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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 29th March 2023

\+ CRL.M.C. 2792/2017

THE WIRE THROUGH ITS EDITOR & ANR. ..... Petitioners

Through: Ms. Nitya Ramakrishnan, Senior Advocate with Mr. Rahul Kripalani, Ms. Rea Bhalla and Ms. Supraja V, Advocates.

versus

AMITA SINGH ..... Respondent

Through: Mr. Alok Kumar Rai, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.' for short) read with Article 227 of the Constitution of India, the petitioners seek quashing of summoning order dated 07.01.2017 made by the learned Metropolitan Magistrate, Patiala House Courts, New Delhi, whereby the petitioners/accused have been summonsed to face trial in CC No. 32203-16 filed by the respondent/complainant alleging offences under sections 499/500/501 and 502 of the Indian Penal Code, 1860 ('IPC' for short).

2. The petitioners impugn the summoning order on various grounds, as detailed in this judgement, the principal contention being that there

was no material on record on the basis of which the learned Magistrate could have summonsed the petitioners.

3. The court has heard Ms. Nitya Ramakrishnan, learned senior counsel appearing on behalf of the petitioners; and Mr. Alok Kumar Rai, learned counsel appearing for the respondent. The court has also heard Professor Amita Singh, the respondent in-person.

4. Briefly, the factual matrix relevant for purposes of the present petition is the following :

   4.1. The criminal complaint alleges offences punishable under sections 499/500/501/502 IPC arising from a publication carried on the on-line news portal "*The Wire*" on 26.04.2016 ('subject publication'). The criminal complaint as filed, arrays 11 persons as accused. Accused Nos. 1 and 2 ('A1' and 'A2') are respectively the Editor and the Deputy Editor of The Wire; and Accused Nos. 3 to 11 are other persons, including a politician, two assistant professors, two other major publications, two students, an SHO and a website;

   4.2. The complainant, who is a Professor at the Jawaharlal Nehru University, New Delhi ('JNU') had prayed for the court to take cognizance of offences punishable under sections 499/500/501/502 IPC against *all accused persons*, and for issuance of a direction to the SHO P.S.: Vasant Kunj, North to investigate the matter and take action in accordance with law;

   4.3. The learned Magistrate recorded the depositions of 05 witnesses on behalf of the complainant, *viz.* CW-1 : the complainant herself, CW-2 : Professor Bupinder Zutshi, CW-3

: Dr. Rahila Sikandar, CW-4 : Nazia Khan and CW-5 : Manu Singh;

4.4. *Vide* order dated 07.01.2017 the learned Magistrate was pleased to issue summons - *only to A1 and A2* - and to none of the other accused persons. It is the said two accused persons who have filed the present petition.

5. The relevant discussion appearing in order dated 07.01.2017, based on which the learned Magistrate proceeds to summons the petitioners *as the only accused persons*, is the following :

> "*This is a complaint made by the complainant Amita Singh, who claims to be a Professor and the Chairperson of Centre for Study of Law and Governance (JNU), u/s 500/501/502 IPC against certain accused persons for imputing that she (complainant) prepared a dossier allegedly depicting that Jawahar Lal Nehru University is a "Den of Organised Sex Racket". Complainant claims that she did not prepare any such dossier. It is claimed by the complainant that the said imputation was firstly made in an e-magazine "The Wire" and thereafter the other accused persons, arrayed in the list of parties, circulated/re-circulated/tweeted/retweeted the above imputation, published by the said magazine,* ***with their comments which were also defamatory in nature****. She further claims that* ***she is a victim of a hate campaign which has begun after the publication of false information by the e-magazine, "The Wire"****.*
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> *"The complainant has placed on record* ***computer printouts*** *of the said publication (in the e-magazine, "The-Wire") in order* ***to substantiate her allegations****.*
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> * * * * *
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> *"It is pertinent to mention here that* ***all the above mentioned documents are actually copies of electronic records****. In order for the said documents to be read in evidence, the* ***complainant is supposed to prove a certificate u/s 65-B of the Evidence Act*** *on the*

> *judicial file. However, the* ***complainant has failed to do so*** *for the reasons best known to her. Only an affidavit, sworn before an Oath commissioner, has been placed on record. But that too has not been tendered in evidence.* ***Consequently the print outs of all the defamatory material, as relied by the complainant, could not be read in evidence at this stage****.*
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> "*Now this Court is left* ***only with oral accounts*** *as deposed by the complainant and her witnesses.*
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> * * * * *
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> *"****She claims that the accused no. 1 and 2 have defamed her by wrongly imputing the preparation of the aforesaid dossier****.* ***It is further claimed by her that the other accused have made defamatory comments against her on the basis of said imputation****. She further claims that she did not prepare any such dossier.*
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> * * * * *
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> *"... All the other witnesses have deposed that* ***they have read*** *the defamatory publication in the e-magazine "The Wire" and* ***have further deposed categorically that the complainant has been defamed on account of the publication of the said report*** *...*
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> * * * * *
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> *"In the considered opinion of this Court, there are sufficient materials on record to summon the editor of accused no. 1 "The Wire" as well as the accused no. 2 who authored the said defamatory article. The other witnesses have not made any statement supporting the assertions of the complainant qua the role of other accused persons in defaming her. Except for oral testimony of complainant Amita Singh, there is nothing on record to assume culpability of the remaining accused persons at this stage. Accordingly, this court is not inclined to summon the remaining accused persons."*
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> (emphasis supplied)

6. It is accordingly the admitted position, as narrated in the summoning order and as also evident from the record, that *at the stage* summons were issued *vide* order dated 07.01.2017, no certificate under section

65-B of the Indian Evidence Act, 1872 ('Evidence Act' for short) in support of a 'print-out' of the on-line publication, had been filed by the respondent. This on-line publication is the *only matter which has been imputed to the present petitioners*. Absent the section 65-B certificate, the print-out of the on-line publication *could not be read in evidence*, as correctly observed by the learned Magistrate.

7. The aforesaid position is unequivocally settled by the verdict of the Supreme Court in ***Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & Ors.***[1], where the Supreme Court holds thus :

> "*61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a* ***condition precedent to the admissibility of evidence by way of electronic record****, as correctly held in Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108], and incorrectly "clarified" in Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865]. ****Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law****. Indeed, the hallowed principle in Taylor v. Taylor [Taylor v. Taylor, (1875) LR 1 Ch D 426], which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.*"
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> (emphasis supplied)

8. So, what was before the learned Magistrate at the stage of passing the summoning order *was only the portion* of the subject publication which was extracted in the criminal complaint which contains the

[1] (2020) 7 SCC 1.

allegations against the petitioners. The relevant extract from the complaint reads as follows :

> "*2. That the Accused Persons have started* ***HATE CAMPAIGN*** *against the Complainant to malign the reputation of the Complainant.*
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> ***A.*** *Accused No.1 & 2 The Wire, Its Editor, Siddharth Bhatia, The Wire, has not verified the authenticity of the Dossier and has used the same for the monetary benefits of its magazine and thereby damaging, defaming and maligning the reputation of the Complainant. Accused No.2 Ajoy Ashirwad Mahaprastha has wrongly used the name of the Complainant in the same Dossier, thereafter shared/distributed/uploaded the same on the Public Domain/Social Websites, thereafter it was made available to the millions of use of the Internet and the Accused Persons have shared/posted/commented Defamatory words/phrases/statements/ remarks against the Complainant. the extract of the Dossier has been reproduced below:*
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> ***ANNEXURE C-3(Colly)***
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> ***"Dossier calls JNU "Den of Organised Sex Racket" Students, Professors Allege "Hate Campaign" By AJOY ASHIRWARD MAHAPRASHASTA on 26/04/2016 . Leave A Comment""***

(emphasis in original)

9. A plain reading of the aforesaid extract shows, that in and of itself, there is nothing in the said extract that could be taken to be defamatory of the respondent. As explained above, the aforesaid caption only says that the dossier called JNU a "den of organised sex racket", but nothing in the extract says anything *against the respondent* herself, much less anything that could be taken to be defamatory of the respondent.

10. The aforesaid extracted portion is *all that there was* before the learned Magistrate by way of the contents of the subject publication. All else

was only the allegations, comments, inferences and grievances of the respondent herself. In fact, the learned Magistrate himself correctly observes in the summoning order, that he "*... is left only with oral accounts as deposed by the complainant and her witnesses ...*" and that he has therefore proceeded *solely* on the basis of the oral testimony of some of the complainant's witnesses in relation to the written matter. The written matter, *viz.* the subject publication, was not before the learned Magistrate in any admissible form.

11. The learned Magistrate correctly appreciates the position of law in this behalf; but then erroneously proceeds to pass the summoning order on the basis of oral evidence in substitution of the electronic record.

12. This, the learned Magistrate could not have done since no certificate under section 65B of the Evidence Act had been filed in support of the subject publication, which was an on-line publication; which, as observed above, was the *only subject-matter* of the criminal complaint *against the present petitioners*.

13. It is also noticed, that even assuming that the subject publication could have been read in evidence, all that was stated in the article was that the respondent had led a team of persons, who had compiled a dossier, which dossier purported to expose certain wrongdoing at JNU. The subject publication *did not say that the respondent was involved in any wrongdoing*; *nor did it speak of the respondent in any derogatory, derisive or denigrating terms*.

14. As the summoning order itself records, it is founded *only* upon the depositions made by CW-1 to CW-5 at the pre-summoning stage. For

one, the depositions of the complainant's witnesses were at best only their conclusions and inferences in relation to whether the subject publication was defamatory of the respondent or not. A reading of the criminal complaint further reveals that the respondent has alleged that *other accused persons* have made derogatory references to her, except she blames all of that on the subject publication. However, the learned Magistrate did not find any material to summons the other accused persons, which would *a-fortiori* mean that the learned Magistrate was of the opinion that *ex-facie* the allegations that the other accused persons had made derogatory references to the respondent, were baseless. If that be so, then to say that the subject publication carried by the petitioners, was the cause for such derogatory references, loses any meaning.

15. On point of fact, some of the witnesses who deposed in the respondent's favour, *do not even confirmedly say that they had read the subject publication*.

16. It may also be observed, that essentially, the learned Magistrate proceeds on the basis of the oral testimony of the complainant's witnesses who say that *they find* the matter defamatory. Since the subject publication is not on record, it is only the *opinion* of those witnesses *about* the publication that was read by the learned Magistrate. In any case, whether or not the subject publication was 'defamatory' in law or not *was a matter for judicial determination* and an opinion that must be formed by the court. The mere interpretation, inferences and conclusions drawn by the complainant's

witnesses on that score cannot have been the basis for summoning the petitioners.

17. At this point, a closer reading of the provision defining the offence of defamation under section 499 IPC is necessary. The said provision recites as under :

> *"**499. Defamation**.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.*
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> *Explanation 1.* * * * * *
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> *Explanation 2.—* * * * * *
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> *Explanation 3.—* * * * * *
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> *Explanation 4.—No imputation is said to harm a person's reputation, **unless** **that imputation directly or indirectly**, in the estimation of others, **lowers** the moral or intellectual character of that person, or **lowers** the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."*

(emphasis supplied)

18. The Supreme Court has also held that before issuing summons in a criminal complaint alleging defamation, a Magistrate must act with great circumspection, and be careful in assessing whether or not an offence is disclosed. This is what the Supreme Court has said in ***Subramanian Swamy vs. Union of India***[2] :

> *"207. Another aspect required to be addressed pertains to issue of summons. Section 199 CrPC envisages filing of a complaint in court. In case of criminal defamation neither can any FIR be filed*

[2] (2016) 7 SCC 221.

