselves not actionable as conveying the imputation of a criminal act (Sweetapple v. Jesse, (1833) 5 B & Ad. 27) (B). In Goldstein v. Foss, (1828) 6 B & C. 154) (C), the plaintiff sued in respect of an alleged libel, the gist of which was that he and certain other persons were reported to a society of guardians for the protection of trade against swindlers "as improper to be proposed to be balloted for as members thereof", and the words were held not defamatory in themselves. They, no doubt, might be taken to impute that the plaintiff was an improper person to be proposed by reason of his bad character, but they were equally consistent with the supposition that the ground of his exclusion was some arbitrary rule involving no question of character (Gompertz v. Levy, (1838) 9 Ad. and E. 282) (D).*

*And in such cases it is a matter of law for the Court to determine, before submitting the issue to the jury, whether or not the words complained of are capable of the defamatory meaning ascribed to them Stubbs v. Russell, (1913) A. C. 386 (E) P. 713).*

*It is further stated that the language may be innocent even*

*"though it may be possible for ingenious malevolence to read between the lines and interpolate some far-fetched suggestion. It is in this class of case as well as in the case of an ambiguous language that the Innuendo is important. But in such a case the facts and circumstances that give sting to a publication apparently innocuous ought to be brought to our notice."*

13.3 At page 715 the following passage is relevant :

*"If the language is defamatory on the face of it, the plaintiff has of course no further difficulty; it speaks for itself, and he need allege and in the first instance prove nothing more. If the language is ambiguous, it is equally consistent with the negative and affirmative of the proposition which the plaintiff has to establish, namely that he has been defamed, and, therefore, by proving simply the language he does not prove his case and if the evidence for the plaintiff only leads to conjecture it ought not to be put before the Jury (Phillipson v. Hayter, (1870) 6 C.P. 38) (F). A fortiori he fails when the language is naturally innocent.*

*In both these cases the plaintiff must bring forward additional facts and circumstances to point the meaning of the language where ambiguous, or qualify and alter its meaning where innocent. This is the function of the Innuendo, a gloss put by the plaintiff on the words alleged to be defamatory averring their defamatory meaning--generally introduced in the pleading by the phrase "meaning thereby"--showing how that meaning is arrived at and the relation of the words to the plaintiff. The Innuendo must be specific and aver a definite actionable wrong (Cox v. Cooper, (1863) 9 L.T. 339) (G)." (p. 715).*

13.4 At page 1240, Lord Atkin observed that:

*"The question, then, is whether the words in their ordinary signification are capable of being defamatory".*

*The test laid down by him was :*

*"Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"*

*He further observed that:*

*"It is well settled that the Judge must decide whether the words are capable of a defamatory meaning. That is a question of law."*

*Referring to the facts of the case he observed at page 1241 as follows :--*

*"But I am at a loss to understand why a person's character should be lowered in anyone's estimation if he or she has borrowed from a domestic servant. I should have thought it such a usual domestic occurrence for small sums to be advanced in such circumstances as the present, and with the assent of everyone concerned to be left outstanding for some days that the mere fact of borrowing from a servant bears not the slightest tinge of "meanness." Quoting Lord Esher, he observed that -*

*"But to make an imputation which is based upon the existence of facts unknown and not to be Inferred from the words attacked is surely exactly to come under the ban." Then he went on to observe that :*

*"It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document." (1241). At page 1242 Lord Atkin observed as follows :*

*"That Juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character; and are treated as actionable wrongs". In the case--[Capital and Counties Bank Ltd. v. George Henty & Sons.](#), (1882) 7 A.C. 741 (I), George Henty and Sons had issued a circular to a large number of their customers to the following effect:*

*"H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the bank".*

*The circular became known to other persons; there was run on the bank and loss inflicted. The bank having brought an action against H. & Sons for libel, with an innuendo that the circular imputed insolvency. It was held that:*

*"In their natural meaning the words were not libellous: that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the onus lay on the bank to show that the circular had a libellous tendency; that the evidence, consisting of the circumstances attending the publication, failed to show it; that there was no case to go to the jury; and that the defendants were entitled to judgment". (head note)."*



13.5 If the publication of an article which form the basis of the complainant's case is not defamatory per se, then the complainant can only succeed in his action by proving a innuendo. **In the case on hand, the complainant has alleged many innuendos. He has also set up a case in this regard. The law of defamation recognizes two types of meaning; Natural and ordinary meaning of the words. This is not limited to the literal and obvious meaning but includes any inference which the ordinary, reasonable reader would draw from the words. There are two types of innuendo meaning; (i) False innuendo - Alternative meaning which the ordinary reasonable person can read between the lines or infer from the words (ii) True innuendo. This is where the words appear to be innocent to some people but appear to be defamatory to the other because they have the special knowledge or extra information. An example of this would be, somebody who is said to be getting married which would not be defamatory to the majority of the readers, but it would be to the readers who knew that the person was already married and as such would be committing bigamy.** A libellous statement may not always be made with clarity. A degree of indirectness or innuendo may be there and this can very well be expected since defamation is an offence. It is reasonable to think that he who defames is not anxious to invite legal consequences and would be looking for loopholes. That, however, does not protect him from prosecution.

#### **14. The word "Makes";**

14.1 The word "makes" in this context has been used in its etymological sense as connoting "to make public" or "to make known to people in general". As to who may be treated as the maker apart from the persons who do it personally, others may also be makers for instance a journalist though he only types

out from the written material received from a person or persons who remained anonymous, and only give shape to the article yet would be the maker of the offensive article.

### **15. The term “Publish”**

15.1 “To publish” means to make known to the 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 vs. new Tobacco Company, AIR 1998 SC 668) Publication includes pleadings, affidavits, articles etc.

### **16. Makes or Publishes**

16.1 The expression “makes or publishes” has been interpreted as supplementing each other. If a person merely writes out defamatory matter but does not publish the same, that is, does not circulate to others, it will not be defamation. The word “make” is intended to refer to the originator of the imputation. In this sense, the mechanic or the compositor of the press, does neither “make or publish” the matter that may be impugned as defamatory. The word “publish” in section 499, IPC, as noted above, is used in its etymological sense as connoting “to make public” or “to make known to people in general”.

### **17. Publication of imputation is an essential ingredient**

17.1 Under the Indian Penal Code, in order that an offence of

defamation may be committed there must be making or publication of any imputation concerning any person by words either spoken or intended to be read or by sign or by visible representations, intending to harm, or knowing or having reasons to believe that such imputation will harm the reputation of such person. To constitute the offence of defamation, there must, therefore, be making or publication of an imputation concerning any person and the making or publication must be with the intent to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person. Unless there is publication, there can be no offence of defamation committed.

**18. Analysis of the facts of the present case**

18.1 Having gone through both the articles, i.e, the first, published in point of time and the later one after the first was withdrawn, prima facie, I am of the view that a case is made out to proceed against the writ applicants for the offence of defamation. Here is a case of a complainant, who happens to be the son of the President of a political party viz. Bhartiya Janta Party at the National level. The article in question talks about the business of the complainant and the sudden rise or the escalation in the revenue of the company owned by the complainant. The most disturbing part of the article, or to put it in other words, the imputation which could be termed as *prima facie* defamatory is the averment that the turnover of the company owned by the complainant, who happens to be the son of the leader of the Bhartiya Janta Party increased 16,000/- times over in the year following the election of Shri Narendra Modi as the Prime Minister and the elevation of his

father to the post of the party president. I do not propose to go into the question whether there has been any escalation, as pointed out in the article in question. What is important is the strong innuendo that the complainant has prospered because of the fact that he happens to be the son of a very powerful political leader, and that too, at a point of time when Shri Narendra Modi took over as the Prime Minister of the country. Let me put it straight without mincing any words. Prima facie, the article tries to portray a picture that an ordinary company, which had a meager revenue of Rs.50,000/- proceeded to accumulate the revenue of Rs.80,00,00,000/- in a single year and that is only because of the political position of the father of the complainant and at a time when Shri Narendra Modi took over as the Prime Minister. What would be the effect on the mind of a common man when he would read the article in question.? In order to determine whether the article contains any defamatory imputations, the Court must ignore all the surrounding circumstances relating to such an article and should view the same as divorced from the context, in which, the imputations were made. It is true that mere lowering of oneself in self-estimation will not necessarily constitute defamation. What the Court has to consider is the effect of such an article on the mind of an ordinary right-thinking member of the society, particularly, bearing in mind the class of persons who would be interested in reading such article. In a country like India, it does not take a second for the people in general to start thinking that the complainant has prospered only because of his political contacts. People may even infer corrupt practice at the end of the complainant. In such circumstances, the article published by the writ applicants, prima facie, could be termed as defamatory in nature. Let me

put it in a different way. In order to determine whether the article in question is defamatory in nature or not, the Court should put itself in the arm chair of an ordinary person and view the matter from that stand point confining itself to the article. The Court should look at the article as a whole, giving to the words used therein their obvious and unnatural meaning. It is possible that the complainant may not have anything to do with his father or the political status of his father. It is also possible that the complainant, on his own merit, may have brought his company in a good financial position. In such circumstances, the complainant can always redress the grievance that such an article with so many innuendos in it, has lowered his moral and intellectual character in the estimation of the people at large. I am of the view that I should give an opportunity to the complainant to make good his case before the Trial Court by leading appropriate legal evidence in this regard. At the same time, the accused will also get the opportunity of putting forward their case before the Trial Court by leading appropriate oral as well as documentary evidence to establish that what has been stated in the Article in question is true, based on the public record. I should not undertake the inquiry as regards the truth or falsehood and assume the role of a trial Court in exercise of my writ jurisdiction under Article 226 of the Constitution of India.

