(2011) 06 AHC CK 0179

Allahabad High Court

Case No: Application No. 15306 of 2011

Dr. Zakir Abdul Karim Naik	APPELLANT
Vs	
State of U.P. and Another	RESPONDENT

Date of Decision: June 6, 2011

Acts Referred:

- Constitution of India, 1950 - Article 19, 21
- Criminal Procedure Code, 1973 (CrPC) - Section 196(1), 196(2), 202, 203, 482
- Penal Code, 1860 (IPC) - Section 109, 115, 116, 121, 124A

Hon'ble Judges: Rajesh Dayal Khare, J

Bench: Single Bench

Judgement

Rajesh Dayal Khare, J.
Heard learned Counsel for the applicant and Sri Shahid Ali Siddiqui, Ms Nazia Ilyas and Sri B.A. Khan, learned Counsel for the opposite party No. 2 and also learned A.G.A. for the State Respondent.

2. The present 482, Code of Criminal Procedure application has been filed for quashing the order dated 7.4.2011 passed by Additional Sessions Judge IV, Jhansi in criminal revision No. 194 of 2010 as well as the order dated 30.4.2010 passed by Judicial Magistrate X, Jhansi summoning the applicant u/s 109, 115, 116, 121, 298, 502, 511 IPC.

3. It is contended by the learned Counsel for the applicant that the applicant is the President of Islamic Research Foundation, Mumbai, which clarifies Islamic viewpoints and clears misconceptions about Islam using Quran, authentic Hadith (saying of Prophet); that the applicant has been delivering public talks even in foreign countries for the last 15 years and has been invited as a State Guest in many countries; that the applicant''s name also finds place in the Indian Express list of the 100 Most Powerful Indians in 2009, in the special list of the top 10 Spiritual Gurus of India, wherein the applicant was ranked No. 3, after survey; that the applicant holds

Annual International Peace Conference, which is attended by millions of people and promotes harmony and peace amongst the citizen of India. He regularly appears on many International Television channels in more than 200 countries of the world; that the applicant is the peace loving and law abiding citizen.

4. The opposite party No. 2 filed a complaint on 9.1.2008 before the Chief Judicial Magistrate X, Jhansi, which was numbered as complaint case No. 92 of 2008, wherein it was alleged that in the television programmed, which was telecasted in Peace TV on 21.1.2006, the applicant had participated in a religious dialogue with Shri Ravi Shanker, the founder of ''Art of Living'' foundation, which was held at Bangalore, wherein the applicant had hurt the religious sentiments of a particular community; that the opposite party No. 2 has alleged in his complaint that the applicant had published and distributed a pamphlet just to incite hatred and ill-will amongst different communities, the extract of which has been quoted in paragraph No. 9 of the accompanying affidavit to the petition filed u/s 482, Code of Criminal Procedure (hereinafter referred to as the accompanying affidavit).

5. Perusal of paragraph No. 9 of the accompanying affidavit shows that the pamphlets, which was allegedly authored by the applicant, showed that it contains a recital to the effect that Muslim should be a Terrorist. Terrorist has been defined to be a person, who causes terror and illustration of policeman has been given, who is a terrorist for a robber and thus, it has been mentioned that similarly every Muslim should be a Terrorist to selective people like anti-social elements of the society such as thieves, dacoits, rapist etc. and every anti social element should be terrorized on seeking a Muslim and thus, in fact, a Muslim should be a source of peace for innocent people.

6. Learned Counsel for the applicant has further contended that the complainant had not produced any material along with his complaint to authenticate that it was the applicant, who had printed, published or distributed the alleged pamphlet; that the complainant has falsely implicated the applicant by way of said pamphlet; that the alleged pamphlet, allegedly printed, published or distributed by the applicant, was not even appended to the complaint and the Magistrate had directed the complainant to produce the same; that even if the contents of pamphlet are read as whole and in its proper perspective, it does not disclose any offence under the charged sections or under any section, inasmuch as the contents thereof, if understood in its proper perspective, promote peace and condemn terrorism in every form; that, thus, filing of complaint by the opposite party No. 2 is nothing but misuse of process of Court and which has been filed with the oblique motive of wrecking vengeance against the applicant; that so far as the programmed, which was held at Bangalore, the same was a joint Endeavour on behalf of the applicant and Shri Ravi Shanker, the founder of ''Art of Living'' foundation to enlighten the viewers regarding the concept of God in Hinduism and Islam in the light of sacred scriptures of both religions and entire programmed was made to apprise people at

