

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Misc. Petition No.1236 of 2020Order reserved on: 23-3-2021Order delivered on: 6-4-2021

Rajendra Agrawal, S/o Motilal Agrawal, aged about 52 years, R/o Housing Board, Kohkha, Bhilai, P.S. Supela, District Durg (C.G.), Alternate Address Vile Parle, Mumbai (Maharashtra)

---- Petitioner

Versus

1. State of Chhattisgarh, through Station House Officer of Police Station Supela, District Durg (C.G.)
2. Inderjeet Singh, S/o Late Dalbir Singh, Age 40 years, R/o B-25, Phase-II, Surya Vihar, Bhilai, P.S. Supela, District Durg (C.G.)

---- Respondents

For Petitioner: Ms. Aditi Singhi, Advocate.

For Respondent No.1 / State: -

Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.

For Respondent No.2: -

Mr. Rahim Ubwani, Advocate.
-----Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Order

1. The petitioner is standing trial for offence under Sections 500 read with Section 120B of the IPC and 67 of the Information Technology Act, 2000 pursuant to registration of Crime No.68/2020 at Police Station Supela, District Durg, dated 28-1-2020 and consequent filing of charge-sheet against him. By this petition under Section 482 of the CrPC, he seeks quashment of FIR and criminal proceeding registered against him.
2. Respondent No.2 herein / complainant filed a complaint before Police Station Supela, District Durg alleging that co-accused Ashish Mishal from his mobile number 9009268440 had been forwarding defamatory

messages on WhatsApp making defamatory allegations against the complainant which was investigated upon and the memorandum statement of co-accused Ashish Mishal was recorded in which he has stated that the petitioner has directed him to send messages against the complainant and the petitioner has also paid ₹ 50,000/- to him for that purpose. Accordingly, ₹ 50,000/- was seized and thereafter, the petitioner and co-accused, both, were charge-sheeted for the aforesaid offences under Sections 500 read with Section 120B of the IPC and 67 of the Information Technology Act, 2000 (for short, 'the IT Act').

3. This petition has been preferred mainly on the ground that taking the contents of the FIR as it is, no offence under Section 67 of the IT Act is made out against the petitioner and alternatively, certificate under Section 65-B(4) of the Evidence Act, 1872 was mandatory to be filed with the charge-sheet which was not filed along with the charge-sheet and in view of the decision of the Supreme Court in the matter of Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and others¹, certificate under Section 65-B(4) of the Indian Evidence Act, 1872 is a mandatory requirement and therefore in the present case, once charge under Section 67 of the IT Act is quashed, cognizance of offence under Section 500 of the IPC, which is non-cognizable offence, cannot be taken on the police report in view of the provisions contained in Section 155(2) of the CrPC and also for the reason that complaint has not been filed by the person aggrieved before the Magistrate within the meaning of Section 199 of the CrPC.
4. Return has been filed by the respondents opposing the petition stating that only charges for the aforesaid offences have been framed against

¹ (2020) 7 SCC 1

the petitioner, sufficient material is available on record and all the charges levelled against the petitioner will be established during the course of trial, as such, this is not the case where charges levelled against the petitioner can be quashed in exercise of jurisdiction under Section 482 of the CrPC, therefore, the petition be dismissed.

5. Ms. Aditi Singhvi, learned counsel appearing for the petitioner, would submit that taking the contents of the FIR as it is, no offence under Section 67 of the IT Act is made out against the petitioner, as neither the statement is defamatory nor certificate under Section 65B of the Evidence Act, 1872 has been enclosed with the charge-sheet which was mandatory to be filed along with the charge-sheet. Even otherwise, offence under Section 500 of the IPC is non-cognizable offence and by virtue of Section 155(2) of the CrPC, no police officer can investigate a non-cognizable case unless there is order of a Magistrate having power to try such case or commit the case for trial. She would further submit that the petitioner has been apprehended on the basis of memorandum of co-accused which is absolutely unsustainable and bad in law, as such, FIR and charge-sheet deserve to be quashed and the petitioner be acquitted of all the charges.
6. Mr. Ravi Kumar Bhagat, learned State counsel, would submit that upon due investigation and upon the memorandum statement of other co-accused Ashish Mishal, the petitioner has been impleaded in this case and charge-sheet has been filed. He would further submit that the petitioner is at liberty to disprove the charges levelled against him during the course of trial and as such, no case is made out for quashing the charges alleged against the petitioner.
7. Mr. Rahim Ubwani, learned counsel for the complainant / respondent No.2, would submit that the petitioner is instrumental in passing