18.2 In *Wilmett v. Harmer*, (1839) 173 ER (679), Lord Denman, J., in summing up said

*“The first plea of the defendants is a plea of justification of so much of the libel as imputes the crime of bigamy to*

*the plaintiff; and I think that on this plea of justification, you should have the same strictness of proof as on a trial for bigamy.”*

18.3 Applying the above principle, a Court is entitled to expect from the accused without discharging the onus placed upon him, of proving any defence mentioned in the exception that he should adduce facts which would show due care and attention justifying honest belief in the truth of the allegations.

19. I am not impressed by the submission of Mr. Joshi, the learned senior counsel that as the entire article is based on the public record available with the office of the Registrar of Companies, the prosecution should fail as the case falls within the first exception to section 499 of the IPC. The first exception talks about the imputation of truth, which public good requires to be made or published. To put it in other words, it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not, it is for the public good, is a question of fact.

20. In this regard, Mr. Joshi placed strong reliance on one decision of the Supreme Court in the case of Rajendrakumar Sitaram Pande (supra). I must look into this decision of the Supreme Court as the principal argument of Mr. Joshi is based on this judgment.

21. In Rajendra Kumar Sitaram (supra), a complaint was filed by the respondent No.1 alleging that the accused persons made a false complaint to the treasury officer containing false imputations to the effect that the complainant had come to the

office in a drunken state and had abused the treasury officer and thereby committed the criminal offence punishable under section 500 read with section 34 of the IPC. The Supreme Court quashed the criminal proceedings relying on exception-8 to section 499 of the IPC. Exception 8 to section 499 says that it is not a defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with regard to the subject matter of accusation. Relying on this decision of the Supreme Court, Mr. Joshi submitted that even at this stage, the accused-applicants can put forward exception-1 to section 499 of the IPC as their defence. Let me quote the observations of the Supreme Court as contained in para-7;

*'The next question that arises for consideration is whether reading the complaint and the report of the Treasury Officer which was obtained pursuant to the Order of the Magistrate under sub-section (1) of [Section 201](#) can it be said that a prima facie case exist for trial or exception 8 to [Section 400](#) clearly applies and consequently in such a case, calling upon the accused to face trial would be a travesty of justice. The gravamen of the allegations in the complaint petition is that the accused persons made a complaint to the Treasury Officer, Amravati, containing false imputations to the effect that the complainant had come to the office in a drunken state and abused the Treasury Officer, Additional Treasury Officer and the Collector and circulated in the office in the filthy language and such imputations had been made with the intention to cause damage to the reputation and services of the complainant. In order to decide the correctness of this averment, the Magistrate instead of issuing process had called upon the Treasury Officer to hold inquiry and submit a report and the said Treasury Officer did submit a report to the Magistrate. The question for consideration is whether the allegations in the complaint read with the report of the Magistrate make out the offence under [Section 500](#) or not. [Section 499](#) of the Indian Penal Code*

*defines the offence of defamation and [Section 500](#) provides the punishment for such offence. Exception 8 to [Section 499](#) clearly indicates that it is not a defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with regard to the subject matter of accusation. The report of the Treasury Officer clearly indicates that pursuant to the report made by the accused persons against the complainant, a departmental inquiry had been initiated and the complainant was found to be guilty. Under such circumstances the fact that the accused persons had made a report to the superior officer of the complainant alleging that he had abused to the Treasury Officer in a drunken state which is the gravamen of the present complaint and nothing more, would be covered by exception 8 to [Section 499](#) of the Indian Penal Code. By perusing the allegations made in the complaint petition, we are also satisfied that no case of defamation has been made out. In this view of the matter, requiring the accused persons to face trial or even to approach the Magistrate afresh for reconsideration of the question of issuance of process would not be in the interest of justice. On the other hand in our considered opinion this is a fit case for quashing the order of issuance of process and the proceedings itself. We, therefore, set aside the impugned order of the High Court and confirm the order of the learned Sessions Judge and quash the criminal proceeding itself. This appeal is allowed. “*

22. In *Rajendra Kumar* (supra), the accused challenged the order of the Magistrate for issuance of a process u/s.500 of the [IPC](#) by filing a revision before the Sessions Court. The Sessions Court allowed the revision and quashed the order of the Magistrate. The order of the Sessions Court was challenged before the High Court on the ground that the order of issuance of the process was only interlocutory and the Sessions Judge could not have interfered with the order. On appeal, the Supreme Court set aside the order of the High Court holding that the order of the Magistrate was not interlocutory and the High Court erred in setting aside the order of the Sessions



Judge on the ground that he had no jurisdiction to interfere in an interlocutory order. Thereafter, instead of remanding the matter for reconsideration on merits, the Supreme Court decided to consider by itself whether the allegations in the complaint read with a report of the Treasury Officer which was called for by the Magistrate u/s.202(1) of the Code before issuance of the process, made out the offence u/s.500 or not. Relying upon the report of the Treasury Officer which indicated that pursuance to a complaint made by the accused to the Treasury Officer against the complainant that he had come to the office in drunken state and abused the Additional Treasury Officer, the complainant was found guilty, the Supreme Court held that the case was clearly covered by exception 8 to section 499 of the IPC. The Supreme Court did not lay down a law that in a petition u/s.482, the High Court is required to consider the probable defences which the accused may raise at the trial that the case falls under any of the exceptions to section 499 of the IPC.

23. The case of Sevakram (Supra) was decided by a three Judge Bench of the Supreme Court. The issue was whether the High Court was right in quashing the prosecution of the respondent Mr.R.K. Karanjiya Chief Editor of the Weekly Blitz for an offence punishable u/s. 500 of the IPC for publication of a news item in the paper, which was per-se defamatory, on the ground that he was protected under the 9<sup>th</sup> Exception of section 499 of the IPC. Chinnappa Reddy (one of the Hon'ble Judges belonging to the majority view) in paragraph no.18 of the decision after posing several questions which would arise for consideration of defence at the trial held that the stage for deciding those questions would not arise at the stage of

issuance of process. The questions of "good faith" and "public good" which form part of exception 9 could be decided only after the trial. Only after the plea of the accused was recorded and only at the trial it could be considered whether the article was published in good faith and public good. The decision lays down that whether the case falls under any exception to sec.499 [IPC](#) could only be decided after the plea was recorded and at the trial and not before.

24. In the case of Balraj Khanna (supra), the Magistrate had dismissed the complaint, inter alia, holding that the resolution passed by the Standing Committee of the Municipal Corporation of Delhi and the discussion proceeding it were covered by the exceptions to section 499 IPC and hence the appellants were well within their rights in passing a resolution recommending suspension of the respondent. This reasoning of the Magistrate, dismissing the complaint, was set aside. The Supreme Court concurred with the High Court and observed that;

*"In our opinion, the question of the application of the Exceptions to section 499 IPC does not arise at this stage..... It is needles to state that the question of applicability of the Exceptions to section 499 Indian Penal Code 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."*

25. In M.N.Damani (supra) which is decided after the Rajendra Kumar's case, the Supreme Court has in paragraph no.7 observed:-

*"Assuming that the imputations made could be covered by exception 9 to [Section 499, IPC](#), several questions still remain to be examined whether such*

*imputations were made in good faith. In what circumstances, with what intention, etc. All these can be examined on the basis of evidence in the trial."*

26. [Section 105](#) of the Evidence Act says that when a person is accused of an offence, the burden of proving the existence of circumstances proving that the case falls 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 any other law defining the offence is upon him and the Court shall presume the absence of such circumstances. Thus at the stage of the issuance of the process the Magistrate if satisfied that the allegations in the complaint, taken at their face value, do constitute an offence and there is a prima facie material in support of them can issue process and is not required to consider whether the case falls in any of the exceptions. That stage would arise after the plea is recorded and at the trial. The burden of proving that the case falls under any of the exceptions is on the person claiming the exception. (see Harbhajan Singh vs. State of Punjab & Anr., AIR 1966 SC 97).

