IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. MMO No.157of 2023
Date of Decision: 13.06.2024

Tahseen Gul .....**Petitioner**

Versus

State of Himachal Pradesh .....**Respondent**

Coram

Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? Yes.

For the Petitioner: Ms. Prabha Yadav and Mohd. Arshad, Advocates.

For the respondent: Mr. Rajan Kahol, Mr. Vishal Panwar & Mr. B.C. Verma, Additional Advocates General and Mr. Ravi Chauhan, Deputy Advocate General, for respondent/State.

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 Cr.P.C., prayer has been made on behalf of the petitioner for quashing of FIR No.018 dated 16.02.2019, registered at Police Station Barotiwala, District Baddi, H.P., under Sections 153(B) of Indian Penal Code, on the ground that no case much less under Section 153(B) of IPC is made out against petitioner.

2. For having bird's eye view, facts relevant for the adjudication of the case at hand are that FIR sought to be quashed in the instant proceeding came to be lodged at the behest of respondent No.2-Mr. A.K. Chauhan, retired Deam Administration, Chitkara University, wherein he alleged that an anti-national activity has come to the notice of the authorities that ID 1711983050 named Tahseen Gul son of Ghulam Rasool Rather, resident of near fish farm Harwan, Srinagar, J&K, a 2nd year student has posted some anti-social remark on the social media, creating tense situation in the campus. Record reveals that besides lodging aforesaid complaint, University/Authority also handed over custody of petitioner herein to the local Police Station, Barotiwala, District Solan for taking legal action.

3. After investigation, Police found that petitioner herein had posted one post on the Facebook stating therein "*Allah App K Shahdat Qabool Karay.....In the Hearts of Green Berds....Missing u Bhai....*". After having found aforesaid post on Facebook, Police lodged FIR under Section 153(B) of Indian Penal Code and thereafter, after completion of investigation, Police presented Challan in the competent Court of law. Before proceedings pending in the competent Court of law could be taken to its logical end, petitioner has approached this Court in the instant

proceedings, praying therein to quash and set aside the aforesaid FIR on the ground that no case much less under Section 153(B) is made out against petitioner.

4. Pursuant to notices issued in the instant proceedings, respondent No.1 has filed reply under the signatures of Superintendent of Police, District Baddi, wherein it has been stated that by posting the post, as detailed hereinabove, attempt has been made by the petitioner to glorify the act of terrorist, who was killed in Police encounter and as such, he has been rightly booked under Section 153(B) of IPC. It has been further submitted in the reply that comment made by the petitioner on the post through his facebook account itself creates imputation and propagates feelings of enmity or hatred and ill-will between the members of society.

5. I have heard the parties and gone through the record. While making this Court peruse Section 153(B) of IPC, Ms. Prabha, counsel representing petitioner vehemently argued that bare perusal of alleged post made by the petitioner on Facebook nowhere suggest that effort, if any, was ever made by him to glorify the act and conduct of terrorist namely Shakoor Bhai, rather he only prayed for the peace of departed soul. Ms. Prabha further argued that by making prayer for departed soul, no attempt can be said to have been made by petitioner to create hostility between two

sections of society. Above named counsel further argued that to invoke Section 153(B) of IPC, it is necessary to prove that accused charged with such provision of law spoke or written such words, which otherwise publicize, may create unrest in the society. She submitted that petitioner by making prayer for departed soul neither hurt feeling of any religious society, nor made any enmity or ill-will amongst different sections of the society, hence, case under Section 153(B) of IPC initiated against petitioner deserves to be quashed and set aside.

6. To the contrary, while justifying the initiation of proceedings under Section 153(B) of IPC against petitioner, Mr. Rajan Kahol, learned Additional Advocate General vehemently argued that by commenting upon the post on the Facebook, petitioner not only glorified the actions of notorious terrorist, but also tried to create unrest amongst the society. He submitted that while offering prayers for terrorist, petitioner attempted to create support for militancy and as such, no illegality can be said to have been committed by the prosecution while initiating proceedings under Section 153(B) of IPC. While referring to the statement made by the complainant, at whose behest, FIR came to be lodged, Mr. Rajan Kahol, learned Additional Advocate General further argued that on account of comments made on the post in Facebook, unrest was created in University

among the students and as such, University was compelled to hand over the custody of the petitioner to the Police.