defamatory messages to the complainant and seizure of ₹ 50,000/- has also been made from co-accused Ashish Mishal as such, it cannot be held that no offence is made out against the petitioner and charges are liable to be quashed.

8. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also went through the material available on record with utmost circumspection.
9. The first and foremost submission vehemently urged on behalf of the petitioner is that the WhatsApp messages allegedly sent by co-accused Ashish Mishal on behalf of the petitioner, do not fulfill the ingredients of Section 67 of the IT Act, as it is neither obscene nor lascivious, therefore, taking the contents of the WhatsApp messages as it is on its face value, no offence under Section 67 of the IT Act is made out against the petitioner.
10. In order to decide the plea raised at the Bar on behalf of the petitioner, it would be appropriate to notice the definition mentioned in Section 67 of the IT Act which states as under: -

“67. Punishment for publishing or transmitting obscene material in electronic form.—Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.”

11. A careful perusal of the aforesaid definition of Section 67 of the IT Act would reveal that following acts amount to offence within the meaning

of Section 67 of the IT Act: -

1. Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious; or
 2. appeals to the prurient interest; or
 3. if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
12. Therefore, if any of the above acts are committed by a person, offence under Section 67 of the IT Act is attracted. As such, the substantial ingredients of Section 67 of the IT Act are broadly analogous to the provisions contained in Sections 294 and 292(1) of the IPC which deal with the concept of obscenity and which read as under: -

Section 292(1) of the IPC

“292. Sale, etc., of obscene books, etc.—(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”

Section 294 of the IPC

“294. Obscene acts and songs.—Whoever, to the annoyance of others—

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine,

or with both.”

13. In order to make it obscene punishable under Section 294 of the IPC, it must satisfy the definition of obscenity as envisaged in Section 292(1) of the IPC. In the definition of obscenity under Section 292(1) of the IPC, the words used must be in sense lascivious or it must appeal to the prurient interest or deprave and corrupt person. Thus, the elements of obscenity as referred to in Section 294 of the IPC has to be understood from the definition of obscenity as provided in Section 292(1) of the IPC. A comparison of the relevant wordings in Section 292(1) of the IPC and Section 67 of the IT Act would make it clear that in order to make the publication or transmission or causing of publication or transmission in the electronic form to be brought within the contours of Section 67 of the IT Act, it should be one which tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it etc., as aforesaid.

14. The Supreme Court in the matter of Ajay Goswami v. Union of India and others² while examining the scope of Section 292 of the IPC and Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986 held as under: -

“70. ... ‘45. ... [The] commitment to freedom of expression demands that it cannot be suppressed unless the situations created by it allowing the freedom are pressing and the community interest is endangered.’*”

15. Similarly, in the matter of Aveek Sarkar and another v. State of West Bengal and others³, their Lordships of the Scheme Court laid down community standard test applicable for determination of obscenity and it was held that obscenity should be determined from point of view of

² (2007) 1 SCC 143

³ (2014) 4 SCC 257

average person and in context of contemporary mores and national standards, as concept of obscenity keeps on changing with changing social values. Their Lordships laid down community standard test in following words: -

“Community standard test

23. We are also of the view that *Hicklin test*⁴ is not the correct test to be applied to determine “what is obscenity”. Section 292 of the Penal Code, of course, uses the expression “lascivious and prurient interests” or its effect. Later, it has also been indicated in the said section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the “community standard test” rather than the “*Hicklin test*” to determine what is “obscenity”. A bare reading of sub-section (1) of Section 292, makes clear that a picture or article shall be deemed to be obscene

(i) if it is lascivious;

(ii) it appeals to the prurient interest; and

(iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene.

Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in the section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse the feeling of or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.”

4 R. v. Hicklin, (1868) LR 3 QB 360

16. The Kerala High Court in the matter of Latheef v. State of Kerala⁵, held that under Sections 292(1) and 294 of the IPC, abusive words or humiliating words or defamatory words will not as such amount to obscenity as defined under the law. It was further held that to make obscene the alleged words must involve some lascivious elements arousing sexual thoughts or feelings or the words must have the effect of depraving persons, and defiling morals by sex appeal or lustful desires. It was observed in paragraph 5 as under: -

“5. Abusive words or humiliating words or defamatory words will not as such amount to obscenity as defined under the law. Of course there is no doubt that the words alleged to have been used by the revision petitioner are in fact abusive and humiliating. But to make it obscene, punishable under Section 294(b) IPC, it must satisfy the definition of obscenity. Section 294 IPC does not define obscenity. Being a continuation of the subject dealt with under Section 292 IPC the definition of obscenity under 292(1) IPC can be applied in a prosecution under Section 294 IPC also. To make punishable, the alleged words must be in a sense lascivious, or it must appeal to the prurient interest, or will deprave and corrupt persons. In P.T. Chacko v. Nainan Chacko reported in (1967 KLT 799) this Court held that, "the test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences." In Sangeetha Lakshmana v. State of Kerala reported in (2008 (2) KLT 745) this Court held thus, "in order to satisfy the test of obscenity, the words alleged to have been uttered must be capable of arousing sexually impure thoughts in the minds of its hearers." Thus it is quite clear that, to make obscene the alleged words must involve some lascivious elements arousing sexual thoughts or feelings or the words must have the effect of depraving persons, and defiling morals by sex appeal or lustful desires. I find that the words alleged to have been used by the revision petitioner in this case are really abusive and humiliating, but those words cannot be said to be obscene. As already stated, every abusive word or every humiliating word cannot, by itself, be said to be obscene as defined under the Penal Code, 1860. I find that the conviction against the revision petitioner under Section 294(b) IPC in

this case, on the basis of the above words alleged to have been used by him, is liable to be set aside, and the revision petitioner is entitled to be acquitted.”

17. Now, the question is whether in the present case, alleged publication and transmission of messages in the electronic form i.e. WhatsApp by co-accused Ashish Mishal would constitute offence under Section 67 of the IT Act, as the messages as such can be arousing sexual thoughts in the minds of its hearers?
18. In order to make it obscene, the alleged words must involve some elements arousing sexual thoughts or feelings or the words must have the effect of depraving persons, and defiling morals by sex appeal or lustful desires. It would be appropriate to notice one of the WhatsApp messages sent by the co-accused through his mobile number, alleged to be on behalf of the petitioner. One of the WhatsApp messages has been filed along with the charge-sheet at page No.33 of the writ petition titled as ट्रांसपोर्टर दलबीर सिंह एंड संस (एचटीसी) ने कंपनी को लगाया करोड़ों का चूना which states as under: -

इमामी सीमेंट के अधिकारी एवं कर्मचारी हनी ट्रैप का शिकार

ट्रांसपोर्टर दलबीर सिंह एंड संस (एचटीसी) ने कंपनी को लगाया करोड़ों का चूना

दलबीर सिंह एंड संस (एचटीसी) भिलाई के ट्रांसपोर्टर ठेकेदार ने अब तक इमामी सीमेंट बलोदा बाजार का करोड़ों का कोयला चोरी कर बेच चुका है सूत्रों के अनुसार कंपनी ने अब यह कार्य किसी दूसरे ठेकेदार को दिया है ।

पूर्व में रेलवे साइडिंग से आने वाले कोयले के ट्रांसपोर्टिंग की आड़ में हजारों टन कोयला भिलाई और सिलतरा में बेचा जा चुका है करीबन 15000 टन कोयला इमामी सीमेंट का इस ट्रांसपोर्टर ने बेच दिया है ।