27. To bring the publication of a scandalous imputation under the Penal Law it is not necessary to prove that it was done out of any ill will or malice or that the complainant had actually suffered from it. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant. Every sane man is presumed to have intended the consequences which normally follow from his act. The accused a journalist of some standing, can very well be presumed to

know or to have reason to believe that the imputation published by him would harm the complainant's reputation. Exception 1 to S.499 I.P.C. recognize the publication of truth as sufficient justification if it is made for the public good. But when truth is set up as a defence it must extend to the entire libel and it is not sufficient that only a part of the libel is proved to be true. The accused has to prove that that the publication was both in good faith and for the public good. Good faith contemplates an honest effort to ascertain the truth of the facts. Fair comment cannot justify a defamatory statement which is untrue is fact. A comment cannot be fair which is built upon facts which are not truly stated. It cannot be stated that because the accused bona fide believes that he is publishing what is true, that is any defence in point of law. Bona fide belief might, in such a case have some bearing on the quantum of damages in a civil action; perhaps also on the question of sentence in a criminal prosecution; but otherwise it is irrelevant. Good faith means good faith and also the exercise of due care and attention. Due care and attention means that the libeller should show that he had taken particular steps to investigate the truth and had satisfied himself from his enquiry, as a reasonable man, that head come to a true conclusion. The conduct of the accused, during the course of the proceedings in a court, is a relevant factor in determining his good faith. If there are several imputations good faith or truth must be proved with respect to every imputation, and if he fails in substantiating truth or good faith in respect of any one imputation, conviction must stand. A publisher of a defamatory statement can only be protected if he shows that he had taken all reasonable precautions & then had a reasonable and well grounded belief in the truth of a

statement. The plea of 'good faith' implies the making of a genuine effort to reach the truth, and a mere belief in the truth, without there being reasonable grounds for such a plea, is not synonymous with good faith. (vide *The Editor, Rashtra Deepika Ltd. & Ors. vs. Vinaya Raghvan Nair*)

28. The decision reported in *Narottamdas L. Shah v. Patel Maganbhai Revabhai and another* (1984 CrL. L. J. 1790), explained the meaning of character and reputation and distinction between them as follows:

*"The term 'reputation' means, "What us generally said or believed about the, persons' or things' character". The two terms "character" and "reputation" are prone to be confused.*

**Character, in the context, would mean, fortitude or morals constitution or strength of a person. It has no relevance with the belief or opinion of others in respect to a person. Therefore, character is what a person "actually is", while "reputation" is what neighbours and others say "what he is". The man may have, in fact, a good character and yet suffer from bad reputation or vice versa. In short, 'reputation' is, what is reputed about, that is to say, common knowledge or general opinion in respect to a person. It is the estimation in which a person is held by others and not the opinion which he himself may have about himself. It may be said that 'reputation' is a composite hearsay, being the community's opinion which implies the definite and final formation of belief by the community. By no stretch of reasoning the term 'reputation' can imply one's own belief about himself".**

29. At this stage, let me deal with the submission of Mr. Joshi, the learned senior counsel as regards explanation-4 of section 499 IPC. The submission of Mr. Joshi proceeds on the footing that an accused can be tried for the offence of

defamation only if the imputation published has lowered the moral or intellectual character of the complainant. The argument is that as whatever has been stated in the article is nothing but the truth, the moral or intellectual character of the complainant cannot be said to have been lowered or affected. Thus, explanation-4 of section 499 has been put forward as the defence for the purpose of quashing of the complaint.

30. Section 499 talks about the publication of any imputation, the harmful effect of the imputation and uses the word reputation. Explanation-4 provides that a person's reputation cannot be said to be harmed unless the imputation directly or indirectly lowers the moral or intellectual character of the person, against whom, such imputations are made.

31. Let me clarify something important. The explanation-4 of section 499 IPC would not apply where the words used and forming the basis of a charge are per se defamatory. When an expression, used verbally or in writing, is doubtful as to its significance, and some evidence is necessary to decide what the effect of that expression will be, and whether it is calculated to harm a particular person's reputation, it is possible that the principle enunciated in explanation-4 of section 499 might, and would with propriety be applied.

32. The exception (1) to section 499 IPC recognizes the publication of truth a sufficient justification if it is made for the public good. When truth is set up as a defence, it must extend to the entire statement. It is not sufficient that only a part of the statement is proved to be true.

33. In the decision reported in Sewakaram Sobhani (AIR 1981 (SC) 1514) considered the privileges of journalism in publishing matters and observed as follows;

*“Journalism do not enjoy any privilege, and have no greater freedom than others to make any imputations or allegations, sufficient to ruin the reputation of a citizen. Journalists are in no better position than any other person. Even the truth of an allegation does not permit a justification under First Exception unless it is proved to be in the public good. The question whether or not it was for public good is a question of fact like any other relevant fact in issue. If they make assertions of fact as opposed to comments in them, they must either justify these assertions or, in the limited cases specified in the Ninth Exception, show that the attack on the character of another was for the public good, or that it was made in good faith, AIR 1942 Nag 117, Approved, AIR 1994 PC 116 Rel, on. (para 11).”*

34. In this regard, I may refer to and rely on a Division Bench decision of the Allahbad High Court in the case of **Queen -Empress vs. Mccarthy**, reported in (1887) ILR 9 ALL 420. Straight-J., speaking for the Bench, observed as under;

*“Now, although we had addressed to us some remarks by the learned Counsel for the respondent, founded on good sense, as to the operation of Explanation 4 of [Section 499](#), they are answered by the observation that that Explanation does not apply where the words used and forming the basis of a charge are per se defamatory. When an expression, used verbally or in writing, is doubtful as to its significance, and some evidence is necessary to decide what the effect of that expression will be, and whether it is calculated to harm a particular person's reputation, it is possible that the principle enunciated in Explanation 4 of [Section 499](#) might, and would with propriety, be applied.”*

35. Character" is not defined either under [the Indian Penal](#)

*Code or under the General Clauses Act. According to Webster's New International Dictionary, "character" means "An attribute, quality, esp. a trait or characteristic which serves as an index to the essential or intrinsic nature of a person"; "reputation, repute; as a man's character for truth and veracity, a description, delineation, or detailed account of the qualities or peculiarities of a person.*

36. According to Law Lexicon of British India, "character" means "estimation of a person by his community; particular qualities impressed by nature or habit on a person Which distinguish him from others." Character lies in the man, it is the mark of what he is, it shows itself on all occasions, reputation depends upon others; and it is what they think of him. According to Oxford Dictionary, "character" means "collective peculiarities, sort, style, reputation, good reputation, description of person's qualities, testimonial, status." The Model Code of Evidence defines character as the "aggregate of a person's traits including those relating to care and skill and their opposites." Just as cause of action means a bundle of facts, character is an expression of very wide import which takes in all the traits, special and particular qualities impressed by nature or habit which serve as an index to the essential intrinsic nature of a person. Character also includes reputation, but character and reputation are not synonymous. (see D. Rama Subba Reddy vs. P.V.S. Rama Das & Anr., 1970 Cri.L.J. 83).

37. The test to be applied for the determination of the question whether a statement is defamatory is that answer to



the question, “would the words tend to lower the plaintiff in the estimation of right-thinking members of the society.?”

As Salmond stated in *The Law of Torts*, 13<sup>th</sup> Edn. P.355, followed in *Suri vs. Stretch*.

*“The test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feeling of other persons. The typical form of defamation is an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct.”*

38. The Supreme Court, while upholding the constitutional validity of sections 499 and 500 of the Penal Code in the case of ***Subramanian Swamy vs. Union of India, Ministry of Law & Ors.***, (2016) 7 SCC 221, under the heading exceptions and understanding of the same, observed as under;

*“Exceptions and understanding of the same*

*[179] Having dealt with the four Explanations, presently, we may analyse the Exceptions and note certain authorities with regard to the Exceptions. It is solely for the purpose of appreciating how the Court has appreciated and applied them. The First Exception stipulates that it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. "Public good" has to be treated to be a fact. In *Chaman Lal v. State of Punjab*, 1970 1 SCC 590, the Court has held that in order to come within the First Exception to Section 499 of the Indian Penal Code it has to be established that what has been imputed concerning the respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the imputation and the*

*publication of the imputation for the public good, is on the accused.*

*[180] It is submitted by Dr. Dhawan, learned senior counsel for the petitioners that if the imputation is not true, the matter would be different. But as the Exception postulates that imputation even if true, if it is not to further public good then it will not be defamation, is absolutely irrational and does not stand to reason. It is urged that truth is the basic foundation of justice, but this Exception does not recognize truth as a defence and, therefore, it deserves to be struck down.*

*[181] It has been canvassed by Mr. Rao, learned senior counsel, that the term "public good" is a vague concept and to bolster the said submission, he has placed reliance upon Harakchand Ratanchand Banthia & others v Union of India and others, 1969 2 SCC 166 to highlight that in the said case, it has been held that "public interest" do not provide any objective standard or norm. The context in which the said decision was rendered has to be appreciated. In the said case, the Court was dealing with the constitutional validity of the Gold Control Act, 1968. Section 27 of the said Act related to licensing of dealers. It was contended that the conditions imposed by sub-section (6) of the Act for grant or renewal of licences were uncertain, vague, unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. The Court expressed the view that the contention was well founded. Further analyzing, the Court expressed that:-*

*"The expression "anticipated demand" is a vague expression which is not capable of objective assessment and is bound to lead to a great deal of uncertainty. Similarly the expression "suitability of the applicant" in Section 27(6)(e) and "public interest" in Section 27(6)(g) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses (a),(d),(e) and (g) of Section 27(6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid..."*

*[182] As we perceive, the factual score and the provision under challenge was totally different. It has been stated*

