

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Jurisdiction)

DATED : 23rd AUGUST, 2016

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.M.C. No.02 of 2016

- Petitioners** :
1. Malayala Manorama,
Represented by its Chief Editor,
Shri Mammen Mathew
having its Office at
Manorama Building,
Post Box No.26,
Kottayam – 686 001,
Kerala.
 2. Shri Mammen Mathew,
Chief Editor,
Malayala Manorama,
Manorama Building,
Post Box No.26,
Kottayam – 686 001, Kerala.
 3. Shri Philip Mathew,
Managing Editor,
Malayala Manorama,
Manorama Building,
Post Box No.26,
Kottayam – 686 001, Kerala.
 4. Shri Jacob Mathew,
Executive Editor,
Malayala Manorama,
Manorama Building,
Post Box No.26,
Kottayam – 686 001, Kerala.
 5. Shri Thomas Jacob,
Editorial Director,
Malayala Manorama,
Manorama Building,
Post Box No.26,
Kottayam – 686 001, Kerala.

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M/s. Future Gaming and Hotel Services Pvt. Ltd.

6. Shri G. Vinod,
Chief Reporter,
Malayala Manorama,
Manorama Building,
Post Box No.26,
Kottayam – 686 001, Kerala.
7. Shri Jiji Paul,
Chief Reporter,
Malayala Manorama,
Manorama Building,
Post Box No.26,
Kottayam – 686 001, Kerala.
8. Shri Prakash Mathew,
Chief Reporter,
Malayala Manorama,
Manorama Building,
Post Box No.26,
Kottayam – 686 001, Kerala.

The above named Petitioners are represented by
Shri Lal John, Chief General Manager,
Personnel and Administration.

versus

Respondent : M/s. Future Gaming and Hotel Services Pvt. Ltd.
with its Corporate Office at
Samdrupling Building, Kazi Road, Gangtok,
East Sikkim – 7371 01,
Represented by Shri P. Ravichandran,
authorised Agent for the said Company

Application under Section 482 of
the Code of Criminal Procedure, 1973

Appearance

Mr. R. Basant, Senior Advocate with Mr. Millu Dandapani and
Mr. Ajay Rathi, Advocates for the Petitioners.

Ms. Laxmi Chakraborty and Ms. Manju Rai, Advocates for the
Respondent.

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ORDER

Meenakshi Madan Rai, J.

1. This Application under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), filed by the Petitioners seeks issuance of notice upon the Respondent to Show Cause as to why the impugned Complaint filed before the Learned Chief Judicial Magistrate, East and North Sikkim, at Gangtok, should not be quashed and the Order taking cognizance be set aside, as also the process of issuance of Summons. Prayer was also made to stay further proceedings in connection with the Complaint pending before the Court of the Chief Judicial Magistrate, East and North, at Gangtok and to exempt the Petitioners from appearance before the Learned Trial Court in terms of Section 205 of the Cr.P.C.

2. The Petitioners' case is that the Petitioner No.1 is a Malayalam Vernacular Daily Newspaper, under the name and style "Malayala Manorama". The Petitioners No.2 to 8 are the Editors in various capacities of the Newspaper, which has been in the business for the last 125 years. That, a Complaint was lodged by the Respondent before the Court of the Learned Chief Judicial Magistrate, East and North, at Gangtok, being Private Complaint Case No.59 of 2015, *inter alia*, on grounds that the news published on 22-04-2015 had defamed the Respondent Company. That, in fact, it was learnt that the Central Government had banned the sale of Sikkim Lottery in the

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State of Kerala for an indefinite period due to financial irregularities and several cases of cheating were registered by the Central Bureau of Investigation against the Respondent Firm and Mr. Santiago Martin with respect to cheating in lotteries, conducted in the State of Kerala and are matters of record in Kerala. This news was duly reported in the "Malayala Manorama" naming the Respondent Firm as being involved in the case. It is contended by Counsel for the Petitioners that it is no one's case that the Newspaper was published in Sikkim neither it is circulated in the State. Secondly, that even if an online publication exists, there must be proof that it was accessed and downloaded to establish circulation in Sikkim, but this is absent. That, the Complainant before the Learned Trial Court has not averred that either he or the other Prosecution Witnesses saw the publication in Sikkim and downloaded it in Sikkim. Thus, in both the above circumstances, there is no publication of the article in Sikkim as required under Section 499 of the Indian Penal Code (for short "IPC"). It is alleged herein that the Complaint is vexatious and has been filed for harassment. The second ground raised was that, the Complainant ought to indicate that it is the Respondent Company who is aggrieved, but the Complaint reveals that it is Mr. Santiago Martin, the Managing Director of the Company who is aggrieved and since it is inconvenient for him to appear in Sikkim, the Complaint has been foisted on the Company, which is registered in Tamil Nadu,