7. Having heard learned counsel representing parties and perused material already available on record, this Court finds that there is no dispute that petitioner herein, who at that relevant time was studying in Chitkara University, made one comment on his Facebook on the post made by certain disgruntled persons with regard to terrorist namely Shakoor Bhai, who had died in a Police encounter, petitioner herein on his Facebook commented that "*Allah App K Shahdat Qabool Karay.....In the Hearts of Green Berds....Missing u Bhai....*". Apart from aforesaid words used by petitioner, there is nothing in the post, suggestive of the fact that after making such comment, petitioner made any attempt, if any, to instigate his colleagues or other members of the society to condemn the action of State, inasmuch as terrorist named Shakoor Bhai was killed in Police encounter. Precisely, the case of the petitioner as has been highlighted in the petition is that no case much less under Section 153(B) of IPC is made out. Before ascertaining correctness of the aforesaid claim putforth on behalf of petitioner, this Court finds it necessary to take note of Section 153(B) of IPC, which reads as under:

"153B. Imputations, assertions prejudicial to national-integration.—

> (1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,—
> (a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or
> (b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or
> (c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,
> shall be punished with imprisonment which may extend to three years, or with fine, or with both."

8. Perusal of aforesaid provision of law reveals that whosoever by words either spoken or written or by signs or by visible representations makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons, shall be punished with imprisonment, which may extend to three years, or with fine, or with both.

9. If the comment made by the petitioner on Facebook is perused juxtaposing provisions contained under Section 153(B)

of IPC, there appears to be merit in the contention of Ms. Prabha, learned counsel for the petitioner that at no point of time, attempt, if any, ever came to be made on behalf of the petitioner to cause feeling of disharmony or enmity, hatred or ill-will between members of the society. No doubt, by making comment through Facebook account by the petitioner, petitioner herein can be said to have made an attempt to glorify the acts and deeds of militant, but such attempt or effort, if any, cannot be said to be a crime/offence, as is covered under Section 153(B) of IPC. Had petitioner after death of militant named hereinabove instigated people to lodge protest against the Administration and other Police authorities, or had he made appeal to others to join the movement, he could be said to have been committed offence under Section 153(B) of IPC. If the comments given by the petitioner through his Facebook account are read in its entirety, he only after having heard news of militant named hereinabove, prayed for the peace of departed soul. While making prayer for departed soul, neither he instigated members of the society or particularly member of any religion to which militant belonged to come out and protest against the action of Administration, rather, he simply made a prayer for departed soul with further comment that he misses Shakoor Bhai.

10. Hon'ble Apex Court in case titled as ***Amish Devgan Vs. Union of India and Others***, **(2021) 1 SCC 1,** has held that publication which contains unnecessary asides, which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a mala fide intention, however, opinions may not reflect mala fide intention. Hon'ble Apex Court in aforesaid judgment has further held that dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Relevant paras of afore judgment, reads as under:

> "70. Manzar Sayeed Khan, taking note of the observations in Bilal Ahmad Kaloo, records that common features of Section 153A. And 505 (2) being promotion of feeling of enmity, hatred or ill-will 'between different' religious or racial or linguistic or regional groups or castes or communities, involvement of at least two groups or communities is necessary. Further, merely inciting the feeling of one community or group without any reference to any other community or group would not attract either provision. Definition of 'hate speech' as expounded by Andrew F. Sellars prescribes that hate speech should target a group or an individual as they relate to a group.
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> 71. The Preamble to the Constitution consciously puts together fraternity assuring dignity of the individual and the unity and integrity of the nation. Dignity of individual and unity and integrity of the nation are linked, one in the form of rights of individuals and other in the form of individual's obligation to others to ensure unity and integrity of the nation. The unity and integrity of the nation cannot be overlooked and slighted, as the acts that 'promote' or are 'likely' to 'promote' divisiveness, alienation and schematism do directly and indirectly impinge on the diversity and pluralism, and when they are with the objective and intent to cause public disorder or to demean dignity of the targeted groups, they have to be dealt with as per law. The purpose is not to curtail right to expression and speech, albeit not gloss over specific egregious threats to public disorder and

in particular the unity and integrity of the nation. Such threats not only insidiously weaken virtue and superiority of diversity, but cut-back and lead to demands depending on the context and occasion, for suppression of freedom to express and speak on the ground of reasonableness. Freedom and rights cannot extend to create public disorder or armour those who challenge integrity and unity of the country or promote and incite violence. Without acceptable public order, freedom to speak and express is challenged and would get restricted for the common masses and law-abiding citizens. This invariably leads to State response and,therefore, those who indulge in promotion and incitement of violence to challenge unity and integrity of the nation or public disorder tend to trample upon liberty and freedom of others.