*in the backdrop of the power conferred on an administrative authority for the purpose of renewal of licence, and in that context, the Court opined that the criterion of "public interest" did not provide objective standard. The Court, on analysis of the provision from a manifold angle, opined that the provision proposed unreasonable restriction. The context and the conferment of power makes a gulf of difference and, therefore, the said authority has to be considered on its own facts. It cannot be ruled that it lays down as a principle that "public interest" is always without any norm or guidance or has no objective interest. Ergo, the said decision is distinguishable.*

*[183] In re, Arundhati Roy, 2002 3 SCC 343 this Court, referring to Second Exception, observed that even a person claiming the benefit of Second Exception to Section 499 of the Indian Penal Code, is required to show that the opinion expressed by him was in good faith which related to the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct. Third Exception states about conduct of any person touching any public question and stipulates that it is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character, so far as his character appears in that conduct. The said Exception uses the words "good faith" and particularizes conduct of any person relating to any public question and the Exception, as is perceptible, gives stress on good faith. Third Exception comes into play when some defamatory remark is made in good faith as held in Sahib Singh Mehra . The Court has clarified that if defamatory remarks are made after due care and attention, it will be regarded as made in good faith. In the said case, the Court also adverted to Ninth Exception which gives protection to imputation made in good faith for the protection of the interest of the person making it or of any other person or for the public good.*

*(184) A three-Judge Bench in Harbhajan Singh v. State of Punjab and another, 1966 AIR(SC) 97 has opined that where the accused invokes Ninth Exception to Section 499 IPC, good faith and public good are both to be satisfied and the failure of the appellant to prove good*

*faith would exclude the application of Ninth Exception in favour of the accused even if requirement of public good is satisfied. The Court has referred to Section 52 IPC which defines "good faith" that requires the element of honesty. It is necessary to note here that the three-Judge Bench has drawn a distinction between the First Exception and the Ninth Exception to opine that the proof of truth which is one of the ingredients of the First Exception is not an ingredient of the Ninth Exception and what the Ninth Exception requires an accused person to prove is that he made the statement in good faith. Proceeding further, the Court has stated that in dealing with the claim of the accused under the Ninth Exception, it is not necessary and, in a way, immaterial, to consider whether he has strictly proved the truth of the allegations made by him.*

*[185] In Sukra Mahto v. Basdeo Kumar Mahto and another, 1971 1 SCC 885 the Court has opined that the ingredients of Ninth Exception are first that the imputation must be made in good faith; secondly, the imputation must be protection of the interest of the person making it or of any other person or for the public good. The Court further opined that good faith and public good are questions of fact and emphasis has been laid on making enquiry in good faith and due care and attention for making the imputation.*

*(186) In Jatish Chandra Ghosh v. Hari Sadhan Mukherjee, 1961 3 SCR 486 the Constitution Bench dealt with appellant's claim of absolute privilege as a Member of the West Bengal Legislative Assembly which was not accepted by the High Court of Judicature at Calcutta. The appellant therein was facing a prosecution under Section 500 IPC. The larger Bench referred to Section 499 IPC and observed that:-*

*"In this connection, it is also relevant to note that we are concerned in this case with a criminal prosecution for defamation. The law of defamation has been dealt with in Sections 499 and 500 of the Indian Penal Code. Section 499 contains a number of exceptions. Those specified exceptions lay down what is not defamation. The fourth exception says that it is not defamation to publish a substantially true report of the proceedings of a court of justice, but does not make any such concession in*

*respect of proceedings of a House of Legislature or Parliament. The question naturally arises how far the rule in Wason case, ( Wason v. Walter,1868 4 QB 73) can be applied to criminal prosecutions in India, but as this aspect of the controversy was not canvassed at the Bar, we need not say anything about it, as it is not necessary for the decision of this case."*

*After so stating, the Court further opined that the proceedings did not deserve to be quashed as there was no such absolute privilege in the facts of the case. Being of this view, the Court opined that the accused appellant must take his trial and enter upon his defence such as he may have. We have referred to the said decision only to highlight that the Court has clarified publishing of substantial true report of proceedings of a Court of Justice.*

*[187] Fifth Exception stipulates that it is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent. The further stipulation is that the said opinion must relate to the character of said person, as far as his character appears in that conduct. In Kanwal Lal v. State of Punjab, 1963 Supp1 SCR 479 the Court, while dealing with the Eighth Exception, has opined that in order to establish a defence under this Exception the accused would have to prove that the person to whom the complaint was made had lawful authority over the person complained against, in respect of the subject-matter of the accusation.*

*[188] Again in M.C. Verghese v. T.J. Poonan, 1969 1 SCC 37 it has been ruled that a person making libellous statements in his complaint filed in Court is not absolutely protected in a criminal proceeding for defamation, for under the Eighth Exception and the illustration to Section 499 the statements are privileged only when they are made in good faith. There is, therefore, authority for the proposition that in determining the criminality of an act under the Indian Penal Code the Courts will not extend the scope of special exceptions by resorting to the rule peculiar to English common law that the husband and wife are regarded as one. In Chaman Lal this Court has opined*

that the Eighth Exception to Section 499 of the Indian Penal Code indicates that accusation in good faith against the person to any of those who have lawful authority over that person is not defamation. In *Rajendra Kumar Sitaram Pande v. Uttam*, 1999 3 SCC 134 it has been observed that Exception 8 to Section 499 IPC clearly indicates that it is not a defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with regard to the subject-matter of accusation. In the said case the report of the Treasury Officer clearly indicated that pursuant to the report made by the accused persons against the complainant, a departmental enquiry had been initiated and the complainant was found to be guilty. Under such circumstances the fact that the accused persons had made a report to the superior officer of the complainant alleging that he had abused the Treasury Officer in a drunken state which was the gravamen of the complaint, would be covered by Exception 8 to Section 499 of the Indian Penal Code.

[189] In *Chaman Lal* the Court has opined that good faith requires care and caution and prudence in the background of context and circumstances. The position of the persons making the imputation will regulate the standard of care and caution. In *Sukra Mahto*, emphasis has been laid on protection of the interest of the person making it or of any other person or for the public good. Reference has been made to *Harbhajan Singh* case to stress on due care and attention. In *Sewakram Sobhani v. R.K. Karanjia*, 1981 3 SCC 208, it has been observed that the ingredients of the Ninth Exception are that (1) the imputation must be made in good faith, and (2) the imputation must be for the protection of the interests of the person making it or of any other person or for the public good, and the imputation made must be in good faith for the public good. In *M.A. Rumugam v. Kittu*, 2009 1 SCC 101 it has been held that for the purpose of bringing the case within the purview of the Eighth and the Ninth Exception appended to Section 499 of the Penal Code, it would be necessary for the accused to prove good faith for the protection of the interests of the person making it or of any other person or for the public good.

(190) This Court, in *Jeffrey J. Diermeier*, has

*observed thus:-*

*"37. It is trite that where to the charge of defamation under Section 500 IPC the accused invokes the aid of Tenth Exception to Section 499 IPC, "good faith" and "public good" have both to be established by him. The mere plea that the accused believed that what he had stated was in "good faith" is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.*

*38. It is well settled that the degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with the degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in "good faith" and for "public good" under the said Exception."*

*[191] The detailed discussion made hereinabove do clearly reveal that neither the main provision nor the Explanation nor the Exceptions remotely indicate any vagueness. It is submitted that the Exceptions make the offence more rigorous and thereby making the concept of criminal defamation extremely unreasonable. The criticism advanced pertain to truth being not a defence, and unnecessary stress on 'public good'. The counter argument is that if a truthful statement is not made for any kind of public good but only to malign a person, it is a correct principle in law that the statement or writing can amount to defamation. Dr. Singhvi, learned senior counsel for some of the respondents has given certain examples. The examples pertain to an imputation that a person is an alcoholic; an imputation that two family members are involved in consensual incest; an imputation that a person is impotent; a statement is made in public that a particular person suffers from AIDS; an imputation that a person is a victim of rape; and an imputation that the child of a married couple is not fathered by the husband but born out of an affair with another man. We have set out the examples cited by the*

*learned senior counsel only to show that there can be occasions or situations where truth may not be sole defence. And that is why the provision has given emphasis on public good. Needless to say, what is public good is a question of fact depending on the facts and circumstances of the case.*

*[192] From the analysis we have made it is clear as day that the provision along with Explanations and Exceptions cannot be called unreasonable, for they are neither vague nor excessive nor arbitrary. There can be no doubt that Court can strike down a provision, if it is excessive, unreasonable or disproportionate, but the Court cannot strike down if it thinks that the provision is unnecessary or unwarranted. Be it noted that it has also been argued that the provision is defeated by doctrine of proportionality. It has been argued that existence of criminal defamation on the statute book and the manner in which the provision is engrafted suffers from disproportionality because it has room for such restriction which is disproportionate. In *Om Kumar v. Union of India*, 2001 2 SCC 386 the Court has observed that while regulating the exercise of fundamental rights it is to be seen whether the legislature while exercising its choice has infringed the right excessively.*