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therefore, leading to an infraction of Section 199 of the Cr.P.C. The next contention canvassed was that the portion which is defamatory has to be specifically indicated by the party concerned, although there are eight accused persons being employees of the Newspaper in question, no averment reveals that they were responsible for the publication. Reliance on this aspect was placed on **S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and Another**¹. That, the Press and Registration of Books Act, 1867, states that only the Chief Editor is to be held liable, therefore, an omnibus statement of defamation is insufficient for the purposes of the case. Reliance on this submission was placed on **K. M. Mathew vs. State of Kerala and Another**². That, in fact, the contents of the alleged defamatory publication are based on the Notification of the Government of India, issued on 19-06-2015 and is not the creation of the Petitioners. It is pointed out that incorrect procedure was adopted by the Learned Magistrate by not complying with the Procedure mandated in Section 202 of the Cr.P.C. which after amendment in 2015 specifies that there should be an enquiry by the Magistrate, more especially, when the accused is residing at a place beyond the area of the Magistrate's jurisdiction, which has been ignored while taking cognizance. That the Apex Court in **Vijay Dhanuka and Others vs. Najima Mamtaj and Others**³ and **Udai Shankar Awasthi vs. State of Uttar Pradesh and Another**⁴

1. (2005) 8 SCC 89

2. (1992) 1 SCC 217 (Paragraph 9)

3. (2014) 14 SCC 638

4. (2013) 2 SCC 435

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has laid down that the compliance of provisions of Section 202 of the Cr.P.C. are mandatory for the Magistrate to issue process. It is also further contended that although Sections 499 and 500 of the IPC are constitutional, but at the same time it cannot be used vexatiously against the Petitioners, on this count, reliance was placed on the decision of **Subramaniam Swamy vs. Union of India, Ministry of Law and Others**⁵. That, under Section 205 of the Cr.P.C. the Magistrate can dispense with the personal attendance of the Petitioners at the stage of Summons, but the Summons clearly indicate absence of an alternative to the Petitioners. Hence, the prayers enumerated hereinabove.

3. *Per contra*, it was argued by Learned Counsel for the Respondent that the specific Paragraphs of the Complaint indicate the portions which are defamatory. Allegations of the Respondent having looted the State have been published in the newspaper while the Gazette Notification of the Government of India is devoid of such allegations. It is also submitted that since the Respondent is not privy to the private work distribution at the publication house, therefore, each of the Petitioners are equally liable for the defamatory articles for which the Petitioners cannot now be heard to say that the Press and Registration of Books Act, 1867, affords them shelter. That, the Managing Director of the Respondent is part and parcel of the

5. 2016 (5) Scale 379

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Company and the Complainant is the authorised representative of the Company, who in his statement before the Learned Chief Judicial Magistrate, has categorically mentioned that he as well as the Management of the Company were informed of the defamatory news articles dated 22-08-2015 and 26-08-2015 by well-wishers, friends and acquaintances residing in various parts of the country including Sikkim. With regard to the lack of territorial jurisdiction, it was urged that the Petitioner No.1 owns a Website in the name and style of 'manoramaonline.com' and the online version of the Newspaper can be accessed World Wide including in Sikkim and loggers have wide options for translation of the vernacular version of its online subscription. That, the Petitioners' argument is confined to lack of proof of access and downloading of online articles but admittedly there is an online version. Drawing strength from the decision of **Dr. Subramanian Swamy (Accused) vs. Prabhakar S. Pai and Another⁶**, it was argued that Section 179 of the Cr.P.C. applies to the instant case, which provides that the offence is triable where the act is done or consequence ensues, hence in view of the circulation of the online version the consequences have ensued within the local jurisdiction of the Magistrate in Sikkim. That, it is not the Petitioners' case that their matter falls under any of the exceptions provided under Section 499 of the IPC, but even assuming so the matter has to be taken to trial

⁶. 1984 CRI.L.J.1329 (Bombay)

