

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) NO. 573 OF 2016

APPLICANT :- Kishor S/o Chintaman Tarone, Aged about 33 years, R/o; Sawar Tola, Tahsil Arjuni – Morgaon, District – Gondia.

...VERSUS...

NON-APPLICANTS :- 1. The State of Maharashtra, Through P.S.O., P. S. Arjuni-Morgaon, District – Gondia.
2. Mrs.Rachanatai W/o Chameshwarji Gahane, Aged about 41 years, R/o; Siregaon – Bandh, Post – Sangadi, Tahsil Arjuni-Morgaon, District – Gondia.

Mr.R.M.Daga, Advocate for the applicant.
Mr.T.A.Mirza, A.P P for the non-applicant No.1.
Mr. Sanjay A. Bramhe, Advocate for the non-applicant No.2.

CORAM : Z.A.HAQ AND AMIT B. BORKAR, JJ.

DATED : 01.03.2021.

ORAL JUDGMENT : (Per : Amit B. Borkar, J.)

1. Heard.
2. **Rule.** Rule is made returnable forthwith.

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3. By this application under section 482 of the Code of Criminal Procedure, the applicant lays challenge to charge-sheet No.26 of 2016 filed in the Court of Judicial Magistrate First Class, Arjuni-Morgaon, District Gondia in pursuance of First Information Report No.36 of 2016, registered with the non-applicant No.1-Police Station for offences punishable under sections 354-A(1)(iv), 509 and 107 of the Indian Penal Code and section 67 of the Information Technology Act, 2000 and also proceedings bearing Regular Criminal Case No.177 of 2016.

4. The First Information Report came to be registered against the applicant and another with the accusations that the applicant (Accused No. 2) is an administrator of a Whatsapp group, that accused No.1 used filthy language against the non-applicant No.2 on the Whatsapp group of which applicant is an administrator, that despite accused No.1 using filthy language against the non-applicant No.2, the applicant had not taken any action against the accused No.1. It is alleged that the applicant being administrator had not removed nor deleted accused No.1 from the Whatsapp group. It is further alleged that the applicant had not asked accused No.1 to submit apology to the non-applicant No.2, on the contrary, the applicant expressed his helplessness. The non-applicant No.2, therefore, lodged First

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Information Report against the applicant and accused No.1. The Investigating Agency, after receipt of the First Information Report of the non-applicant No.2, initiated investigation, recorded statements of the non-applicant No.2 and other witnesses, seized mobile phones of the non-applicant No.2 and accused persons and forwarded it to Forensic Laboratory for further examination. The Investigating Agency, after completion of investigation, filed charge-sheet before Judicial Magistrate First Class, Arjuni-Morgaon.

5. The applicant has therefore, filed present application challenging filing of charge-sheet and continuation of proceedings against the applicant. This Court, on 23/08/2016 issued notice to the non-applicants. The non-applicant No.1 in pursuance of notice of this Court, has filed its reply stating that there is sufficient material available against the present applicant. It is further stated that considering the allegations against the applicant, *prima facie* ingredients of offence alleged against the applicant are made out.

6. We have heard Mr. R.M.Daga, the learned Advocate for the applicant, Mr. T.A.Mirza, learned A. P. P. for the non-applicant No.1 and Mr.Sanjay Bramhe, the learned Advocate for the non-applicant No.2.

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7. We have carefully considered the allegations in the First Information Report and material brought on record in the form of charge-sheet.

