(2024) 07 BOM CK 0042

Bombay High Court (Nagpur Bench)

Case No: Criminal Application (Apl) Nos. 583, 1077 Of 2023

Dr. Subhash S/O. Dnyaneshwar Waghe		APPELLANT
	Vs	
State Of Mah. Thr. Pso, Ps Narkhed Tq. Narkhed Dist. Nagur And Another		RESPONDENT

Date of Decision: July 24, 2024

Acts Referred:

- Constitution of India, 1950 - Article 19(2), 25, 26
- Code of Criminal Procedure, 1973 - Section 161, 196, 196(1)
- Indian Penal Code, 1860 - Section 108A, 153A, 153B, 294A, 504, 505, 506

Hon'ble Judges: Vibha Kankanwadi, J; Vrushali V. Joshi, J

Bench: Division Bench

Advocate: Sameer Sonwane, Anup Badar, R.S. Akbani

Final Decision: Allowed

Judgement

Vibha Kankanwadi, J

1. Heard Mr. S.P. Sonwane, learned Advocate for the applicants, the learned APP for the State and Mr. R.S. Akbani, learned Advocate for the non-applicant No.2.

2. Rule. Rule is made returnable forthwith. Heard finally by consent of the learned Advocates for the parties.

3. Both the applications have been filed under Section 482 of the CrPC for quashing the FIR and the charge-sheet filed against the present applicants on the basis of the FIR lodged by the non-applicant No.2 with Police Station, Narkhed.

4. After taking us through the contents of the FIR and the charge-sheet, the learned Advocate for the applicants submits that as per the informant/non-applicant No2 the alleged insult is stated to be to outrage religious feelings of a class and it is through WhatsApp group. As per the FIR, there was WhatsApp group, named as “Narkhed Ghadamodi”. The non-applicant No.2 was added as a member to the said group a day prior to lodging FIR dated 03.08.2017. He finds that both the applicants were asking certain questions in respect of the Muslim Community which he found to be outrageous. However, the entire contents of the FIR as well as the charge-sheet would show that he was intentionally made a member by somebody so that he can instigate the situation. The conversations/contents recorded in the FIR as well as in the statements of the witnesses, would show that some questions were asked in respect of the Prophet Mohammad and then it is stated that the applicants got annoyed by knowing that certain members of the group were not ready to say ‘Vande Matram’ and then the applicants reacted that if the persons who cannot say ‘Vande Matram’, then they should leave the country and go to Pakisthan. Thereafter, the incident dated 03.08.2017 had taken place in the Hospital of one of the applicant-Dr. Subhash, which shows that the informant was the aggressor. Those chats cannot be considered as deliberate and malicious acts, intended to outrage religious feelings of any class. Lodging of the FIR and the entire proceedings based upon the same itself are with a malicious or mala fide intention. Both the applicants are reputed persons, who love their country and therefore, it would be unjust to ask them to face the trial.

5. Per contra, the learned APP as well as the learned Advocate for the non-applicant No.2, strongly oppose the applications and submitted that not only the conversation that has been reflected in the FIR and the statements of the witnesses, but also the conversations which have been seen from the WhatsApp chats, would show that with some grudge against the Muslim Community both the applicants were asking unnecessary questions and it appears that they wanted to show as to how the Hindus are on upper footing or better than the Muslims and how their religion is great. Only some chats need not be considered to come to the conclusion whether the ingredients of Section 295A of the IPC are attracted or not. The mobiles phones have been seized and the chats have been submitted. When the charge-sheet is filed, let the applicants face the trial.

6. As it can be seen that the charge-sheet that has been been filed against both the applicants, is for the offences punishable under Section 295A, 504 and 506 of the IPC and therefore, the basic fact that ought to have been shown on behalf of the prosecution is that the sanction, as required under Section 196(1) of the CrPC, has been obtained. The reply has been filed on behalf of the Investigating Officer and in the said reply also there are no averments as to when the proposal was sent either to the Central Government or to the State Government for sanction to prosecute the

applicants. We would like to reproduce the relevant part of the Section 196(1) of the CrPC, which reads thus:

"196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.-

(1)No Court shall take cognizance of -

(a)any offence punishable under Chapter VI or under section 153-A, section 295-A or sub-section (1) of section 505 of the Indian Penal Code (45 of 1860), or

(b)a criminal conspiracy to commit such offence, or

(c)any such abetment, as is described in section 108-A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.

[(1-A) No Court shall take cognizance of -

(a)any offence punishable under section 153-B or sub-section

(2) or sub-section (3) of section 505 of the Indian Penal Code, (45 of 1860) or

(b) a criminal conspiracy to commit such offence, except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.]"

