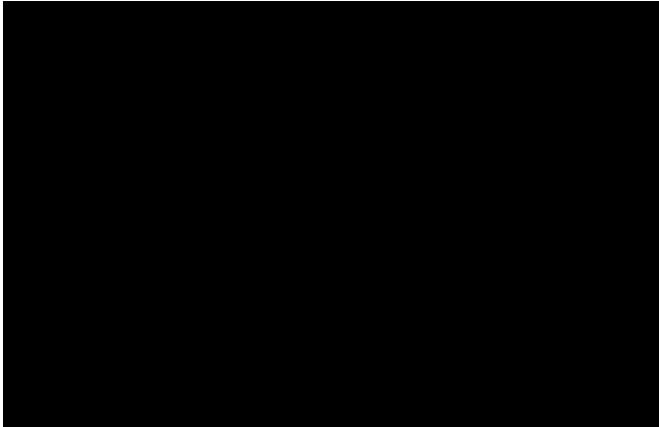




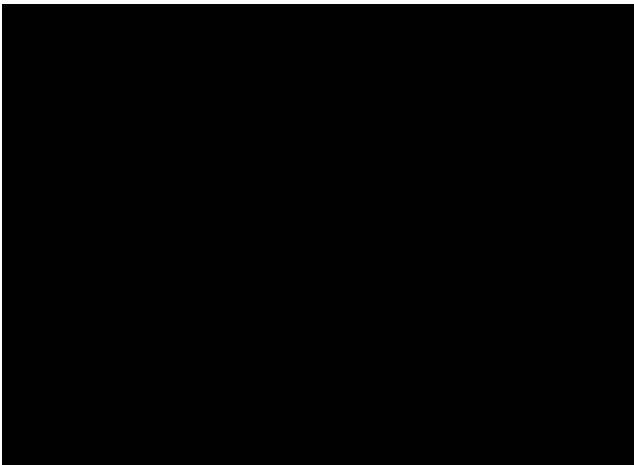
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition No.2686 of 2024



... Petitioners.

V/s.



... Respondents.

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Mr. Shyam Dewani a/w. Advocate Sachet Makhija a/w.	Advocates for the Petitioners.
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Advocate Dashang Doshi i/b. Dewani Associates	
Mr. Ghanshyam Mishra a/w. Ekta Bhalerao i/b. Ekta Mistry	Advocate for the Respondent No.1.
Mr. H.J. Dedhia	APP for Respondent No.2.

CORAM : S.M. MODAK, J

DATE : 17th July 2025.

ORAL JUDGMENT:

Heard learned Advocate Dewani for the Petitioners-the Accused persons and learned Advocate for Respondent No.1-Complainant.

2. It is a matter of record that up til now no process is issued for an offence punishable under Section 500,506 read with Section 34 of the Indian Penal Code against these Petitioners. Though the Respondent No.1 has requested the Court of 11th Additional Chief Metropolitan Magistrate, Kurla to issue process for those sections against the Petitioners, however, he has failed. The learned Magistrate as per the order dated 15th April 2023 has dismissed the complaint by taking recourse to the provisions of Section 203 of Cr.P.C.. **The material findings are as follows:**

“ However, to my mind, complainant has failed to

made out prima facie case to issue process against accused persons for the aforesaid offences. It is for the reason that whatever defamatory statements alleged to have been made by proposed accused No.1 against the complainant are made by the accused No.1 i.e. wife of the present complainant in matrimonial proceedings like divorce and other proceedings. Admittedly, impotency is one of the ground of the divorce. There is nothing on record to show that at any any point of time the accused persons have given criminal intimidation to the complainant.”

3. This order was taken an exception by the Complainant by way of Criminal Revision Application. There also the Complainant has failed to satisfy the revisional Court about issuance of a process. However, the Complainant was successful in convincing the revisional Court to remand the matter to the trial Magistrate for further enquiry. Said order is passed by the Court of Additional Sessions Judge, Greater Mumbai on 3rd April 2024. **The Direction No.3 reads thus:**

“ The learned Metropolitan Magistrate is directed to conduct the inquiry under section 202 of Cr.P.C. and

then decide afresh the point of issuance of process

against respondents No.2 to 4 i.e. accused No.1 to 3 in the complaint case.”

4. **There is a challenge to this order at the instance of the Petitioners.** The contention is even no case for remand is made out before the revisional Court and order of dismissal is proper. **Mr. Dewani made following submissions:-**

- (i) the sole ground for remand is the Complainant was not given an opportunity to examine the witnesses and enquiry was not conducted. (Para No.13).
- (ii) He invited my attention to the memo of the revision application on Page-117 and more specifically Para No.16 on Page-189. The Complainant averred “after recording verification statement of the Applicant and after hearing his Advocate, the impugned order came to be passed.”
- (iii) His contention is nowhere in the memo of revision, the grievance is raised about denial of an opportunity to examine the witnesses prior to issuance of process. In that eventuality, the learned Revisional Court was wrong in

remanding the matter.

