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

+ **CRL.M.C. No.205/2012 & Crl.M.A.No.771/2012(Stay)**

% *Judgment delivered on: 02nd March, 2012*

YAHOO! INDIA PVT. LTD.

..... Petitioner

Through : Mr.Arvind Nigam, Senior
Advocate with Mr.Sanjay Kumar, Adv

versus

STATE & ANR

..... Respondents

Through : Mr.Navin Sharma, APP for
respondent No.1.

Mr.S.P.M.Tripathi, Adv for R-2.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the instant petition, the petitioner has assailed the impugned order dated 23.12.2004 passed by learned Metropolitan Magistrate, whereby the petitioner has been summoned.

2. Mr.Arvind Nigam, learned Senior Advocate appearing on behalf of petitioner submits that the order dated 23.12.2011 passed by learned Metropolitan Magistrate, New Delhi is without application of mind because of the fact that neither averments were made against the petitioner in the complaint nor any evidence produced against him.

3. Learned counsel has drawn the attention of this Court to the

complaint being filed by respondent No.2 vide complaint case No.136/11 wherein the petitioner has been impleaded as respondent/accused No.11.

4. Learned counsel has submitted that respondent No.2 in para No.11 of the complaint does not contain any allegation against the petitioner and same reads as under:-

“11. That the main social networking websites are Google, Facebook, Youtube, Orkut, Broadreader, Mylot, Zomei Time, Shyni Blog, Blogspot, Exbii.com, IMC India. These accused persons knowingly well these facts that these contents and materials are most dangerous for the community and peace of the harmony, but with common and malafide intention and hands under glove with each other failed to remove the same for the wrongful gain.”

5. Learned Senior counsel has further drawn the attention of this Court to the impugned order wherein it is observed that the complainant has alleged that the main social networking websites are Google, Facebook, Youtube, Orkut, Broadreader, Mylot, Zombi Time, Shyni Blog, Blogsopt, Exbii.com, IMC India. It is further alleged that the accused persons knowingly, allowed these contents and material to be hosted in the websites which is dangerous to communal harmony with common and malafide intentions and have failed to remove the objectionable content for their wrongful gain.

6. Learned Senior Advocate further referred to the deposition of complainant as CW1 made before learned Trial Court, who produced

documents Ex.CW1/A-1 to Ex.CW1/A-16 which have been down loaded from website namely www.Zombietime.com. He further deposed that Ex.CW1/A-17 has been down loaded from Orkut which is arrayed as accused Nos.4 & 10. He also proved on record that Ex.CW1/A-18 downloaded from website mylot.com which is *per se* defamatory to all politicians. It is further deposed that Ex.CW1/A-19 to Ex.CW1/A-22 were downloaded from the post of topix.com as the contents are dangerous for social structure and community. He further deposed that Ex.CW1/A-23 to Ex.CW1/A-36 which are posted by the service provider youtube.com without any sensor or prohibitory or disclaimer which is also dangerous for communal harmony and peace. It is further deposed that Ex.CW1/A-37 to Ex. CW1/A-48 are taken from website Facebook, and has also proved on record that Ex.CW1/A-49 to Ex.CW1/A-52 as provided by the blogspot.com which is arrayed as accused No.6 & 9 in the complaint and these documents are obscene and against the culture of this country.

7. Respondent No.2/complainant has also deposed that document Ex.CW1/A-53 has been taken from the website exbii.com which provides service through google.com and the document Ex.CW1/A/54 has been taken from the website indimedia.org and has been shown as an article posted by imcindia.com, which is against Hinduism and defamatory to the religion. He further deposed that Ex.CW1/A-55 provided by broadreader.com which is defamatory to Indian politicians and document Ex.CW1/A-56 and Ex.CW1/A-57 have been taken from the service provider blogsopt.com which have been provided by the

websites.

8. Learned counsel for petitioner submits that firstly there is no averment against the petitioner in the complaint; and secondly, there is no evidence adduced on record by the complainant or other witnesses, which is relatable to the petitioner.

9. He further submitted that petitioner is not a social networking site and he is only email provider, therefore, under Section 79 of the IT Act being intermediary, petitioner is exempted. Therefore, the impugned summoning order deserves to be set aside qua the petitioner.

10. On the other hand, ld. counsel for respondent No.2 submits that there is specific averment against the petitioner in para No.7 of the complaint filed before learned Trial Court, which reads as under:-

“7. That such content, if allowed to be hosted on these websites would seriously damage the secular fabric of India and would severely hurt the sentiment of general public following different religions. Following are the websites which host the said objectionable content as provided to the Hon’ble Court in a sealed envelope:-

- 1. Facebook,*
- 2. Youtube,*
- 3. Google,*
- 4. Yahoo,*
- 5. Orkut,*
- 6. Broadreader,*
- 7. Mylot,*
- 8. Zombie Time,*
- 9. Shyni Blog,*

*10.Blogspt
11.Exbii.com,
12.IMC India”*

11. Mr. Naveen Sharma, Id. APP appearing for State / R-1, has submitted that in para No.7 of the complaint, as mentioned above, there are allegations against the petitioner, however, has fairly conceded that the contents of the same have not been proved / exhibited by any of witnesses, appeared in the witness box at the time of pre-summoning evidence.

12. He further submitted that at the time of summoning of respondent, learned Trial Court has to see only *prima facie* case against the petitioner and it is not necessary to exhibit the evidence against him. Moreso, in status report filed by the SHO, police station Tuglaq Road, New Delhi clearly mentions that during the course of inquiry it is revealed that the documents are available on various websites and copies can be down loaded from there.