> *nor can any direction be issued under Section 156(3) CrPC. The offence has its own gravity and hence,* ***the responsibility of the Magistrate is more. In a way, it is immense at the time of issue of process. Issue of process****, as has been held in Rajindra Nath Mahato v. T. Ganguly [Rajindra Nath Mahato v. T. Ganguly, (1972) 1 SCC 450 : 1972 SCC (Cri) 206],* ***is a matter of judicial determination and before issuing a process, the Magistrate has to examine the complainant****. In Punjab National Bank v. Surendra Prasad Sinha Punjab National Bank v. Surendra Prasad Sinha, 1993 Supp (1) SCC 499 : 1993 SCC (Cri) 149] it has been held that* ***judicial process should not be an instrument of oppression or needless harassment****. The Court, though in a different context, has observed that* ***there lies responsibility and duty on the Magistracy to find whether the accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded, then only process would be issued.*** *At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. In Pepsi Foods Ltd. v. Special Judicial Magistrate [Pepsi Foods Ltd. v. Special Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400], a two-Judge Bench has held that* ***summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course.***"
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> (emphasis supplied)

19. Guiding the High Courts on the same subject, in ***Mehmood Ul Rehman vs. Khazir Mohammad Tunda***[3] the Supreme Court has further held thus :

[3] (2015) 12 SCC 420.

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. ***It is not a mechanical process or matter of course****. As held by this Court in Pepsi Foods Ltd. [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] to set in motion the process of criminal law against a person is a serious matter.*

"21. Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. ***But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected****.*

"22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. ***The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court****. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the*

Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. ***If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court****. **To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment****.*

"23. Having gone through the order passed by the Magistrate, we are satisfied that there is no indication on the application of mind by the learned Magistrate in taking cognizance and issuing process to the appellants. The contention that the ***application of mind has to be inferred cannot be appreciated****. The further contention that without application of mind, the process will not be issued cannot also be appreciated.* ***Though no formal or speaking or reasoned orders are required at the stage of Sections 190/204 CrPC, there must be sufficient indication on the application of mind by the Magistrate*** *to the facts constituting commission of an offence and the statements recorded under Section 200 CrPC so as to proceed against the offender. No doubt, the High Court is right in holding that the veracity of the allegations is a question of evidence. The question is not about veracity of the allegations, but whether the respondents are answerable at all before the criminal court. There is no indication in that regard in the order passed by the learned Magistrate.*"

(emphasis supplied)

20. On a plain, objective and careful reading of the extract of the subject publication as contained in the criminal complaint, it appears that the controversial dossier *exposes wrongful activities* that it says are going-on within the university campus; and that the respondent was leading a team of persons who compiled the dossier. At the risk of repetition, the subject publication *nowhere says that the respondent is involved in the wrongful activities*; nor does it make any other derogatory reference to her in connection therewith. This court is unable to discern therefore, as to how the subject publication can be said to have defamed the respondent.

21. The discussion and reasoning in the summoning order shows, that what the respondent is aggrieved by is the *comments posted by other accused persons against her*, criticising her for what is contained in the dossier, claiming that what was contained in it was false.

22. It would appear that the grievance of the respondent is not that what is stated in the dossier is false, since she nowhere says so. The respondent's grievance is that she did not lead the team of persons who compiled the dossier. Her grievance is that the comments made by the other accused persons against her are defamatory. However, the learned Magistrate has *considered it fit to summons only the petitioners*; and has chosen not to summons any of the other persons arrayed in the complaint.

23. In view of the foregoing discussion, in the opinion of this court, *firstly*, the subject publication itself was *not* before the learned Magistrate since in the absence of requisite certificate under section 65B of the Evidence Act, the print-out of the subject publication filed

could not be read in evidence. The learned Magistrate was cognisant of this; and has specifically so observed in the summoning order. *Secondly*, on a plain reading of the *extract* of the subject publication which is all that was contained in the complaint, there appears to be nothing 'defamatory' in it, as understood in law, since all it says is that the dossier calls-out certain wrongdoing in the university. Since, on point of law, there can be no oral evidence in substitution of a certificate under section 65B of the Evidence Act[4], there was no material before the learned Magistrate based on which the summoning order could have been passed.

24. As a sequitur to the above, summoning order dated 07.01.2017 made by the learned Metropolitan Magistrate in criminal complaint bearing C.C. No. 32203/2016 cannot be sustained in law; and is accordingly quashed and set-aside.

25. The present petition is disposed of.

26. Pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J

MARCH 29, 2023/ds

[4] cf. *Arjun Panditrao Khotkar* (supra)