large of all religions regarding peace and harmony and at the same time terrorism was condemned; that in the entire programmed, which was held in Bangalore, there was absolutely nothing, which can be said to be derogatory or slanderous to any religion nor any effort was made for advocating terrorism amongst the Muslim community; that the said programmed was held in Bangalore, therefore, courts at Bangalore alone would have jurisdiction and not the courts at Jhansi; that after filing of complaint by the opposite party No. 2, his statement was recorded on 21.1.2008 u/s 202, Code of Criminal Procedure, in which opposite party No. 2 has reiterated, whatever he has mentioned in his complaint.

7. Learned Counsel for the applicant has next contended that on 9.4.2008 the Judicial Magistrate, Jhansi directed the complainant to file entire documents containing the name of publisher, distributor of the alleged pamphlet; that the order passed by the Judicial Magistrate, Jhansi was not complied with by the opposite party No. 2 and ultimately the Magistrate rejected the complaint u/s 203, Code of Criminal Procedure on 12.5.2008, copy of which has been filed as annexure-5 to the accompanying affidavit; that aggrieved from the said order dated 12.5.2008, opposite party No. 2 filed criminal revision No. 78 of 2008 before the Additional Sessions Judge IV, Jhansi, who in most mechanical manner, without application of mind, set aside the order of Magistrate dated 12.5.2008 and directed to pass fresh order, vide his order dated 4.2.2010, copy of which has been filed as annexure-6 to the accompanying affidavit. Thereafter, the Magistrate, after remand, again in most mechanical manner and without application of mind, summoned the applicant by issuing process u/s 109, 115, 116, 121, 153-A, 153-B, 298, 502, 505, 511 IPC but the Magistrate, before issuing the process failed to appreciate that there was no evidence whatsoever to connect the applicant under the charged sections, as such, applicant challenged the aforesaid order of Magistrate by way of criminal revision No. 194 of 2010, which was partly allowed by the Additional Sessions Judge IV, Jhansi by setting aside the summoning of the applicants under Sections 153-A, 153-B and 505 IPC but at the same time affirmed the order of Magistrate with regard to other sections; that Additional Sessions Judge ought to have quashed the entire order of Magistrate issuing process under the charged sections, as none of the offence, as alleged, were made out against the applicant by bare reading of the complaint; that the order issuing process against the applicant by the Magistrate is totally illegal in view of the fact that sanction was essential before issuing process; that as per provisions of Section 196(1), Code of Criminal Procedure the Magistrate, while issuing process, was totally guided by the observations made by the revisional court, whereby matter was remanded back to him; that even if the material placed on record and produced by the complainant are taken to be correct for the sake of argument, no prima facie offence u/s 109, 115, 116, 121, 298, 502, 511 IPC is made out against the applicant; that even if the complaint is read as a whole, it does not give rise to any promotion or attempt to promote on the ground of religion, race, place of birth, language, caste or community or any other ground whatsoever,

disharmony or feeling of enmity hatred or ill-will between different religions or races. It is again reiterated by the learned Counsel for the applicant that the opposite party No. 2 did not produce/file any proof in support of his complaint in the form of audio-video recording or any other material to show that the applicant was author, publisher, distributor of the alleged pamphlet; that the court below has failed to consider that the proceedings with regard to the offence under Chapter XXI can only be initiated by a person aggrieved as contemplated u/s 196(2), Code of Criminal Procedure, therefore, complaint itself is barred under the said provision; that in the present case, no sanction as required u/s 196(1) (a)(b)(c) and 1-A of Code of Criminal Procedure to prosecute the applicant for the offence under Chapter VI of IPC and u/s 153, 153-A IPC, has been taken, thus no cognizance can be taken for the offence u/s 153-A, 121 IPC as Section 196(1)(a)(b)(c), Code of Criminal Procedure clearly bars exercise of jurisdiction while issuing the process until and unless such prior permission from the Central/State Government has been taken. It is, therefore, argued that tendency of the present criminal proceeding is volatile of fundamental right guaranteed to the applicant under Article 19, 21 of the Constitution of India.