वर्तमान में इस ट्रांसपोर्टर ने भिलाई स्टील प्लांट से स्लैग परिवहन का कार्य लिया है इसने यह कार्य ठोक बाजार से 50% कम रेट में लिया है कारण साफ है प्लांट में यह ड्राई स्लैग भरकर उसमें बीच में कीमती लोहा हर गाड़ी में तीन – चार टन भरकर निकलता है और प्लांट के बाहर उसे खाली कर उसमें पानी डाल देता है जिससे कि वजन बराबर हो जाए इस प्रकार हर गाड़ी में यह करीबन एक लाख की चोरी कर रहा है ।

इस कार्य में भिलाई स्टील प्लांट तथा इमामी सीमेंट के अधिकारी कर्मचार, गेटकीपर, धर्म

कांटा के लोग सभी शामिल है इस ट्रांसपोर्टर ने बलौदा बाजार में एक किराए का मकान लिया है जहां इमामी सीमेंट के गेटकीपर तथा सुरक्षा गार्ड और अधिकारियों को हनी ट्रैप मामले में सेवाएं दी जाती हैं ।

कृपया ध्यान दें अन्यथा आपकी कंपनी को बर्बाद होने से कोई नहीं रोक सकता जनहित में जारी है कृपया इसे ज्यादा से ज्यादा शेयर करें ।

19. Similarly, two or three other WhatsApp messages have been filed along with charge-sheet which are also part of the writ petition.

20. A careful perusal of the aforesaid WhatsApp message would show that the complainant company is involved in the illegal act and by that the complainant company is making huge money which is said to be defamatory also by respondent No.2 for which offence under Section 499 punishable under Section 500 of the IPC has also been registered. A careful perusal of the aforesaid WhatsApp message would further show that the aforesaid publication or transmission of WhatsApp message by the co-accused is alleged to be sent on behalf of the petitioner. The words in the said WhatsApp message are not capable of arousing sexual thoughts or feelings in the minds of the petitioner or respondent No.2 or other four persons to whom the message has been sent by the co-accused and it does not involve lascivious elements arousing sexual thoughts or feelings or the words in the said message have no effect of depraving persons, and defiling morals by sex appeal or lustful desires, though the words may be extremely unparliamentary, unprintable and abusive in nature, but it cannot be brought within the broad contours of the penal provisions as contained in Sections 294 & 292 of the IPC corresponding to Section 67 of the IT Act. Even according to the complainant, it is only defamatory and as such, the ingredients of offence under Section 67 of the IT Act are not at all attracted.

21. It is the alternative submission on behalf of the petitioner that the

mandatory certificate under Section 65-B(4) of the Indian Evidence Act, 1872 has not been produced, as has been finally laid down by the Supreme Court in Arjun Panditrao Khotkar (supra). In the instant case, it is admitted position on record that the impugned messages have been received by the complainant on his mobile number 9827152855 and it is sent by co-accused Ashish Mishal from his mobile number 9009268440. Admittedly, only the co-accused mobile / cell phone bearing No.9009268440 has been seized and mobile phone of the complainant has not been seized by the police during the course of investigation and even respondent No.2 in his reply filed before this Court on 5-3-2021, paragraph 11, has only stated that the investigating authorities have seized the mobile bearing No.9009268440 held by the co-accused which itself is primary evidence and production of certificate under Section 65B(4) of the Evidence Act is only required for leading secondary evidence.

22. At this stage, it would be appropriate to notice the decision rendered by the Supreme Court in Arjun Panditrao Khotkar (supra) in which their Lordships resolving the dispute and the conflict raised in the matters of Shafhi Mohammad v. State of Himachal Pradesh⁶ and Anvar P.V. v. P.K. Basheer⁷ have clearly held that production of certificate under Section 65-B of the Evidence Act is mandatory only in case of secondary evidence where primary evidence is not laid or original is not produced. Their Lordships further held that the certificate required under Section 65-B(4) of the Evidence Act is a condition precedent to the admissibility of secondary evidence by way of electronic evidence as laid down in Anvar P.V. (supra) and incorrectly clarified in Shafhi Mohammad (supra). It was held as

⁶ (2018) 2 SCC 801

⁷ (2014) 10 SCC 473

under: -

“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.* (supra), and incorrectly “clarified” in *Shafhi Mohammed* (supra). 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*⁸, 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.”