7. This aspect was considered by the Division Bench of the Hon'ble Gujrat High Court in **Shalibhadra Shah v. Swami Krishna Bharati** reported in 1981 CRI. L.J. 113, wherein it is held that the offences enumerated in Section 196(1) of the Code of Criminal Procedure in respect of which prior sanction has been made mandatory, deal with matters relating to public peace and tranquility with which the State Government is concerned. Those offences are of serious and exceptional in nature. It is, therefore, provided that previous sanction of the Government shall be required so that prosecutions which may by themselves generate class feelings can be avoided, In other words, it is stated that obtaining of a sanction of concerned Government is a sine qua non and no Magistrate can take cognizance of the complaint unless sanction order is produced.

8. Here the FIR has been lodged on 03.08.2017 and it charge-sheet has been filed on 04.09.2018. Even during this proceedings the said sanction order has not been produced. On this count the FIR and the proceedings need to be quashed and set aside.

9. The Hon'ble Supreme Court in the decision of **Swaraj Thackeray v. State of Jharkhand,** reported in 2008 Cri LJ 3780 (Jhar), has taken a view that there is a

complete bar for taking cognizance of offence punishable under Sections 153A, 153B and 295A of the IPC, if there is no prior sanction as envisaged under Section 196 of the CrPC. Here it is not clarified by both the sides as to whether the learned Magistrate has taken a cognizance without considering the point of sanction. Then, such trial that will be conducted thereafter, would be void and it is not a curable defect, this so held in **H.N. Rishbud Vs. State of Delhi** reported in AIR 1955 SC 196.

10. The constitutional validity of Section 295A of the IPC was considered by the Constitutional Bench of the Hon'ble Supreme Court in **Ramjilal Lal Modi v. State of U.P**. reported in AIR 1957 S.C. 620, which reads thus:

(8) It is pointed out that S. 295A has been included in chap. 15 of the Indian Penal Code which deals with offences relating to religion and not in chap. 8 which deals with offences against the public tranquillity and from this circumstance it is faintly sought to be urged, therefore, that offences relating to religion have no bearing on the maintenance of public order, or tranquillity and, consequently, a law creating an offence relating to religion and imposing restrictions on the right to freedom of speech and expression cannot claim the protection of cl. (2) of Art.19. A reference to Arts. 25 and 26 of the Constitution, which guarantee the right to freedom of religion, will show that the argument is utterly untenable. The right to freedom of religion assured by those Articles is expressly made subject to public order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. Those two Articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order."

11. The decisions in **Ramjilal Lal Modi** (supra) and other cases were again considered in **Amish Devgan Vs. Union of India and Others** reported in (2021) 1 SCC 1. These provisions have been interpreted earlier in number of cases including **Ramji Lal Modi** (supra), **Kedar Nath Singh Vs. State of U.P**. reported in AIR 1962 SC 955 and **Bilal Ahmed Kaloo Vs. State of A.P.** reported in (1997) 7 SCC 431. It could be correct to say that Section 295A of the IPC encapsulates of all three elements, namely, it refers to the content-based element when it refers to words either spoken or written, or by signs or visible representation or otherwise. However, it does not on the basis of content alone makes a person guilty of the offence. The first portion refers to deliberate and malicious intent on the part of the maker to outrage religious feelings of any class of citizens of India. The last portion of Section 295A refers to the harm-based element, that is, insult or attempt to insult religions or religious belief of that class.

12. The principle laid down in **Ramji Lal Modi** (supra) also considered in **Mahendra Singh Dhoni Vs. Yerraguntla Shyamsundar** reported in 2017 (7) SCC 760, which reads thus:

"6.On a perusal of the aforesaid passages, it is clear as crystal that Section 295-A does not stipulate everything to be penalised and any and every act would tantamount to insult or attempt to insult the religion or the religious beliefs of a class of citizens. It penalises only those acts of insults to or those varieties of attempts to insult the religion or religious belief of a class of citizens which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class of citizens. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the Section. The Constitution Bench has further clarified that the said provision only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Emphasis has been laid on the calculated tendency of the said aggravated form of insult and also to disrupt the public order to invite the penalty."

13. Before drawing attention to the facts, we would like to consider Section 295A of IPC, which runs thus:

295A. Deliberate and malicious acts, intended to outrage religious feelings of any class, by insulting its religion or religious beliefs.

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult in the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

14. Now it is to be noted that this section was inserted in the IPC in 1927. The Government, by Section 2 of Act XXV of 1927 for the first time, introduced Section 295A in the IPC and the Select Committee in their report behind enactment of that Section stated that; "The essence of the offence is that the insult to religion or the outrage to religious feelings must be the sole or primary or at least the deliberate and conscious intention. Further we were impressed by an argument to the effect that an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted in good faith by a writer with the object of facilitating some measures of social reform by administrating such a shock to the followers of the religion as would ensure notice being taken of any criticism so made. We have, therefore, amplified the words 'deliberate intention' by inserting reference to malice and we think that the Section

which we have now evolved will be both comprehensive and at the same time not too wide an application.