8. It is argued by the learned Counsel for the applicant that aforesaid sanction is mandatory for the reason of policy, as the said power has been reserved by the Government to determine whether the offence against the State and other offences specified in the section should be taken cognizance of and as such the prosecution can be launched only after the sanction issued by the Central or State Government with an object to prevent the unauthorized person from intruding into the matters of the State.

9. It is next contended by the learned Counsel for the applicant that non-bail able warrants have been issued against the applicant and the applicant is required to appear pursuant thereto before the court at Jhansi on 1st June, 2011.

10. It is argued by the learned Counsel for the applicant that Sections 109, 115, 116, 121, 298, 500, 511 IPC being punishment for abetment and attempt of the offences, is not made out against the applicant as the principal offences u/s 121, 153-A, 153-B, 298, 500, 511 IPC, as alleged to have been abetted or attempted by the applicant, is itself not made out. So far as Section 121 IPC is concerned, it is contended that the same punishment for waging war against the Government or its attempt and abetment. A perusal of complaint as well as pre-summoning evidence will demonstrate that even if the allegations as contained are taken to be true, the same can not be termed as waging war against the Government inasmuch as the word "Government" as referred in the aforesaid section, means Central Government or the Government of State and as per complaint, no act has been done to destroy property, to over turn Government, to dissolve all the bonds of society and by force of arm to restrain the Government from the reigning, according to law. In support of his contention, learned Counsel for the applicant has relied upon a judgment in the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, So far as Section

298 IPC is concerned, it is punishment for deliberate intent to wound the religious feeling of any person and if the pamphlet, alleged to have been printed, published and distributed by the applicant, is read as whole it would be clear that same does not constitute the offence under the said section. Section 502 IPC is punishment for selling or offering for sale any printed or engraves substance containing defamatory matters, as such, no offence under the said section is made out. It is contended that so far offence u/s 153-A and 153-B IPC is concerned, which is already set aside, thus, there is no need for the arguments to be advanced in the said regard.

11. It is also argued by the learned Counsel for the applicant that the Magistrate has ignored the amended provision of Section 202, Code of Criminal Procedure whereby the word "may" has been substituted with "shall" thereby making it obligatory upon the Magistrate before issuing summons to have inquired into the matter. Thus, criminal prosecution initiated against the applicant is nothing but misuse of process of court, therefore, liable to quashed in view of the well settled principal of law as laid down by the Hon''ble Apex Court in the cases of State of Haryana and others Vs. Ch. Bhajan Lal and others, as well as R.P. Kapur Vs. The State of Punjab,

12. It is argued by the learned Counsel for the applicant that the personal liberty of the applicant, which is a constitutional right, cannot be jeopardized and his arrest cannot be affected only because the police officer is empowered to do so, as arrest and detention of a person can cause irreparable harm to his reputation and self esteem. No arrest can be made merely on an allegation of commission of offence against any person without reasonable satisfaction reached after investigation as to the genuineness and bona fide of complaint and he has relied upon the judgment reported in III 1994 ACC 434 in the matter of Pepsi Foods Ltd. and Anr. v. Special Chief Judicial Magistrate and Ors. reported in 1998 S.C.C. 1400, in support of his contention.

13. Learned Counsel for the opposite party No. 2 has filed short counter affidavit, which is already on record. It is contended by the learned Counsel for the opposite party No. 2 that the applicant is self proclaimed/preacher of new school of thought, i.e., Salafi/Ahley Hadees/Wahabi, being president of Islamic Research Foundation at Mumbai and he is of the opinion that all Hadith should be accepted, understood and followed on its literal meaning; that, thus, the applicant has damaged and changed the original character of Islam in his speeches and lecture in different countries and prejudiced, specially younger Muslim towards terrorism and that is why countries like United Kingdom and Canada has banned the applicant''s entry in their country; that even the administration of some cities in India had banned the applicant for giving his lecture; that the most disturbing part with regard to Muslim community is the applicant''s view on Terrorism, which he openly voices through video clips on Television, which all are available on the Internet; thus, the opposite party No. 2 had filed correct complaint against the applicant based on necessary evidence on record; that in the telecast on 21.1.2006 at Bangalore, of which audio-video clippings are