8. The crux of the issue involved is whether an administrator of Whatsapp group can be held criminally liable for objectionable post of its member for committing offences punishable under sections 354-A(1)(iv) , 509 and 107 of the Indian Penal Code and section 67 of the Information Technology Act, 2000. To adjudicate the said issue, it is necessary to understand functioning of Whatsapp messaging service. Whatsapp is an instant messaging platform which can be used for mass-communication by opting to create a chat group. A chat group is a feature on Whatsapp which allows joint participation of members of the chat group. Group Administrators, as they are generally called, are the ones, who create the group by adding or deleting the members to the same. Every chat group has one or more group administrators, who control participation of members of the group by deleting or adding members of the group. A group administrator has limited power of removing a member of the group or adding other members of the group. Once the group is created, the functioning of the administrator and that of the members is at par with each other, except the power of adding or deleting members to the group. The Administrator of a

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Whatsapp group does not have power to regulate, moderate or censor the content before it is posted on the group. But, if a member of the Whatsapp group posts any content, which is actionable under law, such person can be held liable under relevant provisions of law. In the absence of specific penal provision creating vicarious liability, an administrator of a Whatsapp group cannot be held liable for objectionable content posted by a member of a group. A group administrator cannot be held vicariously liable for an act of member of the group, who posts objectionable content, unless it is shown that there was common intention or pre-arranged plan acting in concert pursuant to such plan by such member of a Whatsapp group and the administrator. Common intention cannot be established in a case of Whatsapp service user merely acting as a group administrator. When a person creates a Whatsapp group, he cannot be expected to presume or to have advance knowledge of the criminal acts of the member of the group. We are not examining the issue of liability of an administrator if he is a creator of objectionable content, as it is not arising in the facts of the present case.

9. It is imperative to delve into the ingredients of section 354(a) (1)(iv) of the Indian Penal Code to understand what are the criteria for constitution of the offence alleged against the applicant, which reads as under:

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“[354-A. Sexual harassment and punishment for sexual harassment. — (1) A man committing any of the following acts—

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2)

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]”

Clause (iv) of sub-section of section 354-A of the Indian Penal Code requires that a man should himself make sexually coloured remarks. The language of section 354-A(1)(iv) of the Indian Penal Code does not introduce vicarious liability, nor could it be said that the Legislature intended to introduce vicarious liability by necessary implication. The First Information Report nowhere alleges that the applicant made sexually coloured remarks against the non-applicant No.2. It is alleged in the First Information Report that the sexually coloured remarks were made by accused No.1 and the applicant being Administrator of the Whatsapp group had not taken action of deleting the accused No.1 from the group, nor had sought apology from the accused No.1. In our opinion, in the facts of present case, non-removal

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of a member by administrator of a Whatsapp group or failure to seek apology from a member, who had posted the objectionable remark, would not amount to making sexually coloured remarks by administrator. We are therefore, of the opinion that even if the allegations in the First Information Report and the material brought on record in the form of charge-sheet is considered as true, the ingredients of the offence under section 354-A(1)(iv) of the Indian Penal Code are not fulfilled.

10. The next offence alleged against the applicant is under section 107 of the Indian Penal Code. To appreciate the criminal liability of an administrator of a Whatsapp group, it is necessary to understand the concept of abetment as enshrined in section 107 of the Indian Penal Code. Section 107 of the Indian Penal Code reads as follows:

“107. Abetment of a thing.— A person abets the doing of a thing, who—

First – Instigates any person to do that thing; or

Secondly. – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly. – Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1. —A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or

procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.”

The aforesaid provision was interpreted in ***Kishori Lal v. State of M.P.***, reported in **(2007) 10 SCC 797** by the Hon’ble Apex Court which in para 6 has held thus –

“6. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in IPC. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word “instigate” literally means to provoke, incite, urge on or bring about by persuasion to do anything. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. “Abetted” in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a

person is charged with the abetment in normally linked with the proved offence.”

On reading of the First Information Report and considering the material brought on record in the form of charge-sheet, we find that the essential ingredients of section 107 of the Indian Penal Code that the applicant had instigated or intentionally aided by his act or illegal omission to the accused No.1 to make sexually coloured remarks against non-applicant no. 2 are conspicuously absent. Therefore, in our opinion, essential ingredients of section 107 of the Indian Penal Code are not fulfilled in the present case.