*(193) Recently, the Constitution Bench in *Modern Dental College & Research Centre and others v. State of Madhya Pradesh and others*, 2016 4 Scale 478 explaining the doctrine of proportionality has emphasized that when the Court is called upon to decide whether a statutory provision or a rule amounts to unreasonable restriction, the exercise that is required to be undertaken is the balancing of fundamental rights on the one hand and the restrictions imposed on the other. Emphasis is on recognition of affirmative constitutional rights along with its limitations. Limitations, save certain interests and especially public or social interests. Social interest takes in its sweep to confer protection to rights of the others to have social harmony founded on social values. To treat a restriction constitutionally permissible it is necessary to scrutinize whether the restriction or imposition of limitation is excessive or not. The proportionality doctrine recognizes balancing of competing rights and the said hypothesis gains validity if it subserves the purpose it is meant for.*



(194) Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective (see : *P.P. Enterprises v. Union of India*, 1982 2 SCC 33). Further, the reasonableness is examined in an objective manner from the stand point of the interest of the general public and not from the point of view of the person upon whom the restrictions are imposed or abstract considerations (see : *Mohd Hanif Quareshi. V. State of Bihar*, 1958 AIR(SC) 731). The judgment refers to and approves guidelines propounded in *MRF Ltd. v. Inspector, Kerala Govt.*, 1998 8 SCC 227 for examining reasonableness of a statutory provision. In the said decision the Constitution Bench while discussing about the doctrine of proportionality has observed:-

"61. Modern theory of constitutional rights draws a fundamental distinction between the scope of the constitutional rights, and the extent of its protection. Insofar as the scope of constitutional rights is concerned, it marks the outer boundaries of the said rights and defines its contents. The extent of its protection prescribes the limitations on the exercises of the rights within its scope. In that sense, it defines the justification for limitations that can be imposed on such a right.

62. It is now almost accepted that there are no absolute constitutional rights 14 and all such rights are related. As per the analysis of *Aharon Barak 21* , two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law, i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as Indian Constitution is concerned, democracy is treated as the basic feature of

*the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the corner stone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. "*

*[195] One cannot be unmindful that right to freedom of speech and expression is a highly valued and cherished right but the Constitution conceives of reasonable restriction. In that context criminal defamation which is in existence in the form of Sections 499 and 500 IPC is not a restriction on free speech that can be characterized as disproportionate. Right to free speech cannot mean that a citizen can defame the other. Protection of reputation is a fundamental right. It is also a human right. Cumulatively it serves the social interest. Thus, we are unable to accept that provisions relating to criminal defamation are not saved by doctrine of proportionality because it determines a limit which is not impermissible within the criterion of reasonable restriction. It has been held in D.C. Saxena (Dr) v. Hon ble The Chief Justice of India, 1996 5 SCC 216 though in a different context, that if maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious, viz., that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. The Court had further observed that the State has legitimate interest, therefore, to regulate the freedom of speech and expression which*

*liberty represents the limits of the duty of restraint on speech or expression not to utter defamatory or libellous speech or expression. There is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation.*

*[196] The submission of Mr. Datar, learned senior counsel is that defamation is fundamentally a notion of the majority meant to cripple the freedom of speech and expression. It is too broad a proposition to be treated as a guiding principle to adjudge reasonable restriction. There is a distinction between social interest and a notion of the majority. The legislature has exercised its legislative wisdom and it is inappropriate to say that it expresses the notion of the majority. It has kept the criminal defamation on the statute book as in the existing social climate it subserves the collective interest because reputation of each is ultimately inhered in the reputation of all. The submission that imposition of silence will rule over eloquence of free speech is a stretched concept inasmuch as the said proposition is basically founded on the theory of absoluteness of the fundamental right of freedom of speech and expression which the Constitution does not countenance. “*

39. At this stage, let me consider one more submission canvassed by Mr. Joshi, the learned senior counsel as regards the vicarious liability of the founding editors of “The Wire” as they have also been arraigned as an accused and the process has been issued to the founding editors also including the foundation for independent journalism, a company registered under section 8 of the Companies Act, i.e. the owner and publisher of the online news portal “The Wire”. In this regard, I must, once again, at the cost of repetition, make a note of the allegations levelled in the complaint as contained in para-3;

*“That the accused No.1 is the author of the defamatory*

*article. That the accused Nos. 2 to 4 are the Founding Editors of The Wire. That accused No.5 is the Managing Editor of The Wire as found on the "About Us" webpage of The Wire. That accused Nos. 2 to 5 are responsible for the content published on The Wire including the defamatory article. That accused No. 6 is the Public Editor of The Wire as found on the "Contact Us" webpage of The Wire and is responsible for proper journalism ethics at The Wire. That the accused No. 7 is the owner and publisher of The Wire. That the "About Us" webpage of The Wire contains details of various Editors and Consultants who are involved with The Wire; however, the complainant has included those individuals as accused who have an ostensible close nexus to the defamatory article"*

40. Let me go straight to a decision of the Supreme Court in this regard in the case of Gambhirsinh R. Dekare (supra). The Supreme Court observed in paras-12 to 19.2 as under;

*"[12] We have bestowed our consideration to the rival submission and we do not find any substance in the submission of Mr. Dave. Complainant has specifically averred in the complaint that the news item was printed in the newspaper as per the instructions and directions of the accused persons. The complainant had specifically alleged that accused nos. 1 and 2 have deliberately published the offending news and it was within their knowledge. At this stage, it is impermissible to go into the truthfulness or otherwise of the allegation and one has to proceed on a footing that the allegation made is true. Hence, the conclusion reached by the High Court that "there is nothing in the complaint to suggest that the petitioner herein was aware of the offending news item being published or that he had any role to play in the selection of such item for publication" is palpably wrong. Hence, in our opinion, the High Court has quashed the prosecution on an erroneous assumption of fact which renders its order illegal.*

*(13) Mr. Ahmadi, further submits that the impugned order is vulnerable on another count. He points out that according to the complainant, the present accused was*

*the Editor and his name has been printed as such in the publication and, therefore, he is responsible for the publication of the news item. Mr. Dave, however, submits that there being Resident Editor for the Vadodara Edition of the newspaper, the present accused, who is the Editor and stationed at Ahmedabad, cannot be held responsible for the publication. He emphasizes that it would be the Resident Editor who shall be responsible for the contents of the Vadodara Edition. In support of the submission he has placed reliance on a decision of this Court in the case of K.M. Mathew v. State of Kerala, 1992 1 SCC 217.*

*[14] A news item has the potentiality of bringing doom's day for an individual. The Editor controls the selection of the matter that is published. Therefore, he has to keep a careful eye on the selection. Blue-penciling of news articles by any one other than the Editor is not welcome in a democratic polity. Editors have to take responsibility of everything they publish and to maintain the integrity of published record. It is apt to remind ourselves the answer of the Editor of the Scotsman, a Scottish newspaper. When asked what it was like to run a national newspaper, the Editor answered "run a newspaper! I run a country". It may be an exaggeration but it does reflect the well known fact that it can cause far reaching consequences in an individual and country's life.*

*(15) The scheme and scope of Press and Registration of Books Act, 1867 (hereinafter referred to as "the Act") also brings forward the same conclusion. Section 1 of the Act is the interpretation clause and the expression "Editor" has been defined as follows:*

*"1. Interpretation-clause.-(1)In this Act, unless there shall be something repugnant in the subject or context,-*

*xxx xxx xxx*

*"editor" means the person who controls the selection of the matter that is published in a newspaper;"*

*(16) Section 5 of the Act provides for rules as to publication of newspapers and prohibits its publication in India except in conformity with the rules laid down. Section 5 (1) of the Act which is relevant for the purpose reads as follows:*

*"5. Rules as to publication of newspapers.-No newspaper shall be published in India, except in conformity with the rules hereinafter laid down:*

*(1)Without prejudice to the provisions of section 3, every copy of every such newspaper shall contain the names of the owner and editor thereof printed clearly on such copy and also the date of its publication".*

*From a plain reading of the aforesaid provision, it is evident that every copy of every newspaper published in India is mandated to contain the names of the owner and Editor thereof. It is in the light of the aforesaid obligation that the name of the accused no. 2 has been printed as Editor. Section 7 of the Act makes the declaration to be prima facie evidence for fastening the liability in any civil or criminal proceeding on the Editor.*

*(17) Section 7 of the Act reads as follows:*

*"7. Office copy of declaration to be prima facie evidence.- In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid, attested by the seal of some Court empowered by this Act to have the custody of such declarations, or, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration, or printed on such newspaper, as the case may be that the said person was printer or publisher, or printer and publisher(according as the words of the said declaration may be) of every portion of every newspaper whereof the title shall correspond with the title of the newspaper mentioned in the declaration, or the editor of every portion of that issue of the newspaper of which a copy is produced."*

*(18) Therefore, from the scheme of the Act it is evident that it is the Editor who controls the selection of the matter that is published in a newspaper. Further, every copy of the newspaper is required to contain the names of the owner and the Editor and once the name of the Editor is shown, he shall be held responsible in any civil*

and criminal proceeding. Further, in view of the interpretation clause, the presumption would be that he was the person who controlled the selection of the matter that was published in the newspaper. However, we hasten to add that this presumption under Section 7 of the Act is a rebuttable presumption and it would be deemed a sufficient evidence unless the contrary is proved. The view which we have taken finds support from the judgment of this Court in the case of *K.M. Mathew v. K.A. Abraham*, 2002 6 SCC 670, in which it has been held as follows:

"20. The provisions contained in the Act clearly go to show that there could be a presumption against the Editor whose name is printed in the newspaper to the effect that he is the Editor of such publication and that he is responsible for selecting the matter for publication. Though, a similar presumption cannot be drawn against the Chief Editor, Resident Editor or Managing Editor, nevertheless, the complainant can still allege and prove that they had knowledge and they were responsible for the publication of the defamatory news item. Even the presumption under Section 7 is a rebuttable presumption and the same could be proved otherwise. That by itself indicates that somebody other than editor can also be held responsible for selecting the matter for publication in a newspaper."