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and cannot be quashed at the threshold. The subject-matter being publication in a Newspaper and its online version, the Petitioners cannot now take a stand that it was not meant to be read. Assistance in this regard was taken of two decisions of the Hon'ble Madras High Court in **Thirumurthi and Another** vs. **Muthusamy**⁷ and **Chellappan Pillai** vs. **Karanjia**⁸. It was also contended that the Notification of the Government of India does not contain the name of Mr. Santiago Martin or any of the Members of its Management or employees except the person representing the Respondent, contrary to which the news item commences with the caption "*Santiago Martin duped Sikkim of about Rs.22 crores in 5 years*". Vouching for the correctness of the Order of the Learned Magistrate and compliance of Section 202 of the Cr.P.C. it was put forth that the Complainant was examined, the Complaint and the documents placed on record perused and after application of judicial mind cognizance taken which, therefore, cannot be faulted. That, Section 205 of the Cr.P.C. is the discretion of the Learned Magistrate, and the filing of the Complaint is not vexatious but has been filed within the jurisdiction of the concerned Court. No Complaint in any other Court of Law has been filed with regard to the news articles in question herein. Hence, the Petition be dismissed.

7. MANU/TN/0637/1971

8. 1962 (2) CRI.L.J. 142 (Kerala)

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4. I have heard Learned Counsel for both parties at length and given anxious consideration to the submissions. I have also carefully perused the Judgments cited at the bar by Learned Counsel for both parties.

5. First, coming to the question of jurisdiction. Section 177 of the Cr.P.C. has been invoked by Learned Counsel for the Petitioners to contend that the Court of the Chief Judicial Magistrate at Gangtok has no jurisdiction in the matter, the publication and circulation not having been made in Sikkim. Section 177 reads as follows;

"177. Ordinary place of inquiry and trial.—Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."

The Section needs no further elucidation.

6. *Per contra* the Learned Counsel for the Respondent has placed reliance on Section 179 of the Cr.P.C. which is extracted hereinbelow for convenience;

"179. Offence triable where act is done or consequence ensues.—When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

To elucidate briefly, it transpires that, the consequences must form an integral part of the offence and should not be a mere

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consequence arising therefrom, thereby meaning that the consequence must be such as has to be proved, to establish the offence. If the primary consequence completes the offence the mere fact that there is a more remote consequence will not make Section 179 of the Cr.P.C. applicable. In the light of the above provisions, what requires examination is as to whether the offence was committed at all in the State of Sikkim as per the requirement under Section 499 of the IPC which reads as follows;

“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.”

There are four Explanations and ten Exceptions to the Section. It is undisputed that the publication of the offending articles was made in the “Malayala Manorama” on 22-08-2015 and another similar article went online on 26-08-2015. It is clear that in the instant matter neither the publication of the Newspaper took place in Sikkim nor has it been established that hard copies of the same were circulated in the State. What remains the moot point now is since the publication went online in the internet, therefore, would the Courts in Sikkim have jurisdiction?

7. In **Rekhabai vs. Dattatraya and Another**⁹ the Bombay

9. 1986 CRI.L.J. 1797 (Bombay)

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High Court held that the posting of a defamatory letter being publication, in cases where the letter reaches its destination, the offence itself is complied with the posting of the letter and gives jurisdiction to the Court where the letter is posted and the consequences which consisted in gaining publicity at the opening of the letter at the other end and also gives jurisdiction where the addressee resides. Therefore, in a defamation case, the venue of trial could also be at the place where the letter was received and read. The Allahabad High Court in ***Ashok Singhal vs. State of U.P. and Another***¹⁰ held that in case of defamation both Courts at the place where the defamatory statement is made and also at the place where the Newspaper in which defamation statement is published, is circulated and read. Therefore, making it accessible to any person who would access the internet and be able to understand the contents thereof. In ***Dr. Subramaniam Swamy***⁶ (*supra*) the Bombay High Court held that when an assailed statement was made at Chandigarh and the Indian Express carried the impugned news item which was published, circulated and read in the city of Bombay where the Complainant resides, it was held that the consequence of the statement made at Chandigarh was completed at Bombay by circulation of the said papers and, therefore, the offence of defamation is complete in the city of Bombay.

