IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION (FOR QUASHING & SET ASIDE FIR/ORDER) NO. 1370 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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RAMESHBHAI S VORA & 5....Applicant(s)

Versus

STATE OF GUJARAT & 1....Respondent(s)

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Appearance:

MR MITESH R AMIN, ADVOCATE for the Applicant(s) No. 1 - 6

MR NITIN T GANDHI, ADVOCATE for the Respondent(s) No. 2

MR LB DABHI, APP for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

Date : 08/05/2015

CAV JUDGMENT

RULE returnable forthwith. Mr.L.B.Dabhi, the learned APP waives service of notice of rule for and on behalf of the respondent no.1 – State of Gujarat. Mr.Nitin Gandhi, the learned advocate waives service of notice of rule for and on behalf of the respondent no.2.

By this application under Section 482 of the Code of Criminal Procedure, 1973, the applicants-original accused persons seek to invoke the inherent powers of this Court, praying for quashing of the proceedings of the Criminal Case No.9868 of 2013 pending in the Court of the learned Metropolitan Magistrate, Court No.16, Ahmedabad, arising from the Inquiry Case No.19 of 2011. The Criminal Case is for the offence punishable under Sections 463, 464, 465, 295A, 120B read with Section 34 of the Indian Penal Code as well as under the provisions of the Juvenile Justice Act, 2000.

It appears from the materials on record that the respondent no.2 herein, original complainant, lodged a private complaint against the applicants herein for the offence enumerated above in the Court of the learned Metropolitan Magistrate, Ahmedabad. The learned Metropolitan Magistrate ordered a magisterial inquiry under Section 202 of the Code. On conclusion of the magisterial inquiry, the learned Magistrate ordered issue of process for the offence enumerated above.

It appears that thereafter the recording of pre-charge evidence commenced. On 30th May 2014, the examination-in-chief of the complainant was completed and the cross-

examination had also commenced. It is at that stage that the present application was filed by the applicants herein praying for quashing of the criminal proceedings.

The case of the complainant in brief is as under :

The issue raised by the complainant is quite serious. The accused no.1 is a trustee of one ‘Sanmarg Prakashan’ which publishes a magazine in the name of ‘Sanmarg’. This particular magazine is being used as a tool to lure and encourage people of the Jain community to renounce the world by taking ‘diksha’. It is alleged in the complaint that in the name of the religion very young children are being misguided, misled and lured to renounce the world and take ‘diksha’. It is the case of the complainant that false and fabricated articles are being published in the said magazine. It is the case of the complainant that one complaint was lodged in that regard before the Commissioner of Police at Mumbai on 23rd June 2010. The Commissioner of Police at Mumbai took serious note of the same but since the offence is alleged to have been committed within the jurisdiction of the State of Gujarat, the said complaint was not entertained and the complainant was asked to file the complaint before the Court of the learned Magistrate at Ahmedabad.

The accused no.2 is a Spiritual Guru of the Jain Swetambar Murtipujak Sangh. The accused no.2 being the Guru of the said Sangh is alleged to be a strong believer of the rituals, by which the children between the age group of 8 to 10 years are encouraged to renounce the world and take ‘diksha’. It is alleged that the accused no.2 has been falsely spreading

the message to renounce the world and take ‘diksha’. It is further alleged in the complaint that in the magazine referred to above, there is a reference of a notification alleged to have been issued by the Government of India permitting such ‘Bal Diksha’. After due verification and confirmation from the concerned department of the Government of India, it came to the notice of the complainant that no such notification had ever been issued and a forged notification has been created by the accused persons which has been referred to above in the article published in the magazine.

Thus, the sum and substance of the case of the complainant is that the accused persons have created a false document in the form of a notification said to have been issued by the Central Government, the same was published in the magazine referred to above, thereby misleading the people of the Jain community. It is further alleged that the accused persons have committed deliberate and malicious acts intending to outrage the religious feelings by insulting its religious belief, which is punishable under Section 295A of the Indian Penal Code.

It is alleged that by creating a false document in the form of a bogus notification purported to have been issued by the Central Government and publishing the same in the magazine, the accused persons have committed the offence of forgery punishable under the provisions of the Indian Penal Code.