(19) Now reverting to the authority of this Court in the case of *K.M. Mathew v. State of Kerala*, 1992 1 SCC 217, relied on by Mr. Dave, in our opinion, same instead of supporting his contention, goes against him.

(19.1) In the said case it has been observed as follows:

"9. In the instant case there is no averment against the Chief Editor except the motive attributed to him. Even the motive alleged is general and vague. The complainant seems to rely upon the presumption under Section 7 of the Press and Registration of Books Act, 1867 ('the Act'). But Section 7 of the Act has no applicability for a person who is simply named as 'Chief Editor'. The presumption under Section 7 is only against the person whose name is printed as 'Editor' as required under Section 5(1). There is a mandatory (though

*rebuttable) presumption that the person whose name is printed as 'Editor' is the Editor of every portion of that issue of the newspaper of which a copy is produced. Section 1(1) of the Act defines 'Editor' to mean 'the person who controls the selection of the matter that is published in a newspaper'. Section 7 raises the presumption in respect of a person who is named as the Editor and printed as such on every copy of the newspaper. The Act does not recognise any other legal entity for raising the presumption. Even if the name of the Chief Editor is printed in the newspaper, there is no presumption against him under Section 7 of the Act."*

*[16] In K.M. Mathew case the accused was the Chief Editor of Malyalam Manorama and there was no allegation against him in the complaint regarding knowledge of the objectionable character of the matter published. In the absence of such allegation, the Magistrate decided to proceed against the Chief Editor. On an application by the Chief Editor, the process issued against him was recalled. The High Court, however, set aside the order of the Magistrate and when the matter travelled to this Court, it set aside the order of the High Court. This Court made distinction between 'Editor' and 'Chief Editor'. In no uncertain terms the Court observed that the Press and Registration of Books Act recognizes 'Editor' and presumption is only against him. The Act does not recognize any other legal entity viz., Chief Editor, Managing Editor etc. for raising the presumption. They can be proceeded against only when there is specific allegation. "*

41. In a very recent pronouncement of the Supreme Court in the case of **Mohammed Abdulla Khan vs. Prakash K.**, Criminal Appeal No.2059 of 2017, decided on 4<sup>th</sup> December, 2017, the Supreme Court decided the question as regards the liability of the owner of a Kannada Daily Newspaper, which contained certain allegations against the appellant. The Supreme Court, after taking note of section 499 of the IPC, explained in details, as to what would constitute the offence of defamation and how far the owner of a newspaper can be held



responsible for publishing the defamatory article. I may quote the observations as contained from paras-12 to 27;

*"[12] Committing any act which constitutes defamation under Section 499 IPC is punishable offence under Section 500 IPC. Printing or engraving any defamatory material is altogether a different offence under Section 501 IPC. Offering for sale or selling any such printed or engraved defamatory material is yet another distinct offence under Section 502 IPC.*

*[13] If the content of any news item carried in a newspaper is defamatory as defined under Section 499 IPC, the mere printing of such material "knowing or having good reason to believe that such matter is defamatory" itself constitutes a distinct offence under Section 501 IPC. The sale or offering for sale of such printed "substance containing defamatory matter" "knowing that it contains such matter" is a distinct offence under Section 502 IPC.*

*[14] Whether an accused (such as the respondent) against whom a complaint is registered under various Sections of the IPC (Sections 500, 501 & 502 IPC) could be convicted for any of those offences depends upon the evidence regarding the existence of the facts relevant to constitute those offences.*

*[15] In the context of the facts of the present case, first of all, it must be established that the matter printed and offered for sale is defamatory within the meaning of the expression under Section 499 IPC. If so proved, the next step would be to examine the question whether the accused committed the acts which constitute the offence of which he is charged with the requisite intention or knowledge etc. to make his acts culpable.*

*[16] Answer to the question depends upon the facts. If the respondent is the person who either made or published the defamatory imputation, he would be liable for punishment under Section 500 IPC. If he is the person who "printed" the matter within the meaning of the expression under Section 501 IPC. Similarly to constitute an offence under Section 502 IPC, it must be established that the respondent is not only the owner of the*

*newspaper but also sold or offered the newspaper for sale.*

*[17] We must make it clear that for the acts of printing or selling or offering to sell need not only be the physical acts but include the legal right to sell i.e. to transfer the title in the goods - the newspaper. Those activities if carried on by people, who are employed either directly or indirectly by the owner of the newspaper, perhaps render all of them i.e., the owner, the printer, or the person selling or offering for sale liable for the offences under Sections 501 or 502 IPC, (as the case may be) if the other elements indicated in those Sections are satisfied.*

*[18] Whether the content of the appellant's complaint constitutes an offence punishable under any one or all or some of the abovementioned sections was not examined by the High Court for quashing the complaint against the respondent. So we need not trouble ourselves to deal with that question. We presume for the purpose of this appeal that the content of the appellant's complaint does disclose the facts necessary to establish the commission of one or all of the offences mentioned above. Whether there is sufficient evidence to establish the guilt of the respondent for any one of the abovementioned three offences is a matter that can be examined only after recording evidence at the time of trial. That can never be a subject matter of a proceeding under Section 482 Cr.P.C.*

*[19] From the judgment under appeal, it appears that before the High Court it was argued on behalf of the respondent that there is no vicarious liability in criminal law and therefore the owner of a newspaper cannot be prosecuted for the offences of defamation.*

*"2. The learned counsel for the petitioner would point out that there can be no vicarious liability insofar as the criminal law is concerned. The complainant's allegation of the defamatory material published in the newspaper against him, even if it is established, can only be sustained against the editor of the newspaper and not the owner of the newspaper. The petitioner admittedly was the owner. The newspaper carries a legend that the newspaper is edited and published on behalf of the petitioner and there is no dispute in this regard."*

[20] It appears from para 3 of the judgment that the appellant herein submitted in response to the above extracted contention of the respondent that the question is no longer *res integra* and is covered by a judgment of this Court in *K.M. Mathew v. K.A. Abraham & Others*, 2002 6 SCC 670. The High Court rejected the submission holding:

"It is however noticed that the said decision was in respect of a managing editor, resident editor or a chief editor of respective newspaper publications, who were parties therein. Therefore, at the outset, it can be said that the said case could be distinguished from the case on hand, as, the petitioner is not claiming as an editor, who had any role in the publication of the newspaper. Therefore, it is a fit case where the petition should be allowed."

The High Court concluded that prosecution of the respondent would lead to miscarriage of justice. A conclusion without any discussion and without disclosing any principle which forms the basis of the conclusion.

**FACTS, ISSUE & RATIO DECIDENDI OF K.M. MATHEW'S CASE:**

[21] K.M. Mathew was the "Chief Editor" of a daily called *Malayalam Manorama*. When he was sought to be prosecuted for the offence of defamation, he approached the High Court under Section 482 Cr.P.C. praying that the prosecution be quashed on the ground that Section 7 of the Press and Registration of Books Act, 1867 only permits the prosecution of the Editor but not the Chief Editor. The High Court rejected the submission.

[22] Even before this Court, the same submission was made. This Court rejected the submission holding:

"16. The contention of these appellants is not tenable. There is no statutory immunity for the Chief Editor against any prosecution for the alleged publication of any matter in the newspaper over which these persons exercise control."

It was further held that though the presumption under

*Section 7 of the Press and Registration of Books Act, 1867 is not applicable to somebody whose name is printed in the newspaper as the Chief Editor, the complainant can still allege and prove that persons other than the Editor, if they are responsible for the publication of the defamatory material.*

*"20. The provisions contained in the Act clearly go to show that there could be a presumption against the Editor whose name is printed in the newspaper to the effect that he is the Editor of such publication and that he is responsible for selecting the matter for publication. Though, a similar presumption cannot be drawn against the Chief Editor, Resident Editor or Managing Editor, nevertheless, the complainant can still allege and prove that they had knowledge and they were responsible for the publication of the defamatory news item. Even the presumption under Section 7 is a rebuttable presumption and the same could be proved otherwise. That by itself indicates that somebody other than editor can also be held responsible for selecting the matter for publication in a newspaper."*

*[23] K.M. Mathew's case has nothing to do with the question of vicarious liability. The argument in K.M. Mathew's case was that in view of Section 7 of the Press and Registration of Books Act, 1867 only the Editor of a newspaper could be prosecuted for defamation. Such a submission was rejected holding that Section 7 does not create any immunity in favour of persons other than the Editor of a newspaper. It only creates a rebuttable presumption that the person whose name is shown as the editor of the newspaper is responsible for the choice and publication of the material in the newspaper. K.M. Mathew's case made it clear that if a complaint contains allegations (which if proved would constitute defamation), person other than the one who is declared to be the editor of the newspapers can be prosecuted if they are alleged to be responsible for the publication of such defamatory material.*

*The High Court, in our opinion, without examining the ratio of K.M. Mathew's case chose to conclude that the decision is distinguishable. The judgment of the High Court is absolutely unstructured leaving much to be desired.*

[24] Vicarious liability for a crime is altogether a different matter. In England, at one point of time, the owner of a newspaper was held to be vicariously liable for an offence of defamation (libel). The history of law in this regard is succinctly stated by Lord Cockburn in *The Queen v. Holbrook*, L.R. 3 QBD 60. Though there appears to be some modification of the law subsequent to the enactment of Lord Campbell's Act i.e. the Libel Act 1843 (6&7 Vict C 96).