Their Lordships also held that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced and this can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and / or operated by him. The reference was answered in paragraphs 73.1., 73.2. and 73.3. as under: -

“73.1. *Anvar P.V.* (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in *Tomaso Bruno*⁹, being per incuriam, does not lay down the law correctly. Also, the judgment in *Shafhi Mohammad* (supra) and the judgment dated 3-4-2018 reported as *Shafhi Mohd. v. State of H.P.*¹⁰, do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer

8 (1875) LR 1 Ch D 426

9 *Tomaso Bruno v. State of U.P.*, (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54

10 (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704

system” or “computer network” and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V.* (supra) which reads as “... *if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act* ...” is thus clarified; it is to be read without the words “*under Section 62 of the Evidence Act, ...*”. With this clarification, the law stated in para 24 of *Anvar P.V.* (supra) does not need to be revisited.

73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.”

23. Reverting finally to the facts of the present case in the light of the aforesaid principle of law, it is quite vivid that in the instant case, the original mobile phone bearing No.9827152855 was owned and possessed by respondent No.2 / complainant which, admittedly, has not been seized during the course of investigation by the investigating officer. Though in the final report it has been mentioned that certificate under Section 65-B(4) of the Evidence Act is enclosed, but on 18-3-2021, during the course of hearing, this Court has raised specific query, whether certificate under Section 65-B(4) forms part of charge-sheet or not and directed the State counsel to seek instructions and make submission. Thereafter, on 23-3-2021, learned State counsel after calling the original case diary has informed that though the final report contains averment that the certificate under Section 65-B of the Evidence Act is enclosed along with the charge-sheet, but in fact, it has never been produced with the charge-sheet. As such, it is clearly established on record that the original mobile

phone of the complainant has not been seized from respondent No.2 herein whom the alleged defamatory WhatsApp messages were sent for the first time and stored in it and even the mobile phone of respondent No.2 has not been produced and therefore certificate under Section 65-B(4) of the Evidence Act was required to be filed which has not been filed along with the charge-sheet. Therefore, there is clear violation of the provisions contained in Section 65-B(4) of the Evidence Act and thus the chances of conviction of the petitioner are very bleak in absence of valid certificate issued under Section 65-B(4) of the Evidence Act.

24. The petitioner has also been charged for offence under Section 500 of the IPC holding that statements in WhatsApp messages are defamatory in nature. It has already been held earlier that offence under Section 67 of the IT Act is not made out against the petitioner. According to the First Schedule of the CrPC in which Classification of Offences has been given and Part 1 of which deals with Offences under the Indian Penal Code, offence under Sections 499 and 500 of the IPC are non-cognizable offences. Once the offences are non-cognizable, Section 155 of the CrPC is attracted which states as under: -

“155. Information as to non-cognizable cases and investigation of such cases.—(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the

same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) xxx xxx xxx”

25. Section 155(1) of the CrPC mandates that when information is given to an officer in charge of a police station of the commission of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate.

26. A careful perusal of sub-section (2) of Section 155 of the CrPC would show that it starts with the words that “no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case”, as such, the provision is explicit and there is legislative injunction to the police officer not to investigate any non-cognizable offence without the order of the Magistrate having power to try such case, and once there is legislative injunction to the police authority not to investigate the non-cognizable case, it is the duty and responsibility of the police officer to see that non-cognizable cases are not investigated without express order of the Magistrate having jurisdiction and power to try such non-cognizable offences. The aforesaid provision of obtaining prior permission for investigation in non-cognizable offence is a mandatory requirement of law and if there is non-compliance of the said provision, the investigation which is carried out by the police officer would be rendered illegal, void and without authority of law.

27. In the matter of State of Haryana and others v. Bhajan Lal and others¹¹, their Lordships of the Supreme Court considered the issue

and it has clearly been held in guideline / sub-paragraph (4) of paragraph 102 of the report that 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 CrPC and extraordinary power and jurisdiction under Article 226 of the Constitution and inherent power under Section 482 of the CrPC can be exercised for quashing the first information report.