(iv) Additionally, he made submission that the revisional Court failed to record a finding about the findings by the trial Court that “*the impotency is one of the ground of the divorce and there is nothing on record to show about criminal intimidation.*” He submitted that in fact the averments made before the lawful authority i.e. police and in judicial proceeding making imputation does not amount to defamation and the case is covered by the exception to Section 499 of the IPC.

(v) On the point of raising the ground of exception, at every stage, he relied upon the observations in case of following judgments:

(i) *Aroon Purie v/s. State of NCT of Delhi and others*¹

(ii) *Iveco Magirus Branschutztechnik GMBH v/s. Nirmal Kishore Bhartiya and anr.*²

5. By way of reply, the learned Advocate for the Complainant made following submissions:

(a) This petition cannot be entertained at this stage because

1 .2022 SCC OnLine SC 1491

2 .(2024) 2 Supreme Court Cases 86

there is no order of issuance of process.

- (b) The Complainant needs to be given an opportunity to satisfy
the Court about issuance of process.
- (c) All the Petitioners are residents of Chhattisgarh State and
hence enquiry under Section 202 of Cr.P.C. would be
required.
- (d) The allegations about impotency of the husband are not at
all warranted in the proceedings referred in the
complaint/proceedings initiated by him and they are not
made in good faith.
- (e) The fact that these allegations are made in a judicial
proceeding and it is a public record, any one can read it and
they are per se defamatory.
- (f) The Complainant cannot be asked to wait till the time the
concerned Courts seized of those proceedings will come to
a finding about veracity of those allegations and if the
Complainant is asked to wait till that time, the complaint
will be beyond limitation.
- (g) He relied upon the observations in the case of ***X v/s. Y⁸***.

Consideration

6. It is certain that while remanding the matter, the learned Additional Sessions Judge has not given any finding on the reasons given by the trial Court. No doubt the trial Court has not specifically opined that these allegations come within the exception to defamation but when he has said that these allegations are made in a divorce proceedings, he mean to convey the same thing. About criminal intimidation, he has opined there are no materials.

7. Even the learned Additional Sessions Judge remanded the matter on a ground which was not taken in a memo of revision. From the memo of revision, it is not pointed out to me that the Complainant has expressed desire before the learned Magistrate for examining the witnesses and the trial Court has refused it. In fact the reasoning given by the Revisional Court in Para No.13 of their judgment is erroneous. **What the learned Judge observed :-**

“it is not appearing whether learned ACMM had given an opportunity to examine any of the witnesses, mentioned in the list of the witnesses”.

The learned Judge further observed:--

“He should have given an opportunity to the Complainant to examine the witnesses mentioned in the list of witnesses and enquiry under Section 202 Cr.P.C. was to be conducted”.

8. It is a matter of record that the learned Magistrate while proceeding further has referred to the verification of the Complainant. In fact if the Complainant wants to examine the witnesses, he ought to have requested the trial Magistrate about the willingness. It was neither there nor grievance is made to that effect before the Revisional Court. There was no duty cast on the trial court to ask the complainant whether he wants to examine the witnesses. **That is why this Court feels that reason quoted in the impugned order is erroneous.**

9. **There is one more reason why the impugned order cannot be sustained in the eyes of law.** When the complaint was dismissed for the reason that impotency is a ground of divorce, the learned Revisional Court while remanding the matter ought to have made some prima-facie allegations about the said finding. Why I say some

prima-facie observations because he has not allowed the revision. If he could have issued the process, then he was supposed to go in detail about the said observation but some prima-facie observations are required, or at least certain directions to the learned Magistrate to go into that reasoning are required. I find they are missing.

Stage at which court can look into the exception

10. It is important to note that this petition is filed as per the provisions of Section 227 of the Constitution for quashing. This Court is certainly empowered to ascertain about the allegations in the complaint and the defence of exception taken in the petition. Even the Hon'ble Supreme Court in case of *Aroon Purie* (supra) in Para No.19 has considered this issue. The issue was whether the benefit of exception to Section 499 of IPC can be availed in a **quashing petition** under Section 482. It can be taken and it cannot be restricted only at a stage of the trial. Similar are the observations in case of *Iveco Magirus*. Both the learned advocates have relied upon the observations in Para No.51. **In fact it is observed if the offence is not made out, the accused should not be made to undergo the ordeal**

of trial.

