

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 271 of 2020

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PRADIPSINH BHAGVATSINH JADEJA

Versus STATE OF GUJARAT

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Appearance:

MR ND NANAVALI, SENIOR ADVOCATE WITH MR BN LIMBACHIA(3454)
for the Applicant(s) No. 1

MR. SAHIL M SHAH(6318) for the Respondent(s) No. 2

MR MITESH AMIN, PUBLIC PROSECUTOR ASSISTATED BY MS. KRINA
CALLA, APP for the Respondent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE ILESH J. VORA **Date : 26/10/2020**

ORAL ORDER

1. Heard Mr. N.D. Nanavati, learned Senior advocate assisted by Mr. B.N. Limachia, learned advocate for the applicant, Mr. Mitesh Amin, learned Public Prosecutor assisted by Ms. Krina Calla, learned APP for respondent No. 1 State and Mr. Sahil M. Shah, learned advocate for respondent No. 2- original complainant.
2. By way of present application preferred under Section 482 of the Code of Criminal Procedure (for short "Cr.P.C"), the applicant seeks to quash the Criminal Complaint as well as summoning order dated 21.12.2019, passed by the learned Additional Chief Metropolitan Magistrate, Court No.3, Ahmedabad in Criminal Complaint No. 114499 of 2019, whereby and whereunder, in exercise of powers conferred under Section 204 of the Cr.P.C., he has summoned the applicant for facing the trial under Section 127A(1), 127A(2)(a) punishable under Section 127A(4) of Representation of People Act , 1951 (for the brevity 'the Act').

3. The facts leading to filing the present case are summarized as under:

3.1 The complainant - respondent no. 2 was Returning Officer of 72 -

Asarva Constituent Assembly. The Election for the State Assembly for the year 2007 was declared and notified on 10.10.2007 by Election Commission of India. The elections were held to be in phase wise namely on 11.12.2007 and 16.12.2007. The applicant was at relevant time sitting MLA of Asarva Constituency at Ahmedabad.

3.2 One Mr. Pankaj Shah, President of Ahmedabad City Congress Committee submitted an application in the form of complaint addressed to District Election officer and Collector Ahmedabad, alleging that after declaration of the election, the applicant had distributed the pamphlet during Navratri period. It is alleged in the application by Mr. Shah that he came to know about the pamphlet through one Mr. Vinaysinh Tomar, who was Member of NSUI, a student union. Admittedly, Mr. Vinaysinh Tomar had handed over the alleged pamphlet to Mr. Pankaj Shah and accordingly, Mr. Pankaj Shah submitted it to the District Election Officer alleging that the action on the part of the applicant is violative of Code of Conduct as the pamphlet bear no signature and name of the printer as well as publisher. It is further alleged by Mr. Shah, that there was a photograph of the applicant displaying on the pamphlet, containing party symbol – Lotus along with printed slogan – 'Aapnu Gujarat' and

Page 2 of 13

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R/CR.MA/271/2020 ORDER

'Aagvu Gujarat' (our Gujarat – different Gujarat).

3.3 After receiving the aforesaid application, along with copy of alleged photograph, from Mr. Pankaj Shah, the District Election Officer, Ahmedabad vide his letter dated 25.10.2007, addressed to Returning Officer (respondent no. 2), directing him to file private complaint under the provisions of the Act and accordingly, the respondent no. 2 being a nominated officer, has filed a private complaint against the applicant and other unknown persons for the offences punishable under Section 127A(4) for the contravention of Section 127A(1) and 127A(2)(b) of the Act before the Additional Chief Metropolitan Magistrate Ahmedabad.

3.4 On receiving the complaint, the Court of learned Metropolitan Magistrate initially ordered verification and the same was recorded on 20.11.2007 and thereafter, the learned Magistrate ordered the investigation by Meghaninagar Police Station, Ahmedabad and directed to submit the investigation report within stipulated period under Section

202 of Cr.P.C.