76. Persons of influence, keeping in view their reach, impact and authority they yield on general public or the specific class to which they belong, owe a duty and have to be more responsible. They are expected to know and perceive the meaning conveyed by the words spoken or written, including the possible meaning that is likely to be conveyed. With experience and knowledge, they are expected to have a higher level of communication skills. It is reasonable to hold that they would be careful in using the words that convey their intent. The reasonable-man's test would always take into consideration the maker. In other words, the expression 'reasonable man' would take into account the impact a particular person would have and accordingly apply the standard, just like we substitute the reasonable man's test to that of the reasonable professional when we apply the test of professional negligence. 98 This is not to say that persons of influence like journalists do not enjoy the same freedom of speech and expression as other citizens, as this would be grossly incorrect understanding of what has been stated above. This is not to dilute satisfaction of the three elements, albeit to accept importance of 'who' when we examine 'harm or impact element' and in a given case even 'intent' and/or 'content element'.

77. Further, the law of 'hate speech' recognises that all speakers are entitled to 'good faith' and '(no)-legitimate purpose' protection. 'Good faith' means that the conduct should display fidelity as well as a conscientious approach in honouring the values that tend to minimise insult, humiliation or intimidation. The latter being objective, whereas the former is subjective. The important requirement of 'good faith' is that the person must exercise prudence, caution and diligence. It requires due care to avoid or minimise consequences. 'Good faith' or 'no-legitimate purpose' exceptions would apply with greater rigour to protect any genuineacademic, artistic, religious or

scientific purpose, or for that matter any purpose that is in public interest, or publication of a fair and accurate report of any event or matter of public interest. Such works would get protection when they were not undertaken with a specific intent to cause harm. These are important and significant safeguards. They highlight importance of intention in 'hate speech' adjudication. 'Hate speech' has no redeeming or legitimate purpose other than hatred towards a particular group. A publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a mala fide intention. However, opinions may not reflect mala fide intention.

78. The present case, it is stated, does not relate to 'hate speech' causally connected with the harm of endangering security of the State, but with 'hate speech' in the context of clauses (a) and (b) to sub-section (1) of Section 153A, Section 295A and sub-section (2) to Section 505 of the Penal Code. In this context, it is necessary to draw a distinction between 'free speech' which includes the right to comment, favour or criticise government policies; and 'hate speech' creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social Racial and Religious Tolerance, 2001 (Victoria, Australia) and economic issues and policy matters, the latter would not primarily focus on the subject matter but on the substance of the message which is to cause humiliation and alienation of the targeted group. The object of criminalising the latter type of speech is to protect the dignity (as explained above) and to ensure political and social equality between different identities and groups regardless of caste, creed, religion, sex, gender identity, sexual orientation, linguistic preference etc. Freedom to express and speak is the most important condition for political democracy. Law and policies are not democratic unless they have been made and subjected to democratic process including questioning and criticism. Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Elected representatives in power have the right to respond and dispel suspicion. The 'market place of ideas' and 'pursuit of truth' principle are fully applicable. Government should be left out from adjudicating what is true or false, good or bad, valid or invalid as these aspects should be left for open discussion in the public domain. This justification is also premised on the conviction that freedom of speech serves an indispensable function in democratic governance without which the citizens cannot successfully carry out the task to convey and receive ideas. Political speech relating to government policies requires greater protection for preservation and promotion of democracy. Falsity of

> the accusation would not be sufficient to constitute criminal offence of 'hate speech'."

11. In another case titled as ***Patricia Mukhim vs. State of Meghalaya***, ***2021 SCC Online SC 258***, Hon'ble Apex Court held that only where the written or spoken words have the tendency of creating public disorder or disturbance of law and order or affecting public tranquility, the law needs to step in to prevent such an activity.

> "14. India is a plural and multicultural society. The promise of liberty, enunciated in the Preamble, manifests itself in various provisions which outline each citizen's rights; they include the right to free speech, to travel freely and settle (subject to such reasonable restrictions that may be validly enacted) throughout the length and breadth of India. At times, when in the legitimate exercise of such a right, individuals travel, settle down or carry on a vocation in a place where they find conditions conducive, there may be resentments, especially if such citizens prosper, leading to hostility or possibly violence. In such instances, if the victims voice their discontent, and speak out, especially if the state authorities turn a blind eye, or drag their feet, such voicing of discontent is really a cry for anguish, for justice denied – or delayed. This is exactly what appears to have happened in this case."

12. In yet another case titled as ***Vinod Dua Vs. UOI and Others***, ***2021 SCC OnLine SC 414***, Hon'ble Apex Court reiterated that "a citizen has a right to criticize or comment upon the measures undertaken by the Government and its functionaries, so long as he does not incite people to violence against the Government established by law or to create public disorder; and that it is only when the words or expressions have pernicious

tendency or intention of creating public disorder or disturbance of law and order that Section 124-A and 505 of IPC must step in".

13. Most importantly, in the judgment passed by the Hon'ble Apex Court in Amish Devgan (supra), Hon'ble Apex Court interpreted word "instigation" as necessarily and specifically be suggestive of the consequences capable of being spelt out to be incitement. The word 'Promote' does not imply mere describing and narrating a fact, or giving opinion, criticising the point of view or actions of another person, it requires that the speaker should actively incite the audience to cause public disorder. Active incitement can be gauged by the content of the speech, the context and surrounding circumstances, and the intent of the speaker. In case the speaker does not actively incite the dissent into public disorder, and is merely pointing out why a certain person or group is behaving in a particular manner, what are their demands and their point of view, or when the speaker interviews such person or group, it would be a passive delivery of facts and opinions, which may not amount to promotion.

14. In the case at hand, as taken note hereinabove, petitioner herein while making comment upon the post through his Facebook account, has only made prayer for the departed soul. Though, learned Additional Advocate General attempted to argue that by making prayer for

departed soul, attempt has been made on behalf of the petitioner to glorify the act and conduct of terrorist, but even if it is presumed that attempt was made by the petitioner to glorify the act of terrorist, he could not have been charged under Section 153(B), especially when after having made prayer for departed soul, petitioner nowhere incited or made an endeavor to create public disorder.

15. The next question which requires adjudication in the case at hand is "*whether Court can proceed to quash FIR, after framing of charge or not*". In this regard, reliance is placed upon the judgment of Hon'ble Apex Court in case tilted ***Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Departmetn of Home and Anr, AIR 2019 SC 210***, whereby it was held that abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation and as such, the abuse of law or miscarriage of justice can be rectified by the court while exercising power under Section 482 Cr.PC. The relevant paras of the judgment are as under:

> ***"16. Even otherwise it must be remembered that the*** provision invoked by the accused before the High Court is Section 482 Cr. P.C and that this Court is hearing an appeal from an order under Section 482 of Cr.P.C. Section 482 of Cr.P.C reads as follows: -
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> > "482. Saving of inherent power of the High Court.- Nothing in this Code shall be deemed to limit or affect

> the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."
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> 17. There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High court can exercise jurisdiction under Section 482 of Cr.P.C even when the discharge application is pending with the trial court (G. Sagar Suri and Anr. V. State of U.P. and Others, (2000) 2 SCC 636 (para 7), Umesh Kumar v. State of Andhra Pradesh and Anr. (2013) 10 SCC 591 (para 20). Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

16. The Hon'ble Apex Court in another case titled ***Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC 608,*** has elaborated the scope of exercise of power under Section 482 Cr.PC, the relevant para whereof reads as under:-

> "7. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and re-iterated

by this Court. In Inder Mohan Goswami v State of Uttaranchal5, this Court observed.

> "23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:
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> (i) to give effect to an order under the Code;
> (ii) to prevent abuse of the process of the court, and
> (iii) to otherwise secure the ends of justice.
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> 24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

8. Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v Bhajan Lal6 conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present case. The court in Bhajan Lal noted that quashing may be appropriate where, (2007) 12 SCC 1 1992 Supp (1) SCC 335

> "102. (1) Where the allegations made in the first information report or the complaint, 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.
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> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).
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> .....
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> (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."

In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar v State of Maharashtra, 2018 SCCOnLine SC3100 ("Dhruvaram Sonar") :

> "13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

17. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, present petition is allowed and FIR No.018 dated 16.02.2019, registered at Police Station

Barotiwala, District Baddi, H.P., under Sections 153(B) of Indian Penal Code as well as consequent proceedings, if any, pending before the competent Court of law are quashed and set aside. Accordingly, present petition is disposed of, so also pending applications, if any.

13th June, 2024 **(Sandeep Sharma),**
(Rajeev Raturi) **Judge**