Mr.Mitesh Amin, the learned counsel appearing for the applicants submitted that the complaint lodged by the complainant is nothing but an abuse of process of law. He

pointed out that similar such complaints were lodged at many places, such as, Mumbai, Delhi, and one such complaint was ordered to be dismissed by the learned Magistrate at Mumbai. He submitted that even if the entire case of the complainant is accepted as true, none of the ingredients to constitute the offence of forgery or even Section 295A of the Indian Penal Code are spelt out. Mr.Amin submitted that the learned Magistrate committed a serious error in taking cognizance of the offence punishable under Section 295A of the Indian Penal Code as there is no sanction obtained by the complainant from the authority concerned i.e. the State Government, in that regard.

Mr.Amin further submitted that most of the accused applicants are residing outside the State of Gujarat and, therefore, before taking cognizance and issuing the process, the mandatory requirements as envisaged under the amended provisions of Section 202 of the Code should have been followed. The non-compliance of the procedure as provided by the amended Section 202 of the Code renders the order of cognizance illegal.

In such circumstances referred to above, Mr.Amin prays that although the trial has commenced, yet having regard to the peculiar facts and circumstances of the case and the neat question of law involved in the matter, this application deserves consideration and the proceedings be quashed.

On the other hand, this application has been vehemently opposed by Mr.Nitin Gandhi, the learned advocate appearing for the respondent no.2 – complainant. Mr.Gandhi submitted

that there is more than a *prima facie* case against the applicants and no error, not to speak of any error of law, could be said to have been committed by the learned Magistrate in issuing the process for the offence enumerated above. Mr.Gandhi pointed out that the complainant has already applied with the Under Secretary to the Government of India, Women and Child Development, for necessary sanction under Section 196 of the Code so far as the offence punishable under Section 295A of the Indian Penal Code is concerned. He submitted that the sanction is being awaited. Mr.Gandhi pointed out that the Government of India, Ministry of Women and Child Development, vide letter dated 15th October 2012 addressed to the Senior Inspector, L.T. Marg Police Station, Mumbai, Maharashtra, made it very clear that no notification of the nature as projected by the applicants herein has been issued by the Department. According to Mr.Gandhi, the letter is self-explanatory and makes the picture more than clear. Mr.Gandhi submitted that the issue raised by the complainant is very serious, and in the name of religion, very young children are being misled and lured to renounce the world by taking 'diksha'. He submitted that the pre-charge evidence has already commenced and in the midst of the same the present application could not have been filed. He, therefore, prays that there being no merit in this application the same be rejected.

The respondent no.2 – original complainant has filed affidavit-in-reply making the following averments :

> *"4. That the copy of the Notification of Gazette of India which is totally forged which has been prepared by the applicants in conspiracy with common intention. The notification is the base of the whole case which has been filed before the Ld. Magistrate Court and which is dated*

13/7/09.

5. Further the respondent no.2 submits that the forged notification was published in the Sanmarg magazine. The Sanmarg paper/magazine is of applicant no.1 and he is the publisher of the same and that has been admitted by him in the petition in the title and that is the base of the whole evidence of forgery and conspiracy of the applicant no.1 in the case prima facie. This press is running in the very jurisdiction of Ahmedabad city at Relief Road that comes under police station Kalupur Ahmedabad. The Jain Dharma followers are supplied with copies of the magazine published by the applicant no.1 and by which the followers are being misguided and false facts has been stated in that and supplied in public at large to hurt their religious feeling intentionally.

6. Further the respondent no.2 submits that applicant no.2 is the master mind of the whole commission of forgery with conspiracy of the other accuses shown in the complaint and who is Guru of Jain Sawetamber Murti Pujak Sangh and he is giving Diksha to many persons in Jain Dharma and he is of intention that Children of Jain Murti Pujak Sangh at the age of 8 to 10 years and who have not completed age of 18 years must not study in the school before the understand socially and own responsibly must take Diksha. The copy of letter by applicant no.2 which is circulated to all followers of jain and other institutions of jain dharma stated that the notification is published by their efforts by the Central Government.