15. At that time, there were no such social media like WhatsApp. This Court as well as the Apex Court considered in many cases that in view of the fact that there is end to end encryption in WhatsApp, a third person i.e. who is not a member of the group (in case of group) or to whom that message is sent, cannot see or know about such messages. From the FIR, it can be seen that already that group was formed and in the charge-sheet, we cannot get as to when the said group was formed and who was the admin of the group. The FIR shows that one Shoyeb had added the non-applicant No.2 in the group on 02.08.2017 and it is also said that in the said WhatsApp group many members were already there, who were either from the Hindu or Muslim religion. There is no explanation as to how till 02.08.2017 the non-applicant No.2 was not added as a member, in order to arrive at a conclusion that those chats were with an intention to outrage religious feelings. The Investigating Officer should reach to a conclusion that as to why there was no addition of non-applicant No.2 prior to 02.08.2017 in the said WhatsApp group. If everything was going smoothly till 02.08.2017, then why the informant was added in the group, which ought to have been considered. We are also required to consider that every insult or attempts to insult the religion or the religious beliefs of a person or community are not covered under Section 295A of the IPC. It is only the deliberate or malicious acts those are covered under the Section. Now for this purpose, along with the reply of the respondent No.1, screen shots of the WhatsApp chats of the informant have been given. Interestingly, it is stated that those chats/pages remained to be added in charge-sheet. It is to be noted that the informant was added on 02.08.2017 so he can have chats after 02.08.2017 only and there is no mention in the affidavit-in-reply or say that the Investigating Officer as to whether he had considered the earlier chats in the group or not. It appears that, from whatever chats of which the screen shots have been provided would show that, some discussion was going on (origin of which cannot be ascertained now) but it appears that even the present applicants were instigated to say something, then at the some point of time, it is said that if they wanted to live in Hindusthan, then they should say ‘Vande Matram’. Even the informant says that he refused to do the same saying that meaning of ‘Vande Matram’ is to worship the mother and if they do that, they would be ousted from the ‘Islam’, instead of they would say ‘Hindusthan Jindabad’. We are constrained to observe that now-a-days people have become more sensitive about their religions may be than before and everybody wants to impress as to how his religion/God is Supreme. We are staying in the democratic secular country, where everybody should respect the religion, caste, creed etc. of another. But at the same time, we would also say that if the person says that his religion is Supreme, then the other person may not immediately react. There are ways and means to react on such sensitive issues.

16. Coming back to the ingredients of Section 295A of the IPC, the prosecution should prove that the accused must insult or attempt to insult the religion or religious beliefs of any class of citizens of India. Secondly, the said insult must be made with deliberate and malicious intention of outraging the religious feelings of the said class of citizens. Whether the chat of the group, which was encrypted end to end that means it was within the group, had the effect of outraging the religious feelings or attempt to outrage religious feelings as contemplated under Section 295A of the IPC, is now required to be seen from the evidence that has been produced before the trial Court. The investigating Officer had taken statements of in all four witnesses. One Parvez Ali Sabir Ali, Shoyeb @ Pintu Mujeeb Shaikh, Gulab Muhidin Abdul Gaffar Shaikh and Parvez Khan Kalimulla Khan Pathan.

17. As per the FIR, the non-applicant No.2 was added as a member by Shoyeb. If we consider the statement of Shoyeb @ Pintu Mujeeb Shaikh, then we cannot gather that he is the same Shoyeb, who had added the non-applicant No.2 in the said group i.e. 'Narkhed Ghadamodi'. Rather, he says that he himself was introduced in the group two months prior to the statement dated 25.09.2017. That means the group was there since prior to that. Then he says that the group is having 150 to 200 people as members. Thus, out of those 150 to 200 people, the Investigating Officer has chosen only four persons as witnesses and therefore, the statements under Section 161 of the CrPC have been recorded. We are again constrained to observe that all these four witnesses are from the same community/religion to which the non-applicant No.2 belongs. The witness Shoyeb further says that the group discusses political issues. We can foresee that when the political issues are discussed, then it will definitely give heated exchange of thoughts and there would be fire-works. The witness Shoyeb then says that both the applicants were speaking against the Muslim and then the non-applicant No.2 replied. In categorical terms this witness has not stated that his religious feelings were hurt.