Lord Campbell's Act did not apply to India. The Press and Registration of Books Act (Act XXV of 1867) is made applicable to British India and continues to be in force by virtue of the declaration under Article 372 of the Constitution of India. There are material differences between the scheme and tenor of both the enactments. In *Ramasami v. Lokanada*, 1886 9 ILR(Mad) 692, it was held:

" But we cannot hold that the provisions of that Statute (Ed. Lord Campbell's Act) are applicable to this country, and we must determine whether the accused is or is not guilty of defamation with reference to the provisions of the Indian Penal Code. We consider that it would be a sufficient answer to the charge in this country if the accused showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his absence, and that the libel was published without his authority, knowledge or consent. As the Judge has, however, misapprehended the effect of Act XXV of 1867, we shall set aside the order of acquittal made by him and direct him to restore the appeal to his file, to consider the evidence produced by the accused and then to dispose of the appeal with reference to the foregoing observations."

and reiterated in *Emperor v. Bodi Narayana Rao and G. Harisarvothama Rao*, 1909 32 ILR(Mad) 338:

"Lord Campbell's Act, of course, is not in force in India, and the Criminal Law of England is not necessarily the same as the Criminal Law of India as contained in the Indian Penal Code "

[25] The extent of the applicability of the principle of vicarious liability in criminal law particularly in the context of the offences relating to defamation are neither discussed by the High Court in the judgment under appeal nor argued before us because the respondent

*neither appeared in person nor through any advocate. Therefore, we desist from examining the question in detail. But we are of the opinion that the question requires a serious examination in an appropriate case because the owner of a newspaper employs people to print, publish and sell the newspaper to make a financial gain out of the said activity. Each of the abovementioned activities is carried on by persons employed by the owner.*

*[26] Where defamatory matter is printed (in a newspaper or a book etc.) and sold or offered for sale, whether the owner thereof can be heard to say that he cannot be made vicariously liable for the defamatory material carried by his newspaper etc. requires a critical examination.*

*[27] Each case requires a careful scrutiny of the various questions indicated above. Neither prosecutions nor the power under Section 482 CrPC can be either conducted or exercised casually as was done in the case on hand."*

42. The Supreme Court, in the case of **Jeffrey J. Diermeier & Anr. vs. State of West Bengal & Anr.**, (2010) 6 SCC 243, considered in details the plea as regards "good faith" and "public good". I may quote the relevant observations as contained in paras-37 to 40 ;

*"37. It is trite that where to the charge of defamation under [Section 500](#) IPC, the accused invokes the aid of Tenth Exception to [Section 499](#) IPC, "good faith" and "public good" have both to be established by him. The mere plea that the accused believed that what he had stated was in "good faith" is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.*

38. *It is well settled that the degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with a degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in "good faith" and for "public good" under the said Exception.*

39. *The question has to be considered on the facts and circumstances of each case, having regard to the nature of imputation made; the circumstances on which it came to be made and the status of the person who makes the imputation as also the status of the person against whom imputation is allegedly made. These and a host of other considerations would be relevant and required to be considered for deciding appellants' plea of "good faith" and "public interest". Unfortunately, all these are questions of fact and matters for evidence.*

40. *In the instant case, the stage for recording of evidence had not reached and, therefore, in the absence of any evidence on record, we find it difficult to return a finding whether or not the appellants have satisfied the requirements of "good faith" and "public good" so as to fall within the ambit of the Tenth Exception to [Section 499](#) IPC. Similarly, it will neither be possible nor appropriate for this Court to comment on the allegations levelled by respondent No.2 and record a final opinion whether these allegations do constitute defamation. Reading the complaint as a whole, we find it difficult to hold that a case for quashing of the complaint under [Section 482](#) of the Code has been made out. At this juncture, we say no more lest it may cause prejudice to either of the parties."*

43. I need not discuss each and every judgment relied upon by Mr. Joshi, the learned senior counsel appearing for the accused-applicants. Each of those judgments are in the facts

of the case. There cannot be any debate as regards the principal of law.

**Freedom of speech & press vis a vis defamation:**

44. Mr. Joshi, the learned senior counsel has placed strong reliance on one decision of the Delhi High Court (Coram: Pradeep Nandrajog J.), as his lordship then was, in the case of **Sanjay Gupta Shobhana Bhartia Vineet Jain Ram Kirpal Singh vs. NCT of Delhi**, reported in AD (CR) (2007) 5 229. This judgment is strongly relied upon to fortify the submission that the right of the media to publish news pertaining to the matters of public concern is recognized as an integral part of freedom of expression. I may quote the relevant observations which have been relied upon;

*"[16] Every individual has a right to protect his reputation. Disparaging and defamatory statements made about a person to a third person or persons without lawful justification or excuse are actionable in law. As observed by the Supreme Court in the decision State of Bihar v Lal Krishna Advani, 2003 AIR(SC) 3357 reputation is an integral and important aspect of dignity of every individual. The right to preservation of one's reputation is acknowledged as a right in rem, a right good against all the world.*

*(17) But freedom of speech and expression are the foundation of all democratic organisations. Freedom of expression stems from the requirement that members of a democratic should be sufficiently informed. In the decision Attorney General v Times Newspaper Ltd., 1973 3 ALLER 54, it was observed that freedom of expression has following four broad social purposes to serve:-*

*(i) It helps an individual to attain self fulfillment. (ii) It*



*assists in the discovery of truth. (iii) It strengthens the capacity of an individual in participating in decision making. (iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.*

*(18) The right of the print media to publish news pertaining to matters of public concern is recognized as an integral part of freedom of expression. (See decisions of the Supreme Court in Virender v State of Punjab, 1958 AIR(SC) 986 and Sakal P AP ers v Union of India, 1962 AIR(SC) 305.*

*[19] The fundamental objective of journalism is to serve the people with news, views, comments and information on matter of public interest in a fair, accurate, unbiased, sober and decent manner. It is the legitimate function of a newspaper in a democratic set up to act as the champion of a clean administration and sentinel of public interest, and as such a newspaper is within its right to expose and bring to the notice of the general public any lapse or malpractice in the working of a public authority including acts of nepotism and favoritism.*

*[20] The law of defamation is a culmination of a conflict between society and the individual. On one hand lies the fundamental right to freedom of speech and expression enshrined under Article 19(1)(a) of the Constitution of India, on the other is the right of individual to have his reputation intact. How far does the liberty of free speech and expression extend" And when does it become necessary for the law to step in to safeguard the right of the individual to preserve his honour. THE law of defamation seeks to attain a balance between these two competing freedoms.*

*(21) The classical definition of 'defamation' has been given by Justice Cave in the case of Scott v Sampson, 1882 QB 491, as a "false statement about a man to his discredit".*

*(22) In the book The Law of Defamation, by Richard*

*O'Sullivan, QC and Ronald Brown, 'defamation' is defined as a false statement of which the tendency is to disparage the good name or reputation of another person.*

*(23) As per Section 499, Indian Penal Code, offence of defamation consists of three essential ingredients namely:-*

*(i) Making or publishing any imputation concerning any person. (ii) Such imputation must have been made by words either written or spoken or by visible representation. (iii) Such imputation must be made with the intention to cause harm or with the knowledge or having reasons to believe that it will harm the reputation of the person concerned.*

*(24) In the light of above discussion, it has to be seen whether news items in question are defamatory or a fair report pertaining to the affairs of DDA, a statutory body charged with the planned development of Delhi.*

*(25) Before proceeding to analyse the news items in question, I quote the well-known passage of Lord Shaw in the decision Arnold v King Emperor LR,1913-14 Ind. App 149.*

*"The freedom of the journalist is an ordinary part of the freedom of subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to this power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."*

45. The submission of Mr. Joshi as regards the fundamental right to freedom of speech and expression as enshrined under Article 19(i)(a) of the Constitution of India can be well answered, considering the decision of the Supreme Court in

the case of Subramanian Swamy (supra).

46. In the case of Subramanian Swamy (supra), the Supreme Court, while declining to de-criminalize defamation, observed that *“Right to free speech cannot mean that a citizen can defame the other.”*

47. The Court said that the right to free speech cannot be used to undermine an individual’s right to dignity and reputation. The Court observed *“cannot be sullied solely because another individual can have his freedom”*.

48. Protection of reputation is a fundamental right. It is also a human right. Cumulatively, it serves the social interest....it is not a restriction that has an inevitable consequence which impairs circulation of thought and ideas. In fact, it is control regard being had to another person’s right to go to court and state that he has been wronged and abused. The Supreme Court observed *“He can take recourse to a procedure recognized and accepted in law to retrieve and redeem his reputation”*.