available, it is apparent that the applicant wants to become a law enforcing agency in this country by creating sense of insecurity among people, by fuelling hatred and prejudice, which may also cause law and order problem, thus, the applicant had rightly been summoned by the court below; that the previous sanction is not necessary u/s 196, Code of Criminal Procedure in a case like the present one and said technicality/irregularity, if any, can be rectified by taking sanction, subsequently if so required; that the prior permission is not mandatory in order to prosecute for the offence punishable with sentence of death or life imprisonment or rigorous imprisonment of two years; that the matter of the applicant was viewed in its right perception with regard to the gravity of offence u/s 121, IPC, and after application of judicial mind, order impugned has been passed, which suffers from no infirmity in law; as per the provision of Section 121 IPC, if waging war is not established then abatement for waging war is sufficient ground for taking cognizance, for which no inquiry and prior permission is required from the State/Central Government; that the opposite party No. 2 had also informed the competent authority of the Central Government with regard to the aforesaid facts; that on some occasions, where the question of country safety and security is involved, time does not permit for such type of sanction for the offence, which amounts to waging war against the Government, therefore, there is no legal infirmity in the orders impugned, which may call for any interference by this Court in exercise of power u/s 482, Code of Criminal Procedure; that the philosophy or ideology propagated by the applicant does not promote harmony and peace amongst the people and it is clearly attempt to swing the mind of Muslims, who are 80% illiterate, specially the younger generation, by advocating such policies, which intend to lead them towards doing illegal act or towards terrorism; that it is much easier to swing the mind of illiterate persons, who tend to believe whatever is told to them, in the name of religion. Such type of action or policy cannot be permitted to be propagated in view of the safety and harmony of the country. Learned Counsel for the opposite party No. 2 has reiterated that if the video clippings of applicant are viewed, which are available on the Internet, the allegations made by him, would stand authenticated.

14. Learned Counsel for the opposite party No. 2 has contended that according to the applicant, any person, who does not follow Hadis and does not accept the truth of Islam is Kafir and anti-social element and only those persons, who follow Sunna and Hadis are innocent. It is further contended that the applicant, in his pamphlet, has written that every Muslim should be terrorist etc. to selective people, i.e., anti-social element, thus the conjoint reading of the pamphlet and speech, makes it clear that all non-Muslim are Kafirs and Muslim should be terrorist for others, who are Kafir. It is next contended that the applicant had already filed criminal revision No. 194 of 2010 before the revisional court, therefore, he has already exhausted the alternate remedy open to him and now only remedy to the applicant is to file criminal misc. writ petition, not the application u/s 482, Code of Criminal Procedure In this regard he has placed reliance in the case of Puran v. Ram Bilash, reported in

(2201) 6 SCC 338 and the judgment rendered in the case of Shafique Ali v. Suraj Bibi, reported in 263, 2004 (TLS) and has contended that the present 482, Code of Criminal Procedure application as a second revision cannot be permitted under the Code of Criminal Procedure and in this regard he has referred a judgment in the case of Harbans Singh v. State of Rajasthan, in which same preposition has been laid down by the High Court of Rajasthan. Learned Counsel for the opposite party No. 2 has also relied upon the case of Swaraj Thackrey alias Swaraj Thackeray Vs. State of Jharkhand and Others, and has argued that Hon''ble Apex Court has held that if sanction is not taken before taking cognizance, same can be taken during trial and if sanction is received by the Government during pendency of trial, then fresh cognizance can be taken under the said section. It has also been contended on behalf of the opposite party No. 2 that the complaint filed by him is not mala fide or frivolous or vexatious.

