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7/12/08

# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Jurisdiction)

**Crl. M. C. No.4 of 2008**

Gagan Rai,  
S/o Late Santa Bir Rai,  
R/o Kazitar, Namchi,  
South Sikkim.

..... **Petitioner/Applicant**

versus

1. Dr. A. D. Subba,  
Sikkim Himali Rajya Parishad Party,  
Presently residing at Daragaon,  
Near Convey Ground,  
Opposite S.B.I. Tadong,  
P.O. & P.S. Tadong,  
East Sikkim.
2. Shri T. B. Thatal,  
Vice President,  
Sikkim Himali Rajya Parishad Party,  
R/o of Tadong,  
31A National Highway,  
P.O. & P.S. Tadong,  
Gangtok,  
East Sikkim.
3. Shri Tara Shrestha,  
General Secretary,  
Sikkim Himali Rajya Parishad Party,  
Presently residing at Deorali School Road,  
P.O. Deorali,  
P.S. Gangtok,  
East Sikkim.
4. State of Sikkim

..... **Respondents**

For Petitioners

:

Mr. A. Moulik, learned senior  
counsel assisted by Mr. Jorgay  
Namka, Ms. Zola Megi and Mr.  
B. K. Rai, learned counsel.

For Respondent Nos.1, 2 & 3 :

Mr. K. T. Bhutia, learned  
senior counsel assisted by Mr.  
Dinesh Agarwal and Mr.  
Bikash Gurung, learned  
counsel.

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For Respondent No.4 : Mr. J. B. Pradhan, learned Public Prosecutor, Mr. Karma Thinlay, learned Additional Public Prosecutor with Mr. Santosh Kumar Chettri, learned Assistant Public Prosecutor.

**PRESENT : HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.**

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Last date of hearing : 05-11-2009

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**DATE OF JUDGMENT : 07-12-2009**

## **J U D G M E N T**

**Subba, J.**

This is an application filed under Section 482 of the Code of Criminal Procedure, 1974 (in short "the Code"). It is directed against the impugned Order dated 31-07-2008 passed in Criminal Revision No.4 of 2006 passed by the Sessions Judge, South & West at Namchi whereby the order dated 18-04-2007 passed by the learned Judicial Magistrate, South at Namchi in Crl. Private Complaint Case No.2 of 2007 taking cognizance of the offence was quashed.

**2.** The brief facts relevant for the present purpose are that the petitioner herein filed a complaint under Sections 499, 500, 501/34 of the Indian Penal Code against the respondents herein before the Court of learned Judicial Magistrate, South at Namchi alleging *inter alia*, that the respondent had committed an offence of defamation by submitting a memorandum on baseless materials to His Excellency the Governor of Sikkim and also by



circulating a pamphlet which contained allegations that the petitioner had procured and transported arms illegally into Sikkim with the objective of using the same against the respondents for which a hit list of the respondents had been prepared. The learned Judicial Magistrate at Namchi examined the complainant and took cognizance of the offence and directed issue of summons. Aggrieved by this order, the respondents herein moved the learned Sessions Judge, South & West at Namchi in revision for setting aside the order dated 18-04-2007 passed by the learned Judicial Magistrate. The learned Sessions Judge after hearing the parties came to the conclusion that the impugned order was not sustainable in law in so far as the learned Magistrate had passed the same without any application of mind and accordingly, quashed it. It is against this order passed by the learned Sessions Judge that the petitioner has come up in the present revision application before this Court.

**3.** The learned counsel for both the parties including the learned Public prosecutor were heard at length.

**4.** It was submitted by Mr. A. Moulik, learned senior counsel for the petitioner that the impugned order was passed by the learned trial Court after examining the complainant and applying its mind to the matter as required under the law. However, the learned appellate Court, i.e., the learned Sessions Judge, South & West at Namchi quashed the order without properly appreciating the legal aspect of law and thereby



assuming jurisdiction not vested in him by law. According to the learned counsel the prerogative exercised by the learned Magistrate in taking cognizance in the present case cannot be interfered on technical grounds. As against this submission the contention of Mr. K. T. Bhutia, learned senior counsel appearing for the respondents is that since the learned Judicial Magistrate passed the order of taking cognizance without giving any reasons the same suffered from non-application of mind and as such, not tenable in the eye of law.

**5.** As can be noticed from the rival submission enumerated above, the questions that arise for determination are whether the order of taking cognizance passed by the learned Magistrate, South at Namchi on 18-04-2007 is according to law and if so, whether the order passed by the learned first Appellate Court quashing the above order was sustainable in law.