10. 2005 CRI.L.J. 2324 (Allahabad)

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8. Here in the instant matter, it is not denied that the offending article dated 26-08-2015 went online thereby making it accessible to any person who would access the internet and be able to understand the contents thereof. The Respondent in his statement before the Magistrate has stated that the Respondent has a Corporate Office and business of the Company within the jurisdiction of this Court. It has also been stated, *inter alia*, as follows;

"

I along with thousands of residents of Sikkim who had known about the company and its operation in Sikkim and other Indian states have been severely disturbed and subject (*sic*, subjected) to a lot of ridicule and mental agony owing to the slanderous and libelous articles published by Accused Persons who had conspired to defame our company and management.

....."

Despite the above statement, no person who has read the online version of the article in Sikkim was produced before the Court of the Magistrate.

9. In the Judgments of the various High Courts discussed hereinabove, it is apparent that the cause of action arose on both sides as it was established that the statement and publication was made in one place whereas circulation was made in another place and duly read by the public. By filing the Complaint the Respondent has failed to point to any person who has in fact read the online version or downloaded the same to make the offence under Section 499 of the IPC complete and thereby extend jurisdiction to the Courts in Sikkim.

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Merely because there is an online circulation of the article the offence will not be established until and unless it is proved that it was read in Sikkim as well. In the circumstances, I cannot agree with Counsel for the Respondent that Section 179 of the Cr.P.C. would apply to the instant case. In the facts and circumstances since it has not been established that the consequence had ensued in Sikkim, merely because the Corporate Office and Business of the Company is within the jurisdiction of the Courts in Sikkim, does not necessarily mean that jurisdiction for Section 499 of the IPC would also be extended. Consequently, it is found that Learned Chief Judicial Magistrate, East and North at Gangtok, has no jurisdiction to try the offences.

10. With regard to the question of taking cognizance, a careful perusal of Section 202 of the Cr.P.C. would indicate that the provisions thereof have not been flouted. For convenience, the said Section is reproduced hereinbelow;

"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, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction 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—

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(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; 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 witness 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."

11. A perusal of the Orders of the Learned Magistrate dated 19-10-2015, 05-11-2015 and 04-12-2015 would clearly indicate that he has taken all necessary steps as contemplated in the above Section. The accused in the said Complaint are alleged to be residing beyond the area in which the Magistrate exercises jurisdiction. In such an event, the Section mandates that he shall postpone the issue of process against an enquiry into the case himself or direct an investigation. In ***Vijay Dhanuka*³ (supra)** the Hon'ble Apex Court has succinctly laid down that an inquiry under Section 202 of the Cr.P.C. would mean in Paragraph 14 which reads as follows;

"14. In view of our answer to the aforesaid question, the next question which falls for our determination is whether the learned Magistrate before issuing summons has held the inquiry as mandated under Section 202 of the Code. The word "inquiry" has

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been defined under Section 2(g) of the Code, the same reads as follows:

"2. (g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;"

It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or court is an inquiry. No specific mode or manner of inquiry is provided under Section 202 of the Code. In the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is nothing but an inquiry envisaged under Section 202 of the Code."

12. From the Order dated 19-10-2015 on the date of filing of the Complaint, it is seen that the matter was listed on 05-11-2015 on which date the Complainant was examined. An enquiry under Section 202(1) of the Cr.P.C. requires the Magistrate if he thinks fit to take evidence of witness on oath. This has also been duly complied with as he has examined Complainant on oath and thereafter taken cognizance and then only resorted to issuing Summons to the accused persons. Therefore, the Orders of the Learned Magistrate under Section 202 of the Cr.P.C. cannot be faulted.

13. While addressing the arguments pertaining to Section 205 of the Cr.P.C., this Section clothes the Magistrate with discretionary powers if he sees reason to do so to dispense with the personal attendance of the accused and permit him to appear by his

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pleader. The provisions thereof are not mandatory and in any event on the first date the personal attendance of the accused persons are required for the purposes of complying with formalities of bail. Therefore, there appears to be no error on the part of the Magistrate in this regard.

14. In conclusion, although the Orders of the Learned Chief Judicial Magistrate, East and North Sikkim, at Gangtok, under Sections 202 and 205 of the Cr.P.C. cannot be faulted for the reasons set out hereinabove, however, on account of lack of jurisdiction of the said Court, the Order taking cognizance as also the process of issuance of summons and Order for appearance of the Petitioners in the Court are hereby set aside. No observations are, however, being made on the other arguments forwarded, as it would tantamount to foreclosing the issue on merits.

15. Crl.M.C. is disposed of accordingly.

16. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Judge
23 -08-2016

Approved for reporting : **Yes**

Internet : **Yes**