3.5 Pursuant to the order of learned Magistrate directing the Meghaninagar Police Station to carry out investigation, the investigating officer had submitted a report on 30.12.2007 along with statements of Shri Pankaj Shah and Mr. V.V. Tomar, concluding that they are unable to find out the name of the printer and publisher of the pamphlet and also it is not

Page 3 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

R/CR.MA/271/2020 ORDER

established that who has distributed the pamphlet.

3.6 Upon receiving the investigating report from Meghaninagar Police Station, the learned Magistrate, vide order dated 21.12.2019 issued process under Section 204 of Cr.P.C., for the offences punishable under Section 127A(1) and 127A(2)(a) punishable under Section 127A(4) of the Act. The learned Magistrate while issuing the process, has mainly considered the credibility of the District Election Officer, who has directed the Returning Officer to file the complaint.

4. The applicant having been aggrieved by the impugned order dated 21.12.2019, followed by the registration of complaint has filed the present application under Section 482 of Cr.P.C.
5. Mr. N.D. Nanavati, learned Senior Counsel assisted by Mr. Limbachiya, learned advocate appearing for the applicant has vehemently argued that the questioned pamphlet page 37 and 38, cannot be termed as "election pamphlet" within the meaning of Sub-section (3) (b) of Section 127A of the Act. The learned Senior Counsel after referring the alleged pamphlet (page 37 & 38), further submitted that the informant Pankaj Shah belonged to a different political party and nowhere he had stated that the contents of the pamphlet having reference to the declared election nor it contains any material either prompting the applicant or prejudicing any other. Mr. N.D. Nanavati, learned Senior Counsel on the same issue vehemently submitted that there is no any whisper about any aspect of the applicant or any

Page 4 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

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other candidature to any election. Mr. N.D. Nanavati, drew the attention towards the provision of the Act, more particularly Section 79(b) defines the meaning of "candidate" which says a person who has been or claims to have been nominated as candidate to any election. He further submitted that the nomination for the election was filed by the applicant on 28.11.2007 and the alleged application of Mr., Pankaj Shah submitted to District Election Officer on 22.10.2007. Therefore, it is submitted that on the day of direction given by the Election Officer, the applicant was not declared as candidate for the election and accordingly, no any prima-facie case is made out against the applicant under the provision of the Act.

In this background the learned Senior Counsel Mr. N.D. Nanavati, submitted that the questioned pamphlet could not be admitted or believed as "election pamphlet" within the meaning as defined in clause (b) of Sub-section (3) of Section 127(A) of the Act.

Mr. N.D. Nanavati, learned Senior Counsel appearing on behalf of the applicant submitted that the learned Magistrate while issuing the process, instead of examining the above referred provisions as well as the material of investigation, he heavily relied upon the allegations made in the complaint and considered the position of the District Election Officer, which shows that before issuing summon, the learned Magistrate has not applied his mind properly.

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R/CR.MA/271/2020 ORDER

Page 5 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

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In support of aforesaid submission, the learned Senior Counsel appearing for the applicant placed reliance on the case of **Mehmood UI Rehman Vs. Khazir Mohammad Tunda, (2016) 1 SCC (cri) 124**, (paras-20, 21 and 22) and submitted that the power exercised under Section 204 Cr.P.C of summoning an accused in criminal case is a serious matter and that the process of criminal law cannot be set into motion in a mechanical manner and order of the Magistrate must reflect that he has

applied his mind to the facts of the case and law governing the issue.

Relying on the ratio laid down in the case Mahmood UR Raheman (supra), the learned Senior counsel for the applicant submitted that no any prima-facie case is made out against the applicant for alleged offence under the Act. It is submitted that the learned Magistrate has failed to consider the material evidence like police report, statement of witnesses and provision of law and there is no sufficient ground for proceeding for commission of alleged offence.

The learned Senior Counsel Mr. N.D. Nanavati, appearing for the applicant submitted that impugned order suffers from vice of non-application of mind and contrary to law laid down by the Supreme Court and this Court, requires interference and the impugned order and complaint deserve to be quashed and set aside in exercise of powers under Section 482 of the Cr.P.C.

R/CR.MA/271/2020 ORDER

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10.