18. Another witness Parvez Ali Sabir Ali Sayyad also said that he was added in the group two months prior to his statement dated 25.09.2017. He says categorically in statement that he does not take active part and reads messages occasionally. Further similar statement to that of Shoyeb is made that both the applicants were making comments against the Muslim community. He says that he did not give any kind of comment.

19. Third witness Gulam Muhidin Abdul Gaffar Shiakh says that some months ago he was added in the group. He also does not take active part and reads messages occasionally. Then he had read the messages those were given by the present applicants, according to him, which were against the Muslim community. Then, he says that he had sent posts/messages to give understanding to the applicants but he does not say that what he had written.

20. The forth witness Parvez Khan Kalimulla Khan Pathan also says that he was introduced in the group some months ago prior to his statement. The group is having 150 to 200 people as members and some are Hindus and some are Muslims. He also is not the active member of the group and reads messages occasionally. The other statements are same and they are also silent on as to what they felt after reading those messages.

21. Taking the note of the evidence i.e. collected, we are of the opinion that the Investigating Authority had adopted a 'pick and choose' method and recorded the statements of only those witnesses who are from the same community of the informant, when the group consisted of more than 150 to 200 members from the Hindu and Muslim Communities. There was no investigation as to who was the admin of the group, because none of these four witnesses claimed that they are the admin. The statement of admin was very much important, when such activity was going on as to what he did, was also required to be considered. The general statements of those witnesses that the applicants were speaking against their community, will not be considered as international insult. Their statements do not show what was the triggering point and when they themselves are not saying that they felt that these applicants are insulting them on their religious beliefs, then it cannot be said that the ingredients of Section 295A of the IPC are attracted.

22. The another point that cropped up is that those messages were end to end encrypted that means they could not have been seen by third person, then whether it can be gathered that the said act attracts Section 295A of the IPC. The Investigating Officer has not collected names of all the group members. It is not stated in the charge-sheet and/or FIR how many of the members of Muslims. Only four witnesses and one informant cannot be counted as 'class' as contemplated in Section 295A of the IPC. We are of the opinion that the offence under Section 295A of the IPC is not transpiring from the contents of the FIR, together with the material collected in the charge-sheet.

23. The offences under Section 504 and 506 of the IPC are also added, which are in respect of the incident alleged to have taken place on 03.08.2017 in the hospital of the applicant-Dr. Subhash. The contents of the FIR in this respect states that when the informant responded to the posts of the applicants, then the applicants had challenged him to say that he should come to Narkhed and was abused as 'rebel' and 'traitor'. If this statement is to be considered, then the informant is giving his address as 'Narkhed', becomes doubtful. If he was residing in Narkhed itself, there was no necessity for the applicants to challenge him to come to Narkhed. But then the informant says that he went to the hospital of Dr. Subhash and gave understanding to him. There was altercation between them, then he says that he left the place and then again in the afternoon, he along with some persons went to the hospital of Dr.

Subhash for giving understanding him. At that time again there was altercation. Threats and abuses were also given. All these facts would definitely show that the informant was the aggressor and went to the hospital of Dr. Subhash to instigate him. If he was the cause for instigation, then he should also ready for reaction. If the applicants had reacted, then it will not amount to any offence, as from the contents of the FIR we do not find that they were disproportionate.

24. The witness-Parvez Ali Sabir Ali Sayyad and Shoyeb @ Pintu Mujeeb Shaikh posed themselves as witnesses to the afternoon incident in the hospital of Dr. Subhash, but then they do not say that they had gone along with the informant. Those persons who were along with the informant, their statements have not been recorded. Therefore, taking into consideration all these aspects, we do not find that even prima facie case is made out against the applicants. It would be unjust to ask both the applicants to face the trial. The parameters governing powers of this Court under Section 482 of the CrPC are well settled. We can get those parameters in the decision of the Hon'ble Supreme Court in **State of Haryana and others v. Ch. Bhajan Lal and others**; AIR 1992 SC 604, **R.P. Kapur v. State of Punjab,** AIR 1960 SC 866 (V 47 C 147), **M/s.Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and others**, AIR 2021 SC 1918 and **Shambhu Kharwar v. State of U.P.,** AIR 2022 SC 3901. In **Bhajan Lal** (supra) parameter No.7, where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. Therefore, we find this is a fit case where we can exercise our powers under Section 482 of the CrPC. Accordingly, we pass following order:

(i) Both the applications stand allowed.

(ii) The FIR, vide C.R. No.259 of 2017 registered with Narkhed Police Station for the offences punishable under Section 295A, 504 and 506 of the IPC, the charge-sheet bearing No.89 of 2018 i.e. RCC No.100 of 2018 arising out of the said FIR, pending before the learned Judicial Magistrate First Class, Narkhed, District : Nagpur, stand quashed and set aside.

Rule accordingly. No order as to costs.