7. Further the respondent no.2 submits that applicant no.2 and other member of Jain Dharma and different trust connected to them are encouraging the Child Diksha and with conspiracy with accused no.3 to 6 this activities are carried on by them which is prohibited in law. And this all applicant in common intention misguiding the Jain Dharma follower by way of this forged notification and publications and there by they are encouraging Jain Dharma followers to take Child Diksha which is really a serious offence affecting public feeling at large.

8. Further accuses from the complaint accused no.1 and accused no.3 to 6 with knowledge of the whole forgery

with conspiracy of accused no.2 in the complaint are reflecting false facts to Jain followers to misguide them on subject of Child Diksha.

9. Further by the Central Government and Government of India no change or amendment has been made still this whole forgery has been shown by the accused as amendment to misguide people at large of Jain Dharma and this has been published by them and the applicants are also circulating the pamphlets of the same in Jain Dharma followers. The applicants are there by submitting to the Jain followers that Government of India has given notification and Child Diksha has been permitted now. This all false are spread in Jain followers by way of paper, magazine and lectures. Further the copy of the Delhi Police report in case which has been done in Delhi is annexed, in that it has been stated that the paper is not published in Delhi so Delhi is not the place of offence hence the place of trial looking to that report of Delhi Police as the press Sanmarg is of Ahmedabad.

10. Further no such notification has been published by the Government of India in respect to Child Diksha and no provision of law has also been made in the same respect. Further in Juvenile Justice Act 2000, no amendment is made in connection to any permission to take Child Diksha or parents of the child may send there child for Child Diksha. Further in Juvenile Act no such provision is there that can show that Jain Gurus can encourage the child for this diksha and further no any trust or trustees of the Jain Dharma are authorized by any law that permits them to encourage Child Diksha. All the applicants by way of this are playing with the feelings of minor children and the feelings of their parents and religious feeling of the whole Jain Dharma followers.

11. Further in the meeting called on 8/6/09 at Bhuleshwar by applicant no.1 to 6 in which Jain Dharma followers were called and in that the accuses in the complaint submitted to public by way of speech that Central Government has given permission to Jain Samaj for Child Diksha.

12. Further applicant no.1 publishes his paper around Ahmedabad, Gujarat and Maharashtra by name of Sanmarg and to misguide the public. In the High Court of

Bombay, the Writ Petition No.3159/06 was filed in that observations are made in this respect of Child Diksha. The applicants are in conspiracy with common intention has done this whole forgery and looking to evidence on record the summons were issued against them by the Ld.Metropolitan Magistrate Court.

13. Further reply dated 15/10/12 the Government of India has replied that no such notification dated 13/7/09 has been issued by the Ministry of Women and Child Development, that shows how these applicants have played with the feelings of the Jain Dharma followers at large. Hence the process issued are proper and in accordance with law. The sections of Indian Penal Code which are mentioned in the case some of them are definition that does not be a ground to quash the summons order that can be amended in due course of trial and there is provision under Cr.P.C. for the same and it can be done even after taking of evidence also further regarding sanction of Government is concerned already the Central Government has submitted report that they have not given any such type of notification in the Gazette that is prima facie enough to proceed in the case only point of sanction does not affect the case that is already clear by judgments of Apex Court and High Court so looking to these all aspects this is not a case of quashing at this initial stage and in normal course these all decisions which are made in the petition of applicant they are reading the evidence at this stage that is not permissible for that whole process of trial is needed and that cannot be hurdle by these grounds mentioned in the petition of the applicants."

Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is, whether the proceedings of the Criminal Case referred to above should be quashed.

There are three submissions before me :

(1) Lack of sanction under Section 196 of the Code so

far as the offence under Section 295A of the Indian Penal Code is concerned,

(2) Non-compliance of the mandatory provisions of the amended Section 202 of the Code, and

(3) Different complaints filed at different places for the same cause of action.