**6.** The impugned order passed by the learned Judicial Magistrate reads as follows:-

"18.04.2007            Seen the complaint U/S 499/500/501/34, I.P.C. filed by the complainant, Shri Gagan Rai through Ld. Counsel, Shri B. K. Rai and Ld. Counsel, Shri A. J. Sharma.

Ld. Counsel, Shri B. K. Rai and Shri A. J. Sharma has filed their Vakalatnama which is accepted and placed on record.

The names and addresses of the Accused persons and the list of witnesses has been filed by the complainant.

The complaint is examined on oath.

Cognizance taken.



Register is as Private Complaint case.

Issue summons along with copies of the complaint to the accused persons, returnable by: 15.05.07.

To: 15.05.07

For: Appearance of accused persons."

A bare reading of the above order goes to show that the learned Court took cognizance of the offence after duly examining the complainant in accordance with law. It is after taking such cognizance that the summons were ordered to be issued on the accused persons, i.e., the present respondents.

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7. In his order under challenge before this Court, the learned Sessions Judge opined as follows:-

"6. .... In my opinion the learned Counsel for the petitioners is right in saying that the impugned order is vague, laconic and without application of mind inasmuch as it has not been mentioned as to under what sections of law the case is to be registered and process is to be issued against the accused persons."

For coming to such conclusion, the learned Sessions Judge relied on a Single Bench decision of this Court rendered in **A. K. Jain and Ano. vs. State of Sikkim and Ano.** reported in **1992 CRI. L. J. 843**. The observation relied on and which occurs in paragraph 10 of the judgment reads as follows:-

"The issue of process under S.204 or dismissal of complaint under S.203 is a matter for judicial determination and where the order summoning the accused does not show application of mind of the magistrate and




discusses no evidence, the order, not being a speaking order, is liable to be quashed."

**8.** A bare reading of the above observation makes it clear that an order directing issue of process passed under Section 204 must be a speaking order. The question, however, is whether the ratio of the case applies to the facts of the present case. In order to find an answer to it, I find it sufficient to refer to the following observation in the beginning of the sub-paragraph of paragraph 10 of the judgment made by the learned Bench:-

"Where the allegations disclose the essential ingredients but are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against an accused, then also the complaint has to be rejected."

**9.** The above makes it clear that the observation relied on by the learned lower Appellate Court was made in the light of the peculiar facts and circumstances of the said case. In the present case, there is no question of the allegations being patently absurd or inherently improbable. The only submission made by Mr. Bhutia is that the acts complained of would fall under the exceptions engrafted in the Section. However, this is not the stage when the question raised by the learned counsel can be taken up for consideration. It is thus obvious that the observation relied on by the learned Appellate Court below was made in a different background keeping in view the peculiar facts and circumstances of the case. It thus follow that the said

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observation does not apply to the facts of the present case. Even otherwise the law on the point is no longer *res integra*. Section 190 which deals with cognizance of offence by Magistrate and Section 204 of the Code which deals with issue of process has come up for consideration in a number of decisions both of the High Courts as well as the Apex Court and in all these decisions it has been made explicitly clear that at the stage of issue of process by the Magistrate all that is to be seen is whether any offence appears to have been committed and if so by whom. Thus, the opinion to be formed by the Magistrate taking cognizance is restricted to there being sufficient ground for commencement of proceeding against the accused persons. The Magistrate can be said to have taken cognizance of complaint when on receiving a complaint he applies his mind for the purpose of proceeding under Section 200 and succeeding Sections under Chapter XV of the Code. These decisions also make it clear that taking cognizance means cognizance of offence and not of offenders and as such, cognizance does not mean commencement of proceeding against anyone. All that the word "cognizance" ordinarily means is that the Magistrate has come to the conclusion that there is a case to be enquired into.

**10.** A perusal of the impugned order passed by the learned Court of Judicial Magistrate in the light of the above legal position does not show that the same suffers from any irregularity or illegality which justifies any interference by the Revisional Court.



**11.** Coming to the decisions rendered by some of the High Courts of the country, we may refer to the decision rendered by the Patna High Court as far back as 1948 in ***Dalu Gour and Ors. vs. Moheswar Mahato*** reported in ***AIR (35) 1948 Patna 25***. In this case, the High Court following a Calcutta High Court decision rendered in ***Hafijar Rahman vs. Aminal Hoque*** reported in ***AIR 1941 Calcutta 185*** observed as follows:-

"Taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as a magistrate as such applies his mind to the suspected commission of an offence."