49. Disagreeing with the argument that the criminal defamation must be struck down because it curtailed the right to free speech, the Supreme Court said that the reputation of a person could not be allowed to be crucified at the altar of the other’s right of free speech.

50. Right to freedom of speech and expression is not absolute. It is subject to imposition of reasonable

restrictions....there is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation....the legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate."

51. Underscoring that criticism was not defamation, the Supreme Court accepted the plea that a trial court must be "very careful" in scrutinizing a complaint before issuing summons in a criminal defamation case. But the Supreme Court held that defamation would, in fact, be a form of reasonable restriction" on one's right of free speech.

52. One is bound to tolerate criticism, dissent and discordance but not expected to tolerate defamatory attack... liberty to have a discordant note does not confer a right to defame the others. The dignity of an individual is extremely important," observed the Supreme Court, adding the concept of fraternity under the Constitution expected every citizen to respect the dignity of the other.

53. The Supreme Court also rejected an argument that defamation could become a criminal offence only if it incited to make an offence. It said that defamation had its own independent identity, which has enabled the state to maintain a balance between the fundamental rights.

54. The Supreme Court also pointed out the distinction between sections 499 and 500 on one hand and section 66A (Prosecution for obscene social posts) of the Information

Technology Act on the other, saying the latter was struck down by the apex court on the ground of vagueness and procedural unreasonableness.

55. The Supreme Court held “Once we have held that reputation of an individual is a basic element of Article 21 of the Constitution and balancing of fundamental rights is a constitutional necessity and further the legislature in its wisdom has kept the penal provision alive, it is extremely difficult to subscribe to the view that criminal defamation has a chilling effect on the freedom of speech and expression.”

56. The Supreme Court in the case of Sewakram Sobhani (supra) observed in paras-11 and 12, as under;

“11. The High Court appears to be labouring under an impression that journalists enjoyed some kind of special privilege, and have greater freedom than others to make any imputations or allegations, sufficient to ruin the reputation of a citizen. We hasten to add that journalists are in no better position than any other person. Even the truth of an allegation does not permit a justification under First Exception unless it is proved to be in the public good. The question whether or not it was for public good is a question of fact like any other relevant fact in issue. If they make assertions of facts as opposed to comments on them, they must either justify these assertions or, in the limited cases specified in the Ninth Exception, show that the attack on the character of another was for the public good, or that it was made in good faith: per Vivian Bose, J. in Dr. N.B. Khare v. M.R. Masani and Ors.

12. As the matter is of great public importance, it would, perhaps, be better to quote the well-known passage of Lord Shaw in Arnold v. King Emperor

“The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to this power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful: but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position. “

57. Thus, what becomes critical therefore is balance: The fine equilibrium required between protecting the freedom of speech, fair comment and criticism (including investigative journalism and whistleblower action) on the one hand and transgression into malicious defamation of a person for oblique or political purposes on the other.

58. The U.S. toyed with the legal concept of the “chilling effect” to get this balance right. Anything - law, legislation or threat of lawsuits - that stifles the legitimate expression or political debate amounts to having a chilling effect on the freedom of speech.

59. Justice Brennan of the U.S. Supreme Court in the celebrated 1964 case of “New York Times V. Sullivan” on the anvil of the First Amendment hammered out a constitutional guarantee mandating that a public official if defamed could only recover damages if he could prove that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard for truth. The court therefore placed a very high burden of proof on a public official, opening the gates wider for legitimate public criticism and opinion. In

crafting such a principle, the judge quoted James Madison, one of the founding fathers of the U.S. and the fourth president: “The censorial power is in the people over the Government and not in the Government over the people.”

60. The U.S. Supreme Court in “Gertz v. Robert Welch” extends the Sullivan privilege to those “seeking governmental office” and to those who involuntarily “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes”. This broad catch-all concept would therefore include more people, not only governmental officials. The concept, recently adopted in international money laundering law of PEPs or Politically Exposed Persons, offers a useful illustration. It includes, “individuals who are or have been entrusted domestically with prominent public functions, for example, heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.”

61. The Supreme Court in the case of **R. Rajagopal Versus State of Tamil Nadu** AIR 1995 SC 264 notes all these expositions by the U.S. Supreme Court referred to above and in turn sets out the broad principles on which libel and privacy law may evolve for India as well. The Supreme Court observed as under:

“The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone.” A citizen has a right to safeguard the privacy of his own, his family, his marriage, procreation, motherhood, child bearing and education among other matters. None can publish

anything concerning the above matters without his consent – whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however be different. If a person voluntarily thrust himself into controversy or voluntarily invites or raises a controversy.

The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspect becomes unobjectionable if such publication is based upon records including Court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interest of decency (Article 19(2)) an exception must be carved out to this rule viz. a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in press/media.

62 In the overall view of the matter, as discussed aforesaid, I have reached to the conclusion that it would not be appropriate for this Court to quash the complaint at the threshold. I must give an opportunity to the complainant to establish his case. At the same time, the accused persons will also have a right to defend themselves by placing reliance on explanation 4 of section 499 IPC as well as the First exception of section 499 IPC. Whatever has been submitted on behalf of the accused is in the form of defence.

63. Para 6 of the judgment in Sewakram's case (AIR 1981 SC 1514: 1981 Cri. LJ 894) (supra) reads:

*"6. The order recorded by the High Court quashing the prosecution under Section 482 of the Code is wholly perverse and has resulted in manifest miscarriage of justice. The High Court has prejudged the whole issue*



*without a trial of the accused persons. The matter was at the stage of recording the plea of the accused persons under Section 251 of the Code. The requirements of Section 251 are still to be complied with. The learned Magistrate had to ascertain whether the respondent pleads guilty to the charge or demands to be tried. The circumstances brought out clearly show that the respondent was prima facie guilty of defamation punishable under Section 500 of the Code unless he pleads one of the exceptions to Section 499 of the Code.*

Xxx xxx xxx xxx

*It is for the respondent to plead that he was protected under Ninth Exception to Section 499 of the Penal Code. The burden, such as it is, to prove that his case would come within that exception is on him. The ingredients of the Ninth Exception are that (1) the imputation must be made in good faith, and (2) the imputation must be for the protection of the interests of the person making it or of any other person or for the public good. “*

64. Again, in para 18 of the judgment dealing with the aspect of good faith in relation to 9th Exception of Section 499, it is stated that several questions arise for consideration if the 9th Exception is to be applied to the facts of the case. Questions that may arise for consideration depending on the stand taken by the accused at the trial and how the complainant proposes to demolish the defence and that stage for deciding these questions had not arrived at the stage of issuing process. It is stated, 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.

65. Para 13 of the judgment in Shatrughna Prasad Sinha's case (1996 AIR SCW 4030: 1997 Cri.LJ 212)(supra) reads: -

*“13. As regards the allegations made against the appellant in the complaint filed in the Court of Judicial Magistrate, 1<sup>st</sup> Class, at Nasik, on a reading of the complaint we do not think that we will be justified at this stage to quash that complaint. It is not the province of this Court to appreciate at this stage the evidence or scope of and meaning of the statement. Certain allegations came to be made but whether these allegations do constitute defamation of the Marwari community as a business class and whether the appellant had intention to cite as an instance of general feeling among the community and whether the context in which the said statement came to be made, as is sought to be argued by the learned Senior Counsel for the appellant, are all matters to be considered by the learned Magistrate at a later stage. At this stage, we cannot embark upon weighing the evidence and come to any conclusion to hold, whether or not the allegations made in the complaint constitute an offence punishable under section 500. It is the settled legal position that a court has to read the complaint as a whole and find out whether allegations disclosed constitute an offence under Section 499 triable by the Magistrate. The Magistrate prima facie came to the conclusion that the allegations might come within the definition of defamation under Section 499 IPC and could be taken cognizance of. But these are the facts to be established at the trial. The case set up by the appellant are either defences open to be taken or other steps of framing a charge at the trial at whatever stage known to law. Prima facie we think that at this stage it is not a case warranting quashing of the complaint filed in the Court of Judicial Magistrate, Ist Class at Nasik. To that extent, the High Court was right in refusing to quash the complaint under Section 500 IPC.”*

66. Let me make myself very clear that any observations, touching the merits of the case are purely for the purpose of deciding the question whether the complaint and the order of the process should be quashed at this stage and none of the observations made by this Court on the merits if any be construed as an expression and the final opinion in the main matter.

67. At the cost of repetition, I state that it will be open for the accused person to raise all contentions available to them in law in their defence to establish the correctness of the contents of the alleged defamatory article. It shall also be open for the founding editors to make good their case so far as their liability as alleged is concerned. I have thought fit not to exercise my discretion in favour of the founding editors because there are specific and clear allegations in the complaint that they are responsible for the defamatory matter and had the personal knowledge about the contents of the defamatory matter. There is also an averment in the complaint that all the accused had the malafide intention to harm or the knowledge or reason to believe that the imputation will harm the reputation of the complainant.

68. In view of the aforesaid discussion, this writ application fails and is hereby rejected.

(J.B.PARDIWALA, J.)

Vahid