Let me deal with the first submission as regards the sanction under Section 196 of the Code is concerned. Section 196 of the Code reads thus :

> *"**SECTION 196 : Prosecution for offences against the State and for criminal conspiracy to commit such offence.***
>
> *(1) No Court shall take cognizance of*
>
> *(a) any offence punishable under Chapter VI or under section 153A,[section 295 A or sub-section (1) of section 505] of the Indian Penal Code (45 of 1860), or*
>
> *(b) a criminal conspiracy to commit such offence, or*
>
> *(c) any such abetment, as is described in section 108A of the Indian Penal Code (45 of 1860),except with the previous sanction of the Central Government or of the State Government.*
>
> *[(1A) No Court shall take cognizance of*
>
> *(a) any offence punishable under section 153B or sub-section (2) or sub-section (3) of section 505 of the Indian Penal Code (45 of 1860), or*
>
> *(b) a criminal conspiracy to commit such offence, except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.]*
>
> *(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under section 120B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit [an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term*

of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceeding:

> *Provided that where the criminal conspiracy is one to which the provisions of Section 195apply, no such consent shall be necessary.*

(3) The Central Government or the State Government may, before according sanction [under sub-section (1) or sub-section (1A) and the District Magistrate may, before according sanction under sub-section (1A)] and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section 155."

Section 295A of the Indian Penal Code reads thus :

"SECTION 295A : Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs [Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [citizens of India], [by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [three years], or with fine, or with both.] "

There is no escape from the fact that although the complainant has prayed for the requisite sanction before the competent authority, yet till this date no sanction has been accorded. The sanction of the Government is a condition precedent for the validity of a prosecution under Section 196 of the Code. Sanction 196 of the Code makes it very clear that no Court shall take cognizance of the offence under Section 295A of the Indian Penal Code except with the previous sanction of the Central Government or of the State Government or of the

District Magistrate. There is no room left for any further interpretation in this regard. Therefore, I am of the view that the learned Magistrate ought not to have taken cognizance so far as Section 295A of the Indian Penal Code is concerned without any valid sanction on record. The order of the learned Magistrate issuing the process for the offence under Section 295A of the Indian Penal Code could definitely be said to be illegal. To that limited extent, the order will have to be quashed.

So far as the second submission of non-compliance of the amended provision of Section 202 of the Code is concerned, I am not impressed by the same. The amended Section 202 of the Code reads thus :

"SECTION 202 : Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192 may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses

present (if any) have been examined on oath under Section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence or witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

A learned Single Judge of this Court had an occasion to deal with this issue in the case of Ketan Anant Rajpopat v. State of Gujarat and another (Criminal Misc. Application No.5536 of 2007 decided on 3rd September 2007). The learned Single Judge made the following observations, which I may quote with profit :

"8. The learned advocate appearing on behalf of the applicant has drawn attention of the Court to the notes of Clauses prior to sec.202 of the Code of Criminal Procedure as reproduced in the Code of Criminal Procedure, 1973 by universal law publication is as under:-

"CR.P.C. (Amendment) Act, 2005 (notes on clauses):-

Sub-section(1) has been amended to make it obligatory upon the magistrate that before summoning the accused residing beyond his jurisdiction, he shall inquire into the case himself or direct investigation to be made by a police officer or such other person as he thinks fit, for finding out whether or not there was sufficient ground for

proceeding against the accused. This has been done to see that innocent persons are not harassed by unscrupulous persons."

9. It is also further submitted that while construing an amendment, the Courts can look into the mischief which was sought to be remedied applying what is popularly known as the Heydons Rule or the Mischief Rule. Applying the aforesaid principles, it is submitted that the amendment has been brought in to ensure that persons residing outside the jurisdiction of the Magistrate were not forced to face trial without the Magistrate being fully satisfied that a prima facie case for summoning the accused has been made out.

10. It is submitted that in the instant case, had such a procedure of holding an inquiry has been followed, it would have become clear to the learned Magistrate that the accused had replied to the notice u/s.138 of the N.I. Act by his letter dtd.6/3/2007, wherein it was inter-alia pointed out that the complainant had never met the applicant and instead a blank cheque had been issued to one Mr.Ashish Vagadia who had acknowledged on a stamp paper that this blank cheque was only being issued as a security for certain advance being agreed to be arranged as a loan. No loan, in fact, had been arranged and this blank cheque had somehow reached the complainant who had misused the same and the said reply dtd.6/3/2007 was not produced on record by the complainant before the learned Magistrate. An investigation would have revealed these facts and it is possible that the learned Magistrate might have even dismissed the complaint u/s.203 of the Code of Criminal Procedure.