28. Similarly, in the matter of Keshav Lal Thakur v. State of Bihar¹², FIR for the offence punishable under Section 31 of the Representation of the People Act, 1950 was registered which is non-cognizable offence; quashing the FIR registered for offence under Section 31 of the said Act, their Lordships of the Supreme Court held that since the offence is a non-cognizable offence, investigation for the said offence without the order of the competent Magistrate under Section 155(2) of the CrPC is illegal and pertinently observed as under: -

“3. ... On the own showing of the police, the offence under Section 31 of the Act is non-cognizable and therefore the police could not have registered a case for such an offence under Section 154 CrPC. Of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155(2) CrPC but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen. While on this point, it may be mentioned that in view of the Explanation to Section 2(d) CrPC, which defines 'complaint', the police is entitled to submit, after investigation, a report relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint' of the police officer concerned, but that explanation will not be available to the prosecution here as that relates to a case where the police initiates investigation into a cognizable offence – unlike the present

one – but ultimately finds that only a non-cognizable offence has been made out.”

29. In the matter of Google India Private Limited v. Visaka Industries¹³, complaint filed under Section 200 of the CrPC for offence under Section 500 of the IPC was sought to be quashed on the ground that offence under Section 500 of the IPC is non-cognizable and covered by paragraph 102(4) of the judgment rendered in Bhajan Lal's case (supra). Rejecting the said plea, their Lordships pertinently held as under: -

“44. Applying the principles, the question would be whether the appellant had made out a case for granting relief in proceedings under Section 482 CrPC. As far as the offence of defamation is concerned, even though the offence under Section 500 is non-cognizable under the First Schedule to the CrPC, the matter would not be governed by para 102(2) of the judgment of this Court in *Bhajan Lal* as it is the case of a complaint and not of a police report. Equally, para 102(4) of *Bhajan Lal* is for the same reason inapplicable. ...”

30. In view of the above-stated settled legal position, investigation of a non-cognizable offence by the police without the permission of the competent Magistrate is illegal, subsequent permission granted cannot cure the illegality as police officer has no jurisdiction to investigate non-cognizable offence without the order of the Magistrate having jurisdiction to try such case.

31. Section 120B of the IPC provides for punishment of criminal conspiracy and reads as under: -

“120B. Punishment of criminal conspiracy.—(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.”

32. The term “criminal conspiracy” is defined under Section 120A of the IPC as to mean when two or more persons agree to do, or cause to be done, an illegal act, or an act which is not illegal by illegal means. Proviso to Section 120A of the IPC provides that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Only if the allegations contained in the FIR taken on face value, the ingredients of Section 120A of the IPC are satisfied; the question of punishment of accused under Section 120B would arise.

33. Thus, on the basis of the aforesaid discussion and applying the parameters of the Supreme Court in Bhajan Lal's case (supra), paragraph 102, it is a fit case where registration of FIR and consequent proceedings against the petitioner for offences under Sections 500 read with Section 120B of the IPC and 67 of the IT Act should be quashed, as the same would be abuse of the process of the Court. I am sorry to note that the learned Magistrate without looking to the requirement of law and without appreciating the material available on record, initiated proceeding against the petitioner. As such, it is a fit case to exercise the power under Section 482 of the CrPC to secure the ends of justice. Therefore, I am inclined to allow this petition and set aside the FIR and the consequent criminal proceedings initiated against the petitioner.

34. Accordingly, FIR dated 28-1-2020 registered against the petitioner under Crime No.68/2020 at Police Station Supela, District Durg, for

the offences punishable under Sections 500 read with Section 120B of the IPC and 67 of the IT Act and the consequent criminal proceedings pending in the Court of Judicial Magistrate First Class, Durg, qua the petitioner herein, are hereby quashed. The petition is allowed to the extent indicated herein-above.

35. Before parting with the record, it is made clear that the case of co-accused will be decided as per record and in accordance with law, without being influenced by any of the observations made herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma