

2024:BHC-AUG:22690-DB



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 CRIMINAL APPLICATION NO.2375 OF 2019

Dnyaneshwar Rohidas Wakale,
Age 34 yrs., Occ. Agri.,
R/o Sonkheda, Tq. Khultabad,
Dist. Aurangabad.

... Applicant

... Versus ...

- 1 The State of Maharashtra
Through Investigation Officer,
Police Station, Khultabad,
Tq. Khultabad, Dist. Aurangabad.
- 2 Fakirrao Asaram Bhalerao,
Age 41 yrs., Occ. Agri.,
R/o Khandipimpalgaon,
Tq. Khultabad, Dist. Aurangabad.

... Respondents

...

Mr. R.V. Gore, Advocate for applicant

Mr. V.K. Kotecha, APP for respondent No.1

Mr. P.B. Vikhe Patil, Advocate (appointed) for respondent No.2

...

CORAM : SMT. VIBHA KANKANWADI &
S.G. CHAPALGAONKAR, JJ.

DATE : 19th SEPTEMBER, 2024

ORDER : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present application has been filed under Section 482 of the Code of Criminal Procedure, 1973 for quashing criminal proceedings in Sessions Case No.121/2019 pending before learned Additional Sessions Judge, Aurangabad arising out of offence vide Crime No.223/2018 dated 14.08.2018 registered with Khultabad Police Station, Dist. Aurangabad, for the offence punishable under Sections 295-A, 153-A of the Indian Penal Code, 1860 and under Section 3(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for the sake of brevity hereinafter referred to as "Atrocities Act").

2 Heard learned Advocate Mr. R.V. Gore for applicant, learned APP Mr. V.K. Kotecha for respondent No.1 and learned Advocate Mr. P.B. Vikhe Patil for respondent No.2.

3 It has been vehemently submitted by learned Advocate for applicant that perusal of First Information Report would show that one Rajesh Baburao Waghmare had posted a post in respect of Bharatratna late Dr. Babasaheb Ambedkar on the informant's mobile around 20.51 hours on 09.08.2018. Since it was objectionable post, informant felt insulted and gave

a call to said Rajesh Waghmare and asked him who has posted the said post. Rajesh Waghmare told him that the said post was posted by one Chitte on WhatsApp of one Raju Patole and Chitte had also posted the said post on the WhatsApp of Rajesh Waghmare. Therefore, the informant and persons from his community made inquiry about the said post and came to know that the applicant had posted it on the WhatsApp group by name "Only Bhau" of Padali from his mobile. Therefore, the First Information Report has been lodged. In fact, police have not investigated as to whether the said post was created by the applicant. In fact, when he came to know about the objectionable post wrongly forwarded by him, he had tendered apology immediately on the group itself. The origin of the post has not been traced out by the police and, therefore, the applicant cannot be held responsible for the same, when even as per the First Information Report, the other persons had also forwarded the said post on the mobile of other persons. There was no intention on the part of applicant to hurt feelings of any community. The ingredients of offence under Section 153-A, 295-A of the Indian Penal Code and 3(v) of the Atrocities Act are not at all attracted. In fact, when the First Information Report came to be lodged initially, it was only under the Indian Penal Code Sections. It would be unjust to ask the applicant to face the trial.

represent the cause of respondent No.2 strongly opposed the application and submitted that if we consider the post that was posted, then certainly there was intention to defame one of the respected personalities, who was amongst the committee who framed our Indian Constitution. The objectionable part in the same as it was appearing is a photo, in which a person was seen urinating on the photograph of Dr. Babasaheb Ambedkar. Certainly, such act was not only objectionable but it was with an intention to cause prejudice to the harmony in the society and the religious feeling of the entire community from which the informant and the witnesses were belonging and, therefore, this cannot be considered as a fit case where the inherent powers of this Court under Section 482 of the Code of Criminal Procedure can be exercised.

5 The facts those are revealed in First Information Report would show that informant was not the first person who had seen the said post. In fact, he had seen the post which was then forwarded to him by witness Rajesh Waghmare. The link is that even Rajesh Waghmare had received the said post from Chitte. Chitte had also forwarded the said post to Raju Patole and then it is said that when inquiry was made, it was found that it was posted in one group on WhatsApp which was by name "Only Bhau" from village Padali, Tq. Khultabad, Dist. Aurangabad. The informant in his First Information Report does not say that he is the member of that group.

Statement of Rajesh Waghmare also does not say that he is the member of the said group. Charge sheet does not show that statements of Raju Patole and Chitte, whose names have been reflected in First Information Report, have been taken under Section 161 of the Code of Criminal Procedure. Now, the question is, unless the said post would have been forwarded by a member of said group "Only Bhau", it would not have gone beyond the group. Note has to be taken that WhatsApp is a messenger, which is available for private messaging and calling, may be individual or in a group, it comes with end to end encryption. Therefore, personal messages and the calls are secured between sender and receiver. Therefore, unless it is sent by the member in respect of a group to another person who is not from the group, question of it going viral does not arise. Entire charge sheet does not show that there was any such effort to find out as to who was the said member of the group who had made it viral or allowed it to be sent to the person who is not the member of the group. There is a statement of one Arun Papat Aghade taken under Section 161 of the Code of Criminal Procedure, wherein it appears that he is the Administrator (Admin) of the said group, who had created that group on 01.08.2014. On the date of his statement dated 11.08.2018 there were 249 members. He says that the present applicant is his relative, who was added in the group in April-May, 2018. He says that the applicant had posted the said objectionable photo in the said group around 4.18 p.m. on

09.08.2018 and around 6.00 p.m. members started saying to witness Arun Aghade regarding the said objectionable photo and, therefore, he asked the applicant to delete the said photo. Thereupon, the applicant instead of removing the photo made exit from the group. Thereupon, again witness Arun added him, so that the photo can be deleted, however, he says that applicant could not delete the said photographs but then he immediately asked for the apology of group members. Even Arun Aghade had asked the pardon and stated that nobody should act, which would be prejudicial to the harmony in two communities. Thereafter none from the group made any kind of chatting in the group. Thus, his statement, therefore, is sufficient to say that there was no intention on the part of the applicant to outrage the religious feeling or defame anybody.

6 Here, we are required to consider as to whether the material collected in the charge sheet was sufficient to hold that the offences are made out. As aforesaid, initially the offence was registered only under the Indian Penal Code Sections and the Section from Atrocities Act was not invoked. In fact, there is no evidence in the entire charge sheet to show that the Investigating Officer had taken efforts to find out who was the creator of the post. Everybody appears to have forwarded including the friends of the informant. Therefore, it cannot be segregated that those friends viz. Rajesh

Waghmare, Raju Patole and Chitte had no intention to outrage the religious feeling or to defame Dr. Babasaheb Ambedkar, because the act is same as regards them as well as the applicant i.e. "forwarding". Therefore, only the applicant could not have been prosecuted. The friends of informant have not been made as an accused in the matter. Investigating agency cannot pick and choose the persons on the basis of their caste to come to a conclusion that they had no intention but only the applicant had intention. For that purpose the investigation ought to have been till the point as to who had created the said photograph. Another fact is that Investigating Officer could not have made hurry of filing charge sheet till the C.A. report is received. Further, the letter addressed by Investigating Officer to Director of Forensic Science Laboratory, Kalina, Mumbai would show that the said photograph was found deleted from the group as the mobile handset of the applicant has been seized and then the question has been posed, as to whether the deleted photograph be revived and seen as to whether it is the same which appears to have been then produced by the informant. The second question is, the Forensic Science Laboratory should give that whether that post was on the WhatsApp group 'Only Bhau' ? Names of all the members should be given and to find out from which WhatsApp number the objectionable post was forwarded. Thus, it is to be noted that the said letter by which these questions were referred dated 18.09.2018 was given; yet, even when we

heard the matter the said C.A. report has not been produced before us. It is pending since last six years only to that extent but the charge sheet has then been filed on 13.03.2019. When the Investigating Officer had not found out the origin of the post, it would be unjust to ask the applicant to face the trial. Even the question was not posed/asked to the Forensic Science Laboratory as to whether the said photo was morphed or it was real. The Investigating Officer has not taken any efforts to find out the person found/seen in the photograph in the position of urination. His statement has not been recorded nor he has been tried to be arrayed as an accused. The quality of investigation is of very low standard, though it is stated to have been made by the Police Officer of the rank Sub Divisional Police Officer. As per the provisions of the Atrocities Act, the investigation of the offence under the said Act should be by the Police Officer of the rank of Sub Divisional Police Officer and above. In spite of this, there is absolutely no basic investigation, that too, from the point of the fact that electronic evidence is involved in the matter.

7 We want to rely on the decision in **Priya Prakash Varrier vs. State of Telangana** [2019 (12) SCC 432], wherein it has been held that it should be proved that the alleged act of outraging the religious feelings or intending to outrage religious feelings should be deliberate and malicious. If the intention is missing then offence cannot be said to be proved or forthcoming.

7.1 Further, we also rely on the decision in **Mahendra Singh Dhoni vs. Yerraguntla Shyamsundar and another** [AIR 2017 (SC) 2392], wherein also it is held that insult to religion offered unwittingly without any deliberate or malicious intention not come within Section 295-A of the Indian Penal Code.

7.3 Further, we also rely on the decision in **Bilal Ahmed Kaloo vs. State of A.P.** [1997 (7) SCC 431], wherein it has been held that -

“The question to be decided was whether those acts would attract penal consequences under Section 153-A or 505(2) of the Indian Penal Code. The common ingredients of both offences is promoting feeling of enmity and hatred between the two groups religious or racial. The main distinction between the two offences was that while publication of the words or the representation was not necessary under Section 153-A, such publication was necessary under Section 505 of the Indian Penal Code. In such circumstances, no offences under Section 153-A or 505(2) of the Indian Penal Code are made out.”

This case was then relied by the Division Bench of this Court at Principal Seat in **Amol Kashinath Vyavhare vs. Purnima Chaugule Shrirangi and others** in Writ Petition No.2954 of 2018 decided on 06.05.2022, wherein also it is held that feeling of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities is a

sine qua non for attracting Section 505(2) of the Indian Penal Code, if such material is published.

8 Thus, the material on record is not sufficient to hold even *prima facie* that the applicant had the intention to outrage religious feelings or being hatred or enmity between two religious or racial groups.

9 Another point involved in this case is whether there was sanction under Section 196 of the Code of Criminal Procedure when the offence involved was under Sections 295-A and 153-A of the Indian Penal Code. Taking into consideration the copy of charge sheet, it appears that the same was produced before learned Judicial Magistrate First Class, Khultabad on 13.03.2019. We had made query and passed an order to that effect on 02.09.2024 to produce on record order of taking cognizance in the matter. Accordingly, the certified copy of relevant part in the charge sheet has been made available. There are shocking things revealed. It appears that and as aforesaid the charge sheet was filed before Judicial Magistrate First Class, Khultabad and then it appears that the matter was placed before the learned Special Judge, Aurangabad on 03.04.2019, whereupon there is a stamp of taking cognizance and allotting the case to a particular Court. Accordingly, the case was assigned to the Court of District Judge-4 for the disposal

according to law. Time and again, this Court is bringing it to the notice of Judges in the District Judiciary that they should write proper designation wherever it is involved. It reminds them as to under which provisions of law and Act they are exercising their powers. 'District Judge' is always referred for matters of Civil side and for matter of Criminal side it is 'Sessions Judge' or 'Additional Sessions Judge' and in case of special enactments, it would be either 'Special Judge' or designated Court under the relevant Act. The orders are not required to be passed without application of mind and mechanically even by a Sessions Judge. Thereafter, in the present matter on 04.04.2019 there is order by learned District Judge-4/Additional Sessions Judge for issuance of process against the accused. It is to be noted that Section 14 of the Atrocities Act came to be amended with effect from 26.01.2016 and it made provision for power to take cognizance of the offence directly to the Special Court. Meaning thereby, there was no necessity of committal of the case by Judicial Magistrate First Class. In other words, the Investigating Officer was supposed to file the charge sheet directly before the Special Court established under the Atrocities Act and thereupon such Court was empowered to take cognizance directly of the offences under the Atrocities Act. Here, in this case, no such procedure has been adopted. In fact, we deprecate use of stamp for the orders of taking cognizance. Because taking of cognizance of an offence, involves the process of application of mind and it

should be specifically mentioned for which offences the cognizance has been taken. There might be such circumstances that some of the offences are not made out though the Investigating Officer mentions it in charge sheet. Here, there is no such detailed order, but we take that the cognizance has been taken in respect of offence under Section 295-A, 153-A of the Indian Penal Code and Section 3(v) of the Atrocities Act. Learned District Judge-4 (it ought to have been 'Special Judge, under the S.C. & S.T. Act') had not even considered the point of sanction under Section 196 of the Code of Criminal Procedure at the time of taking cognizance. Now, the learned APP is tendering a communication by District Magistrate, Aurangabad to Superintendent of Police (Rural), Aurangabad, which does not bear complete date, it is/11/2018, but it appears that it was received by office of Superintendent of Police on 05.12.2018 stating that the District Magistrate, Aurangabad has given sanction to file charge sheet. In fact, in the letter it is said that sanction is given in respect of all the offences. However, we find that this order/sanction is also without application of mind as it does not refer to which documents were especially perused by the learned District Magistrate. Only the last paragraph of three lines is required to be considered, which states that District Magistrate had perused letter given by the office of Superintendent of Police (Rural), Aurangabad dated 27.10.2018 and thereupon he has arrived at the conclusion that sanction is required to be