11. Therefore, it is submitted that as no inquiry has been held by the learned Magistrate as required under sec.202 of the Code of Criminal Procedure as amended in the year 2005 and straightaway relying upon the verification of the complainant summons / process has been issued by the learned Magistrate, the same is without complying with the mandatory procedure as provided under sec.202 of the Code of Criminal Procedure. Submitting accordingly, it is requested to allow the present petition and quash and set aside the impugned complaint.

12. Present application is opposed by Mr.M.R. Mengdey, learned Additional Public Prosecutor for State and Mr.Shakeel Qureshi, learned advocate appearing on behalf of the respondent No.2 ý original complainant.

13. The learned advocates appearing on behalf of the respondents while opposing the present application have vehemently submitted that while issuing summons upon the applicant for the offence under sec.138 of the N.I. Act, the learned Magistrate has specifically observed that he has considered the complaint, verification, documents produced along with the complaint and considering the same, he is satisfied that a prima facie case is made out against the applicant for the offence u/s.138 of the N.I. Act. Therefore, it is not that the learned Magistrate has straightaway issued the summons simply relying upon the verification. He has submitted that considering the above and the inquiry made by the learned Magistrate, when the learned Magistrate was satisfied that the prima facie case is made out, summons has been issued and therefore, it cannot be said that the procedure as contemplated under sec.202 of the Code of Criminal Procedure has not been complied with by the learned Magistrate. It is submitted by the learned advocates appearing on behalf of the respondents that inquiry contemplated under sec.202 of the Code of Criminal Procedure should be considered and restricted to inquiry to find out whether or not there is sufficient ground for proceeding against the accused or not and nothing more than that. At that stage the learned Magistrate is not required to to consider whether on the basis of the evidence on record, the accused would be convicted or not. It is submitted that the statement and object for the amendment in sec.202 of the Code of Criminal Procedure is required to be considered. It is submitted that considering the statement and object of amendment in sec.202 of the Code of Criminal Procedure, as it was found that false complaints were being filed against the accused persons residing at the far off places simply to harass them and therefore, in order to see that innocent persons are not harassed by the unscrupulous persons, sec.202 of the Code of Criminal Procedure has been amended and the inquiry is contemplated for finding out as to whether or not there is sufficient ground for proceeding against the accused. It is submitted that at

that stage full-fledged inquiry is not contemplated or not required as suggested and submitted by the learned advocate appearing on behalf of the applicant. It is submitted that the decisions cited on behalf of the applicant are the decisions prior to amendment in the year 2005. Therefore, it is submitted that when the learned Magistrate was satisfied that the prima faice case is made out which requires further trial, it is requested not to interfere with the same and therefore, it is requested to dismiss the present application.

14. Heard the learned advocates appearing on behalf of the respective parties.

15. The impugned complaint has been filed by the respondent No.2 against the applicant in the court of learned Chief Judicial Magistrate, Rajkot for the offence under sec.138 of N.I. Act alleging inter-alia that the applicant has issued a cheque of Rs.2,75,000 and when the said cheque has been deposited in the bank, the same has been returned with an endorsement ýSaccount closedýý. It is further submitted that thereafter statutory notice has been served upon the applicant and within stipulated time, the amount has not been paid as required under sec.138 of the N.I. Act, and therefore, the complaint has been filed on 15/3/2007. That thereafter, the learned Judicial Magistrate (FC) by order dtd.19/3/2007 has issued summons upon the applicant for the offence under sec.138 of N.I. Act. The said order dtd.19/3/2007 reads as under:-

> *“Read the complainant's complaint and his verification and on taking into consideration the documents, evidence produced by the complainant, as prima facie offence is made out against the accused for the offence under sec.138 of the Negotiable Instruments Act, complaints be taken on register and on payment of process fee, summons for the date 27/4/2007 be issued against the accused.”*

Thus, considering the aforesaid order, it appears that before issuance of the summons upon the applicant and registering the complaint, the learned Magistrate has considered the complaint, verification, documents produced along with the complaint and considering the

same, the learned Magistrate was satisfied that a prima facie case is made out against the applicant for the offence u/s.138 of the N.I. Act. Thus, it cannot be said that there was no inquiry by the learned Magistrate before issuing summons upon the applicant. Now, what type of inquiry is required to be held by the learned Magistrate as contemplated under sec. 202 of the Code of Criminal Procedure before issuance of the summons, is the question which is required to be considered by this Court.