11. It is true at the time of issuance of process as per the old law, the accused is not having locus so it is a issue between the Court and the Complainant. The Court has to arrive at a *prima-facie* satisfaction about issuance of a process satisfying the ingredients of the relevant sections. However, before the High Court when both the parties are there and where the scope is wide, certainly this Court can go into the allegations and ascertain itself whether the exception is made out.

12. As per Section 499 of IPC, if the harm is caused by making imputation to the reputation of such person, it amounts to defamation of that person. In this case imputation is there by way of written words before the police and before the judicial authorities. Such imputation will amount to defamation when the case does not fall within either of the 10 exceptions. It is true at the time of issuance of process Court is not supposed go into the detail hearings and find out whether the exception is made out or not. **It is for two reasons; first**, the accused is not before the Court and **second**, the detail hearing is not contemplated **but this is not true when the**

Court has exercised power under Article 227 of the Constitution along with Section 482 of the Code.

About actual averments in the proceedings

13. Now the objection raised is “*these imputations of impotency are not justified considering the nature of the proceedings when they are made*”. According to the Complainant these imputations are made in following proceedings :--.

- (i) In an FIR filed by the wife against the husband-Complainant and his parents.
- (ii) In a Hindu Marriage Petition filed by the wife under Section 13(1)(i)(a) of the Hindu Marriage Act, divorce is claimed on the ground of cruelty.
- (iii) Imputations are made in a maintenance petition filed under Section 125 of the Code.
- (iv) Imputations are made in transfer petition filed by the wife before the Hon’ble Supreme Court.

14. It is true that the prayers made in all these proceedings are different. **Where FIR is lodged**, certainly, the first informant wants

the police to take an action. **When a divorce petition is filed**, the Petitioner has to prove one of the ground for dissolving the marriage. **In a maintenance petition** the wife has to show refusal to maintain and neglect and capacity of the husband. **In a transfer petition** the Applicant has to show why the transfer is justified. Depending upon the nature of proceedings and prayers made therein, scope of inquiry depends and that is how burden on the parties and facts to be pleaded. In a Hindu Marriage Petition, the allegations of impotency are very much relevant. That is to say when the wife alleges due to impotency it has caused mental cruelty to the wife, she is certainly justified in making those allegations. So the grounds of impotency even though may not be primarily necessary, the allegations are on the basis of incidents that took place between their matrimonial life. As such they are very much necessary. Even on a maintenance petition in order to show neglect and refusal, these allegations of impotency are as such relevant.

15. It is her case that the husband was not capable of intercourse and according to husband these allegations have damaged his reputation. The learned Advocate for the Respondent has pointed

out to me a certificate showing that there is a son begotten from the said marriage. **In this petition we are not deciding whether the allegation of impotency is true or false and whether the husband is capable of intercourse or not.** We have only to decide whether these imputations are made without good faith and and not for protecting the interest of the maker.

16. This Court feels that when the litigation is in between both the spouses arising out of a matrimonial relationship, the wife is justified in making those allegations to support her interest. As said above, there is no judicial finding given by any Court in either way. So this Court feels that these allegations falls within the exception Ninth to Section 499 of IPC. The Accused No.2 is a father of Accused No.1 and Accused No.3 is the brother. It is their case that they have been joined unnecessarily in that particular case.

17. The power under Section 482 of the Code and Article 227 of the Constitution has to be exercised when there is a misuse of the process of the Court. So just because there is no order of issuance of process, it does not mean that the petition is filed at pre-mature

stage. This issue has already been clarified by the Supreme Court in above two judgments.

18. The ratio in case of *X v/s. Y* will not be helpful to the Complainant for the reason the Supreme Court has already clarified the issue on this aspect. The learned Single Judge has laid down certain principles where it can be said offence of defamation. It finds place in Para No.16. It was also a case wherein defamatory allegations are made in a petition challenging the order of interim custody of a daughter. On the basis of such allegations about impotency only criminal law was set in motion. There is a discussion about availability of an option of filing writ petition and filing revision application. Learned Judge deal with facts in para no. 23 and gave its findings in para no. 24. learned Judge held evidence need to be adduced. The learned Single Judge was pleased to dismiss the petition but this Court is bound by the law which is interpreted by the Hon'ble Supreme Court. I am inclined to allow the petition. Hence, the following order:-

ORDER

- (i) The Writ Petition is allowed.

- (ii) The order dated 3rd April 2024 passed by the Court of Additional Sessions Judge in a Criminal Revision Application No.446/2023 is set aside.
- (iii) The complaint filed for offences under Section 500,506 read with Section 34 of IPC stand dismissed.

(S.M. MODAK, J.)