given. We are aware that in an application for quashing we are not supposed to sit as an Appellate Authority or cannot enter into merits, because there is no trial as such up till now, but still, if there are inherent defects, then they can be certainly considered. Anyway, this letter has not been made as a part of charge sheet and the copy of the same has not been given to the applicant. If this document i.e. sanction was not made part of the charge sheet, we presume that it was not before the concerned Special Judge under the Atrocities Act either on 03.04.2019 or 04.04.2019 when the cognizance was taken. Here, we would like to reproduce relevant part of Section 196(1) of the Code of Criminal Procedure, 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 153A, [section 295A 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 108A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.”

10 Thus, it is to be noted that Section 196(1) puts an embargo on the powers of the Court to take cognizance of the offence unless there is

previous sanction of the Central or of the State Government. It does not empower the Court to take into consideration previous sanction by District Magistrate. District Magistrate has been given power or previous sanction by District Magistrate can be considered for the separate offences which have been enumerated in Section 196(1A) of the Code of Criminal Procedure, however, here, both the offences under the Indian Penal Code are covered under Section 196(1) of the Code of Criminal Procedure and, therefore, the previous sanction could have been by the Central or the State Government only and, therefore, the said sanction which is taken from District Magistrate, Aurangabad somewhere around 05.12.2018 could have been considered by any Court of Law. In absence of any such sanction for those offences under the Indian Penal Code the learned Special Judge who passed the order of taking cognizance was in fact not authorized in view of the said embargo. Learned APP was fair in making statement that there is no correspondence by the Investigating Officer either to the Central or to the State Government to get the sanction as contemplated under Section 196(1) of the Code of Criminal Procedure prior to 04.04.2019. Therefore, the order of taking cognizance in this matter passed by learned Special Judge itself is an illegal order and, therefore, it would be unjust to ask the applicant to face the trial not only for the offences under the Indian Penal Code, but also for the offence under the Atrocities Act, as they could not have been segregated and

there is no such order.

11 We are disturbed to note that Judges from the District Judiciary are not paying attention to the requirements under Sections 195, 196, 197, 198 of the Code of Criminal Procedure. The embargo created under these provisions should be considered by them before taking cognizance. In succession in recent times we are coming across such orders which have been passed without considering these provisions under the Code of Criminal Procedure. If these basic provisions are not adhered to, then it is prejudicial to the accused persons as they would be unnecessarily asked to face the trial when there was defect or illegality in passing of the order of taking cognizance of the offence itself. Therefore, we want to put the Judges of the District Judiciary on guard and direct them that they should consider these provisions whenever they are necessary and pass detailed orders in respect of the same.

12 We are aware about the sentiments of the people when such objectionable posts are created and then made viral. The reality in the life nowadays is that there is rampant use of smart phones and the WhatsApp messenger or any such App and the social media but certain persons are not that Technosavvy and in such circumstances they will land in trouble on some

occasion. People are also interested in forwarding every stuff in the form of messages, photos, videos, reels etc. and even on many occasions not even watching that they will forward it. People are required to exercise self restraint in such situation and not to forward whatever is received on such App or social media platforms. Anyway, each forward of such message cannot be interpreted to create unrest in the society or two groups of people or two races.

13 The entire scrutiny, therefore, leads us to exercise our powers under Section 482 of the Code of Criminal Procedure, as it would be unjust to ask the applicant to face the trial and as the case is befitting in the guidelines laid down in **State of Haryana and others vs. Ch. Bhajan Lal and others** [AIR 1992 SC 604]. Hence, we proceed to pass following order.

ORDER

- i) Criminal Application stands allowed.
- ii) Proceedings in Sessions Case No.121/2019 pending before learned Additional Sessions Judge, Aurangabad arising out of offence vide Crime No.223/2018 dated 14.08.2018 registered with Khultabad Police Station, Dist. Aurangabad, for the offence punishable under Sections 295-A,

153-A of the Indian Penal Code, 1860 and under Section 3(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, stands quashed and set aside.

iii) Registrar (Judicial) to circulate this order to all the Judges in District Judiciary with directions to them to take note of the observations in paragraph Nos.9 and 11 of this order.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

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