16. It is the contention on behalf of the applicant that full-fledged inquiry is required to be conducted by the learned Magistrate before issuance of the summons / process upon the applicant in respect to the accused who is residing outside the jurisdiction of the learned Magistrate. According to the learned advocate appearing on behalf of the applicant relying upon various decisions in respect to the inquiry which are of prior to the amendment in sec.202 of the Code of Criminal Procedure, inquiry under sec.202 of the Code of Criminal Procedure is to see as to whether there is prima facie case as distinguished from a probability of conviction and the said inquiry must be more than verification of the complainant. As per the applicant, now, as per the amended sec.202 of the Code of Criminal Procedure, the learned Magistrate is bound to postpone the issuance of the process as contemplated under sec.200 of the Code of Criminal Procedure and therefore, something more than verification is required. The submission seems to be more attractive but looking to the statement and object for amendment in sec.202 of the Code of Criminal Procedure, it appears that as it was found that false complaints were being filed against the persons residing at far off places simply to harass then and in order to see that the innocent persons are not harassed by unscrupulous persons, there is amendment in sec.202 of the Code of Criminal Procedure and now it is made obligatory upon the learned Magistrate that before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct investigation to be made by a police or by such other person as he thinks fit, for finding out whether or not there is sufficient ground for proceeding against the accused. Therefore, considering the statement and object of amendment in sec.202 of the Code of Criminal

Procedure, it appears that the at the stage of sec.202 of the Code of Criminal Procedure, the learned Magistrate is required to hold an inquiry for finding out whether or not there is sufficient ground for proceeding against the accused and whether the complaint which is filed is frivolous or not, so that innocent person who is residing outside his jurisdiction is not harassed. Therefore, considering the statement and object of the amendment in sec.202 of the Code of Criminal Procedure, the scope of inquiry is to be restricted only to that extent and nothing more than that i.e. whether there is a prima facie case made out for conviction and/or there is a sufficient evidence on the basis of which the accused are likely to be convicted or not. At that stage what is required to be considered by the learned Magistrate is whether prima facie case is made out against the accused for proceeding further with the trial or not. At that stage, the decision of the Hon'ble Supreme Court in the case of State of Orissa Vs. Saroj Kumar Sahoo, reported in (2005) 13 SCC 540 is required to be referred to. As held by the Hon'ble Supreme Court in the said decision, even at the stage when the charge is framed, the court has to only prima facie be satisfied about the existence of sufficient ground for proceeding against the accused and for that limited purpose, it can evaluate materials and documents on record but it cannot appreciate the evidence.

17. Now, looking to the order passed by the learned Magistrate issuing summons upon the applicant for the offence u/s.138 of the N.I. Act as stated above, it appears that the learned Magistrate himself has held inquiry after considering the complaint, verification and the documents produced along with the complaint and he is satisfied that a prima facie case is made out against the applicant for the offence u/s.138 of the N.I.Act, meaning thereby he is satisfied that the complaint which has been filed against the applicant is not vexatious and frivolous and therefore, it cannot be said that the learned Magistrate has not held any inquiry whatsoever. It is also required to be noted at this stage that though the learned advocate appearing on behalf of the applicant has submitted that the learned Magistrate while postponing the issuance of the process and before issuance of the process, is required to hold inquiry which would be something more than the verification, however, he is not in a position to point out as to what type of

inquiry should be conducted / held by Magistrate. As stated above, at the time of inquiry under sec.202 of the Code of Criminal Procedure and looking to the statement and object of the amendment in sec.202 of the Code of Criminal Procedure this Court is of the opinion that inquiry which is contemplated under sec.202 of the Code of Criminal Procedure is to be restricted to make out a prima facie case against the accused and with a view to satisfy the Magistrate whether or not there is sufficient ground for proceeding against the accused and the complaint against the accused who is residing outside his jurisdiction is not vexatious or frivolous to harass the accused persons. Under the circumstances, it cannot be said that the issuance of the process against the applicant for the offence u/s.138 of the N.I. Act by the learned Magistrate or order dtd.19/3/2007 issuing process against the applicant, is in any way illegal and/or contrary to sec.202 of the Code of Criminal Procedure."

In the present case also, the learned Magistrate took cognizance upon the complaint and postponed the issue of process since a magisterial inquiry was ordered under Section 202 of the Code. From the impugned order dated 21st November 2013, it is manifest that a detailed inquiry was conducted by the learned Magistrate, and at the end of it, the learned Magistrate was satisfied that a *prima facie* case had been made out for issue of the process for the offences as alleged by the complainant.

The scope of inquiry under Section 202 of the Code has been very succinctly explained by the Supreme Court in the case of Smt.Nagawwa v. Veeranna Shivalingappa Konjalgi and others, AIR 1976 SC 1947. I may quote with profit the observations of the Supreme Court made in paragraphs 5 and 6 as under :

"Mr.Bhandare laid great stress on the words "the truth or falsehood of the complaint" and contended that in

determining whether the complaint is false the Court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant ill support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercise his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under s. 202 of the Code of Criminal Procedure which culminates into an order under s. 2042 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does net disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

"...The High Court in quashing the order of the Magistrate completely failed to consider the limited scope of an inquiry under Section 202. Having gone through the order of the Magistrate we do not find any error or law committed by him. The Magistrate was exercises' his discretion and has given cogent reasons for his conclusion. Whether the reasons were, good or bad, sufficient or insufficient, is not a matter which could have been examined by the High Court ill revision. We are constrained to observe that the High Court went out of its way write a laboured judgment highlighting certain aspect of the case of the accused as appearing from the documents filed 'of them which they were not entitled to file and which were not entitled in law to be considered."

The complaint discloses all the necessary ingredients to constitute the offence as alleged by the complainant. Thus, the second submission so far as the non-compliance of Section 202 of the Code (amended provision) should fail.

So far as the third submission with regard to different complaints at different places is concerned, is also not appealing. I may only say that the recording of the pre-charge evidence has commenced. The examination-in-chief of the complainant is over. His cross-examination is in progress and it is at that stage that this petition was filed and the proceedings have been stalled. I am of the view that the trial should proceed further in accordance with law.

At this stage, I may quote the letter dated 15th October 2012 of the Under Secretary to the Government of India, addressed to the Senior Inspector of the L.T. Marg Police Station, Mumbai, Maharashtra, so far as the forged Gazette Notification is concerned. The same reads as under :

"To,
Senior Inspector,
L.T.Marg Police Station,
Mumbai,
Maharashtra.

Subject : Information under RTI Act, 2005

Sir,

Subject : Verification of the Gazette Notification No.33004/99 dt.13.07.2009.

Reference : L.T.Marg Police Station C.R. No.198/12 U/s 420, 468, 471, 34 IPC.

Sir,

With reference to your letter No.O.W.10076/PI (L&O/12 dated 05.10.2012 on the above mentioned subject, CW-II Section of this Ministry has to furnish the following point wise reply :

Point No.(i) : Govt. of India, Ministry of Women and Child Development has not issued any notification dt. 13.07.2009 regarding "Bal Sanyasi or child sadhu or child sadhvi or child dikshit in Jain religion.

Point No.(ii) : CW-II Section of Ministry of Women and Child Development has not filed any affidavit in any court on the issue.

Point No.(iii) : CW-II Section in this Ministry has not submitted/ filed any notification/affidavit in the Hon'ble High Court Mumbai in respect of Writ Petition No.3159 of 2006.

Point No.(iv) : Does not arise in view of reply above for point (I) to (iii).