To the same effect are the observations made by a Single Bench of Orissa High Court in ***Hatia Swain vs. Chintamani Mishra*** reported in ***1990 CRI. L. J. 47***. In this case, the learned Single Bench relying on a decision of Allahabad High Court in ***Ratan Singh vs. Kusum*** reported in ***(1984) 1 Crimes 690*** observed in paragraph 5 as follows:-

"Thus while summoning the accused under S.204, Cr.P.C. the Magistrate is only to form an opinion that he is to take cognizance of the offence and that there is sufficient ground for proceeding against the accused. When S. 204 does not require recording the reasons, the order of summoning the accused need not be a speaking order."

[emphasis supplied]

In the Allahabad High Court case referred to above it was observed on a careful comparison of the provision of Sections 203 and 204 of the Code that whereas S.202 provides that while dismissing a complaint the Magistrate has to record briefly the

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reasons for doing so, S. 204 which provides for issuing of process, does not lay down that in that event the Magistrate has to record the reasons.

To add one more decision on the point reference may be made to the observation made by Rajasthan High Court in ***Brahmachari Lalit Baba vs. State of Rajasthan & Ors.*** reported in ***1997 (1) Crimes 258***. The relevant observation is as follows:-

"For taking cognizance, a prima facie case is to be established. Meticulous examination about probabilities or improbabilities of involvement of accused does not arise."

**12.** Now coming to the position of law as laid down by the Apex Court on the point, I find it sufficient to refer to the following decisions:-

Laying down the general guidelines which a Court is required to follow in different stages of the criminal trial, the Apex Court in ***Kanti Bhadra Shah and Ano. vs. State of W.B.*** reported in ***(2000) 1 SCC 722*** in paragraph 12 observed as follows:-

"If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down."

[emphasis supplied]



The Court in the same paragraph further observed:-

"But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial."  
[emphasis supplied]

In ***U.P. Pollution Control Board vs. M/s. Mohan Meakins Ltd. and Ors.*** reported in ***AIR 2000 SC 1456*** which is directly on the point, the Apex Court has clearly observed following its earlier decision rendered in the above ***Kanti Bhadra Shah*** case that there is no such legal requirement imposed on a magistrate for passing detailed order while issuing summons.

In ***Deputy Chief Controller of Imports and Exports vs. Roshanlal Agarwal and Ors.*** reported in ***2003 SCC (Cri) 788*** the question which came up before the Court was whether an order only stating that "Cognizance taken. Register the case. Issue summons to the accused." amounts to taking cognizance. Holding that such an order was sufficient in law the Hon'ble Supreme Court observed that the Magistrate is not required to record the reasons at the stage of issuing the process to the accused.

In a later decision rendered in ***CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd. and Ors.*** reported in ***(2005) 7 SCC 467*** the Apex Court has clearly held that once the Court on perusal of the complaint is satisfied that the complaint discloses

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the commission of an offence and there is no reason to reject the complaint at the stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. Absence of words "cognizance taken" in the order would make no difference.

**13.** Even though number of other decisions have been relied upon by the learned counsel for the petitioner, I find it unnecessary to multiply the decisions *inasmuch* as the decisions cited above make the point more than clear and leave no room for doubt that at the stage of issue of process no speaking order is required.

**14.** Of course, one more point raised by the learned counsel for the respondents that needs to be addressed before coming to any final conclusion is that the order was bad in law as the learned Judicial Magistrate had failed to mention the Section of law under which cognizance was taken. This plea as well does not further the case of the respondents in so far as it is a settled position in law that it is only at the stage of framing charge under Sections 211 of the Code that the offence which the accused has been charged is determined and it is stated by specific name and description [see ***Ashwani Kumar and Ors. vs. Delhi Administration etc.*** reported in **1992 CRI. L. J. 446 Del**].

**15.** It thus follows that the order passed by the learned Sessions Judge, South and West at Namchi quashing the order of taking cognizance by the learned Judicial Magistrate is not sustainable in law. Accordingly, the order passed by the learned

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Sessions Judge, South & West at Namchi is hereby quashed and set aside. The order passed by the learned Judicial Magistrate, South at Namchi is accordingly restored.

**16.** The learned trial Court shall proceed with the matter according to law and dispose of the matter as early as possible.

**17.** A copy of the judgment be sent to the court below for information and compliance.

**18.** The lower court records may be returned forthwith.

  
( **Justice A. P. Subba** )  
**Judge**  
07-12-2009

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