Page 6 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

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Per contra, Mr. Sahil Shah, learned advocate appearing for the Returning Officer – respondent no. 2 – Prakash Makwana, who has filed the private complaint, submitted that the complainant being a Returning Officer in the General Election of Gujarat Legislative Assembly for 72 Asarva Constituent Assembly, has filed the complaint on the basis of instruction given by District Election Officer. Therefore, though the complainant not having personal knowledge regarding alleged incident but has acted in his official capacity to comply with the direction of the Superior Authority. It is submitted that there is a prima-facie material to proceed with the complaint and therefore, learned trial Court has not committed any error.

R/CR.MA/271/2020 ORDER

12. Heard Mr. Mitesh Amin, learned Public Prosecutor for respondent No.1 – State at length.

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Heard learned counsel for the respective parties at length and perused the impugned order and material placed on record.

At the outset, it is required to be noted that by impugned order, learned Magistrate has directed to register complaint and to issue summon against the applicant for the offences under Section 127A(1), 127A(2)(a) punishable under Section 127A(4) of the Act. Learned Magistrate has exercised its power under Section 204 of Cr.P.C.. It is also required to be noted that before passing the impugned order, learned Magistrate directed the concerned

Page 7 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

R/CR.MA/271/2020 ORDER

police station to hold inquiry and the Investigating Officer, after holding inquiry, submitted its report, which is in favour of the applicant. In the inquiry report, Investigating Officer found no material to show that it was the applicant, who distributed and published the offending material (pamphlet). Therefore, as such, the inquiry report technically can be termed as 'closure report'. It is true that the learned Magistrate is not bound by the report. However, at the same time, there must be even a prima-facie material against the applicant before he summoned to face the trial. Section 204 of the Cr.P.C, provides that if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceedings and prima-facie case is made out, the Magistrate can issue summon. Therefore, existence of a sufficient ground is prerequisite before taking cognizance.

15.As observed by the Supreme Court and this Court in catena of decisions, an order summoning accused under Section 204 of the Cr.P.C to face the trial is a serious matter and such order must reflect that the Magistrate has applied his mind to the facts of the case and law governing the issue before issuing the summon. It is also settled that there must be some prima-facie material, even may be in the form of statement of witnesses, making out prima- facie case, before issuing the summon.

16.At this stage, decision of the Supreme Court in case of *Mehmood UI*

Rehman (supra), is required to be referred to, wherein, the scope of inquiry and satisfaction of the Magistrate for issuance of

Page 8 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

R/CR.MA/271/2020 ORDER

the process under Section 204 of the Cr.P.C. Has been considered and held as under :

“23. The steps taken by the Magistrate under Section 190(1) (a) of Cr.P.C. followed by Section 204 of Cr.P.C. 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 of Cr.P.C. 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.”

17. Having heard the learned counsel for the respective parties and considering the complaint and material on record including application given by informant, who at relevant time was President of Ahmedabd City Congress Committee and relevant provisions of the Act, 1951, this Court is of the opinion that learned Magistrate has committed grave error while issuing summon and passed the order to register complaint against the

Page 9 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

R/CR.MA/271/2020 ORDER

applicant to face the trial under the provisions of Section 127A(1), 127A(2)(a) punishable under Section 127A(4) of the Act. A bare reading of Section 127A(1) read with two statements of witnesses as well as inquiry report, no any prima-facie offence for the aforesaid offences

having been disclosed against the applicant.

18. Now let us examine the pamphlet (page-37 & 38). After close scrutiny of the contents of the pamphlet, it contain religious phrases, songs and Aartis of Goddess Ambey Ma along with the name of applicant and also contained the map of State of Gujarat, symbol of applicant's party along with slogan, titled as 'Aapnu Gujarat' (our Gujarat) Aagvu Asarva (distinct and different Asarva). It further appears that the photograph of the applicant is also displaying on the pamphlet.