11. The next offence alleged against the applicant is under section 509 of the Indian Penal Code, which reads as under:

“509. Word, gesture or act intended to insult the modesty of a woman.— Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, [shall be punished with simple imprisonment for a term which may extend to three years, and also with fine.”

Section 509 of the Indian Penal Code criminalizes word, gesture, or act ‘**intended**’ to insult modesty of a woman. In order to establish this offence, it is necessary to show that modesty of a particular woman has been insulted by a spoken word, gesture or

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physical act. Clearly this offence cannot be made out against the applicant (accused no. 2) when the grievance of the non-applicant No.2 is that it is the accused No.1, who had used filthy language against the non-applicant No.2. We are therefore, satisfied that the allegations in the First Information Report and material brought on record in the form of charge-sheet, do not disclose essential ingredients of offence punishable under section 509 of the Indian Penal Code.

12. The next offence alleged against the applicant is under section 67 of the Information Technology Act, 2000 which reads as under:

“67. Punishment for publishing or transmitting obscene material in electronic form. – *Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.”*

To constitute an offence under Section 67 of the Information Technology Act, 2000, a person must publish or transmit an obscene material in electronic form. Section 67 provides for punishment

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to a person whoever transmits or publishes or causes to be published or transmitted, any material which is obscene in electronic form. In view of the allegations made in the First Information Report and material in the form of charge sheet, the words employed in Section 67 of the Information and Technology Act are required to be analyzed to find out whether any of the allegations made against applicant would fall within the ambit of Section 67 of the Information and Technology Act. On careful consideration of the allegations in the First Information Report and material produced in the form of charge sheet, we find that there is no allegation or material that the applicant had either published, transmitted or caused to be published or transmitted in electronic form any material, which is lascivious or appeals to prurient interest or its effect is such as to tend to deprave and corrupt persons who are likely, to read, see or hear the matter contained or embodied in it. It is necessary at this stage to consider definition of intermediary under section 2(w) of the Information Technology Act, 2000, which reads as under:

“2. Definitions. – (1) In this Act, unless the context otherwise requires, –

[(w) "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment

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sites, online-auction sites, online-market places and cyber cafes;]”

The term intermediary refers to any person who on behalf of other person receives, stores or transmits that record or provides any service with respect to that record. There is no allegation in First Information Report or in the material brought on record that the applicant has transmitted or received any record or provided any service with respect to such record. In the backdrop of definition of intermediary, we are satisfied that the applicant has neither published or transmitted or caused to be published or transmitted any electronic form, any material which is obscene in nature.

13. The parameters of exercise of the powers conferred on this Court under Section 482 being settled, that in order to prevent the abuse of process of any Court and to secure the ends of justice, this power can be exercised. There is no doubt this is a case where this power needs to be exercised. In terms of the decision of the Hon'ble Apex Court in case of *State of Haryana v. Bhajan Lal [1992 Supp.(1) SCC 335]*, the power under Section 482 can be exercised by this Court, where the allegations made in the FIR, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused. Taking an overall

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view of the matter, we are satisfied that even if allegations in the First Information Report are accepted as correct, and considering the material in the form of charge-sheet on its face value, it does not disclose essential ingredients of offences alleged against the applicant under sections 354-A(1)(iv), 509 and 107 of the Indian Penal Code and section 67 of the Information Technology Act, 2000. We are therefore satisfied that continuation of present proceedings against the applicant would amount to abuse of process of Court.

14. We, therefore, pass the following order:

- i) The First Information Report No.36 of 2016 and consequent charge-sheet bearing No. 26 of 2016 for the offences punishable under sections 354-A(1)(iv), 509 and 107 of the Indian Penal Code and Section 67 of the Information Technology Act, 2000 and further proceedings of Regular Criminal Case No.177 of 2016 pending on the file of Judicial Magistrate First Class, Arjuni-Morgaon, District Gondia, are quashed and set aside.

Rule is made absolute in the above terms.

(AMIT B. BORKAR, J)

(Z.A.HAQ, J)

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