13. Learned counsel for respondent No.2/complainant has submitted that CW3 Dr.Aziz Ahmad Khan, has been examined on behalf of the complainant before learned Trial Court. The status report filed, as mentioned above, allegations are there against the petitioners also, therefore, the summoning order issued by learned Trial Court is just and proper. Id. Trial Court in the order dated 16.12.2011 observed that complainant examined four witnesses on oath in the Court in support of the complaint as CW1 to CW4. The documents are supplied are *prima facie* and palpably indecent and likely to spread communal

violence and hence these documents may be kept under sealed cover.

14. Learned counsel for respondent No.2 further submitted that in the order of learned Trial Court, as mentioned above, after considering the submissions made and material produced on record, found it fit to hold an inquiry through the SHO concerned regarding the authenticity of the documents, as filed.

15. Mr.Arvind Nigam, learned Senior Advocate appearing on behalf of petitioner, in rejoinder has argued that in the report dated 17.12.2011 filed by SHO, police station Tuglaq Road, New Delhi clearly mentioned the documents received with it containing indecent documents. However, no documents against the act or omission of the petitioner neither proved in the Court nor provided to the SHO concerned, nor the SHO filed the said document against the petitioner along with its report dated 17.12.2011.

16. He further submitted that the documents Ex.CW1/A-1 to Ex.CW1/57 are the documents qua other parties; nor a single document has been filed with the complaint against the petitioner. In the complaint, there is no averment for the act or omission of the petitioner and even in the testimony of four witnesses examined on oath on behalf of complaint, not a single iota of evidence has been deposed qua the petitioner or proved when the complainant examined himself as CW1.

17. Learned counsel further submits that at least in the complaint,

there should have been specific averments that what the petitioner has done which law has been violated and what kind of act or omission he has committed thereto. In the absence of aforesaid averments or evidence, the summoning order against the petitioner could not have been issued against the petitioner.

18. The settled law is that at the time of summoning, the magistrate should not be casual while issuing the summoning order because it led to the complete trial for the person; therefore, before issuing the summons, concerned magistrate has to apply its mind while going through the complaint and evidence adduced on record.

19. Learned counsel has relied upon **State of Haryana & Ors v. Bhajan Lal & Ors** 1992 Supp(1) SCC 335 wherein the Apex Court has formulated seven points on the subject, which are as under:-

“(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;

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. 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) of the Code;

(3) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(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.”

20. Ld. Counsel submitted that the case of the petitioner is squarely covered under very 1st Principle of the case of ***Bhajan Lal (Supra)***

21. Learned counsel for has relied upon the provisions contained in Section 190, 200 and 204 of the Cr. P.C. For convenience same are reproduced as under:-

“190. Cognizance of offences by Magistrate:-

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon it police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

200. Examination of Complainant:-

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

204. Issue of process:-

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) A summons-case, he shall issue his summons for the attendance of the accused, or

(b) A warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued

under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.”

22. He further submitted that under Criminal Procedure Code, step to step procedure is prescribed, and the Magistrate is bound by the procedure mentioned above. If sufficient material is on record, then he may issue summons against the person. But in the present case, there is no material against the petitioner; despite learned Trial Court while passing the impugned order has observed that there is prima facie material on record against the accused persons for committing offences under Section 292/293/120 Indian Penal Code, 1860 and they are liable to be summoned for facing trial for the same.

23. Learned counsel for respondent No.2 has further submitted that if respondent No.2/complainant has missed the opportunity to make proper averments in the complaint and adduced evidence, in that situation he has a right to amend the same and lead the evidence thereafter.

24. Mr.Nigam, learned Senior Advocate submits that in Cr. P.C. there is no provision to amend the complaint. Therefore, since, there

are no allegations against the petitioner in the complaint and there is no evidence on record, in that situation the impugned order dated 23.12.2011 has to be set aside qua the petitioners.

25. I am of the considered opinion that neither allegations are against petitioner nor evidence thereto. Even report filed by SHO does not prove anything against the petitioner. No averments for the act or omission of the petitioner are made in the complaint nor has been brought by the testimony of 4 witnesses examined on oath on behalf of the complainant.

26. There is no iota of evidence has been deposed qua the petitioner. Nor proved even by the complainant when he was examined as PW1. There should have been specific averments about the nature of act or omission and law violated and in the absence of the same, summons issued against the petitioner are not sustainable in law.

27. There is no provision in Cr.P.C. to amend the complaint or produce the documents after issuing the summons.

28. Law is settled in case of **Pepsi Foods Ltd. & Ors. v. Special Judicial Magistrate and Others AIR 1998 SC 128** wherein it is held that summoning of an accused in a criminal case is a serious matter. Criminal Law cannot be set into motion as a matter of course. It is not that the complainant has to bring only witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of Magistrate summoning the accused must reflect that he

has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary as well in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of accused.

29. Magistrate has to carefully scrutinize the evidence brought on record and may even put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is *prima facie* committed by all or any of the accused.

30. Considering the above facts and circumstances of the case in hand, and in the light of law discussed above I find force in the submission of learned counsel for petitioner. The corrective measure of amending the complaint, as put forth by learned counsel for respondent No.2, cannot be accepted, being not tenable under law.

31. Accordingly, the impugned order dated 23.12.2011 passed by learned Metropolitan Magistrate, New Delhi in complaint case No.136/11 titled 'Vinay Rai v. Facebook India & Ors' qua petitioner is accordingly set aside.

32. Therefore, CrI.M.C.No.205/2012 is allowed with no order as to costs.

33. Before parting with present order, I make it clear that whatever observed herein shall not be construed as finding on merit of the case, which is pending trial qua other accused persons and the proceedings.

34. In view of above, CrI.M.A.No.771/2012 does not require further adjudication and stands disposed of.

SURESH KAIT, J

MARCH 02, 2012

Mk/jg