19. At this stage, it is appropriate to refer the legal provision which define the "election pamphlet". Section 127A(3)(b), define the "election pamphlet", which is reproduced hereinnder:

Section 127A(3)(b):

“election pamphlet or poster” means any printed pamphlet, hand-bill or other document distributed for the purpose of promoting or prejudicing the election of a candidate or group of candidates or any placard or poster having reference to an election, but does not include any hand-bill, placard or poster merely announcing the date, time, place and other particulars of an election meeting or routine instructions to election agents or workers.”

Page 10 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

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Bare perusal of the pamphlet (page-37&38) for which, the complaint is filed against the applicant, it cannot be said that it is "election pamphlet" within the meaning of Section 127A(3)(b). Thus, the pamphlet page-37 & 38 taken at their face value, it cannot be said that even a prima-facie case is made out against the applicant for the alleged offences. The pamphlet do not contain the promotion of the election or any election agenda nor any reference to the election notified. Once it is found that the offending material – pamphlet (page-37&38) cannot be said to be an "election pamphlet", as defined under Section 123A(3)(b) of the Act, it could not be said that prima-facie case is made out against the applicant for the offences under Sections 127A(1), 127A(2)(a) punishable under Section 127A(4) of the Act. Learned Magistrate while directing to register complaint and issuing summon against the applicant for the offences under Sections 127A(1), 127A(2)(a) punishable under Section 127A(4) of the Act, has not at all properly applied its mind to the facts whether the offending material – pamphlet can be said to be an

"election pamphlet" or not. Therefore, it appears that the learned Magistrate has not properly examined the the nature of allegations made in the complaint and supporting evidence and applied his mind before issuing the summon. Even, the learned Magistrate has not referred to the inquiry report submitted by the Inquiry Officer. It is rightly submitted by the learned counsel for the applicant that after election of 2007, there were two elections contested by the present applicant and no any such type of allegation of violation of code of Conduct having been found

R/CR.MA/271/2020 ORDER

Page 11 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

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against the applicant.

Even otherwise it is to be noted that in the present case, none of the ingredients of afore stated offences are satisfied. To make out a case for offence under Section 127(A)(1), there must be some evidence, even at the stage of issuance of summon, that applicant has printed, published and distributed the material – "election pamphlet". In the present case, there is no prima-facie case made out for aforesaid offences. It is admitted fact that complaint has been lodged at the instruction of higher authority and complainant having no any personal knowledge with regard to allegation made in the complaint. A bare reading of the complaint, it is not alleged that applicant has published, printed and distributed the "election pamphlet". When this Court finds that the pamphlet (page-37&38) , cannot be said to be an "election pamphlet", as defined under provision of Section 127(3)(b) of the Act, 1951, the learned Magistrate materially erred in taking cognizance and issuing summon against the applicant. Similarly, there is no prima-facie evidence for the offence under Section 127 A(2)(a).

In light of the provisions of law as well as facts of the complaint and in support of material evidence, this Court is of the view that the trial Court failed to consider the facts and applicable law in its proper prospective and without any basis initiated judicial process mechanically against the applicant. Even, the impugned order does not demonstrate that the learned Magistrate has perused

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Page 12 of 13

Downloaded on : Mon Oct 26 19:13:03 IST 2020

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the material on record and applied his mind before taking cognizance and satisfaction of the learned Magistrate forming his opinion with regard to proceed against the applicant for the alleged offences are without any basis and contrary to the settled law. Therefore, the continuation of proceedings against the applicant to face the trial for aforesaid offences would nothing but abuse of process of law and harassment and this is a fit case to exercise the power under Section 482 of Cr.P.C. to quash the impugned order dated 21.12.2019 as well as proceedings of Criminal Case No. 114499 of 2019.

Under the circumstances as well as for the reasons stated above, the present petition is allowed. The impugned order dated 21.12.2019 summoning the applicant and directing to register the complaint for the offences under Section 127A(1), 127A(2)(a) punishable under Section 127A(4) of the Act, 1951 and proceedings of Criminal Case No. 114499 of 2019 are hereby quashed and set aside. Rule is made absolute. **Direct service is permitted today**, additionally through E-mail also.

(ILESH J. VORA,J)