15. However, it is well established that no person or community can be permitted to act in a manner, which is against the established procedure of law and start acting like a law enforcing agency. In fact, a speech or pamphlet, which may incite any particular community or individual to act in a manner, which may strike terror, even on anti-social elements cannot be permitted, inasmuch as for dealing with anti-social elements and offender of law, the law enforcing agencies are existing for taking appropriate action against them. Any kind of depiction by way of telecast or by way of print media, which may incite any person or community for doing such act, is not permissible under the established law or the procedure as laid down under law, should be deprecated and should be punished to the extent of commission of the offence under the relevant provisions of the penal code.

16. After hearing the learned Counsel for the parties and considering the arguments raised by them and also after perusing the record, this Court is of the opinion that in so far as the speeches of the applicant is concerned, same can be scrutinized/analyzed by the agencies of the Government, which are specialized for the said work, because as pointed out by the learned Counsel for the opposite party No. 2, the said speeches are available on the Internet. The machinery of the Government would also be aware of the contents thereof, and, if necessary, the Government would scrutinize the same and act accordingly, if required. Primarily, before this Court, the challenge is to the summoning order dated 7.4.2011, whereby revision of the applicant was partly allowed and summoning order u/s 153-A, 153-B and 505 IPC was set aside and order of Magistrate dated 30.4.2010 was upheld and also for quashing the order dated 30.4.2010 passed by Judicial Magistrate, Jhansi, whereby applicant was summoned u/s 109, 115, 116, 121, 298, 502, 511 IPC. This Court has to decide the matter before it and not on such issues, which are not part of the pleadings/controversy before this Court.

17. The U.S. Supreme Court in the matter of Clarence Brandenburg v. State of Ohio, reported in (1969) 395 US 444 , by deviating their earlier decision in Whitney s.

California, reported in (1927) 274 US 357 had observed that mere "advocacy or teaching the duty, necessity, or propriety" of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed "to teach or advocate the doctrines of criminal syndicalism" is not per se illegal. It will become illegal only if it incites to imminent lawless action.

18. The Hon''ble Apex Court in the recent judgment rendered on 10.2.2011 in the matter of Sri Indra Das v. State of Assam, while dealing with such issues, had observed that mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to act of violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resorting to imminent violence. It is also observed that even if the accused was a member of ULFA, it has not been proved that he was an active member and not merely a passive member. Similar view has also been taken by the Hon''ble Apex Court in the matter of Arup Bhuyan v. State of Assam, in criminal appeal No. 889 of 2007 vide judgment and order dated 3.2.2011.

19. Thus, as per settled law as laid down by Hon''ble Apex Court, unless the act of a person is such, which can be said to be an act of violence or an act, which has been done to incite the people to imminent violence or intended to create disorder or disturbance of public peace by resorting imminent violence, the person cannot be prosecuted under the provisions of the Penal Code.

20. The Hon''ble Apex Court in the matter of Kedar Nath Singh Vs. State of Bihar, has held that candid and honest discussion is permitted under and the law and only permits interference when the discussion conducted is to promote public disorder, which is a crime against Society. The Hon''ble Apex Court has also held that mere casual raising of some slogans, a couple of times by accused persons without intention to incite people to create disorder, does not constitute any threat to any person nor give rise amongst different communities or religious or other groups, therefore, does not attract the provisions of Section 124-A and 153-A IPC.

21. Freedom of speech is a fundamental right guaranteed under the Constitution of India but it cannot be said to be an unlimited freedom. If the freedom of speech, whether by electronic or print media is such, which does not incite the feeling of any group or individual towards violence or attempt violence, no offence can be said to be made out.

22. In the aforesaid facts and circumstances of the case, this Court is of the opinion that unless a detailed counter affidavit is brought on record, the issue which are required to be considered, cannot be adjudicated in its true prospective. Accordingly, it is directed that a detailed counter affidavit may be filed by the

contesting Respondent within a period of three weeks. Rejoinder affidavit may be filed within two weeks thereafter.

23. List after expiry of the aforesaid period before the appropriate Bench.

24. Till the next date of listing no coercive action shall be taken against the applicant pursuant to the order dated 7.4.2011 passed by Additional Sessions Judge IV, Jhansi in criminal revision No. 194 of 2010 as well as the order dated 30.4.2010 passed by Judicial Magistrate X, Jhansi summoning the applicant u/s 109, 115, 116, 121, 298, 502, 511 IPC.