Yours faithfully,

sd/-

(Fazal Mahmood)
Under Secretary to the Government of India"

There is a reference of this very same notification in the magazine 'Sanmarg'. The forged notification has also been placed on record dated 13th July 2009 said to have been published in the Gazette of India, which reads as under :

"Be it resolved and amended:

Exercising the powers laid by Section 68 of the principle act of Juvenile Justice (care and protection of children) Amendment Act 2006, the Ministry of Woman and Child Development makes the following notification :

1. *'Bal Sanyasi' or 'Child Sadhu' or 'Child Sadhvi' or 'Bal Sadhvi' or 'Child Dikshit' (religious practice) in Jainism or Jain religion are provided with all care and protection by the community in whole. Hence they don't come under the provisions of jurisdiction of Juvenile Justice (care and protection of children) Amendment Act 2006 or Juvenile Justice (care and protection of children) Act 2000 as the above said legislation provides care and protection in need of the same."*

2. *Whereas provided in SCR34 that; "community in whole" mentioned in point 1 means :*

   a. The guru of the said 'Bal Sanyasi' at the foremost.

   b. Other ascetics or senior sadhus of the community.

   c. Laymen of the Jain Community by birth or domicile or minority of Jain ethnic in Union of India, wherever applicable in distinctive states."

A bare perusal of the forged notification would suggest the manner in which the members of the Jain community have been misled. The extent to which the applicants have gone is really shocking. Of course, whether they are responsible for

the same or not is a subject matter of evidence and the same, ultimately, will be considered by the trial Court.

I am conscious of the fact that so far as Section 295A of the Indian Penal Code is concerned, sanction is necessary, and in the absence of a valid sanction, the accused persons cannot be prosecuted for the said offence. However, no sanction is necessary so far as the other offences is concerned i.e. forgery. The accused persons can be prosecuted for the other offences.

In the aforesaid view of the matter, this application is partly allowed. The order passed by the learned Magistrate taking cognizance upon the complaint and issuing process so far as Section 295A of the Indian Penal Code is concerned, is ordered to be quashed.

So far as the other offences are concerned, the trial should proceed further expeditiously in accordance with law.

Before parting with the matter, I deem it necessary to observe that why the Central Government, the State Government and the other authorities concerned have maintained complete silence on this issue. Why the Central Government in its Ministry of Women and Child Development failed to take any steps, more particularly, when it was brought to their notice regarding the forged notification way back in the year 2012. Why the Central Government did not deem fit to initiate an appropriate inquiry or investigation in that regard at the earliest. The Central Government should have realized, at least after having come to know about the forged Gazette

notification, that the same would be thoroughly misused, and this is exactly what has happened in the present case. As observed earlier, the issue on hand is very serious. How come an eight years old child, male or female, renounce the world by taking ‘diksha’. At the age of eight years or at least till a boy or a girl attains majority, whether they would be in the capacity to understand the consequences of his or her action of renouncing the world. Why children of tender age are being encouraged to renounce the world by taking ‘diksha’. Is it for their own spiritual gain or because the religion says so or for the benefit of the community at large. Even if the parents give their consent, the Government as well as the Court should not remain a silent spectator. The Government should act in *loco parentis*. The Government as well as the Court owes a duty to see the welfare of a minor and protect the interest of the minor if the minor is deserted by the legal guardians. The right to childhood is covered under Article 21 (Right to Life) of the Constitution of India. Whether the right to childhood will conflict with the right to religion (Freedom of Religion, Article 25). As a court of law, I am only concerned with the legal aspects of the matter and not the religious sentiments. With a view to come out of the rigors of Section 23 of the Juvenile Justice Act, which provides for punishment for cruelty to juvenile or child, a forged notification is created which states that the *bal sanyasi or child sadhu or child sadhvi or bal sadhu or bal sadhvi or child dikshit* do not fall within the purview of the provisions of the Juvenile Justice Act. This is something very disturbing. The Central Government, the State Government and the other authorities concerned should take up this issue very seriously and are expected to act promptly. The Government should also consider, if necessary, to come

out with some legislation in this regard, in accordance with law.

It is needless to clarify that whatever has been observed is only with a view to highlight the seriousness of the issue. The ultimate guilt or the innocence of the accused persons shall be decided strictly on the basis of the evidence that may be led in the course of the trial without being influenced in any manner by any of the observations made by this Court in this order.

Rule made absolute to the aforesaid extent.

(J.B.PARDIWALA, J.)

After the judgment is pronounced, Mr.Mitesh Amin, the learned counsel appearing for the applicants, prays for stay of the proceedings of the Criminal Case No.9868 of 2013 pending in the Court of the learned Metropolitan Magistrate, Court No.16, Ahmedabad, upto 13th July 2015, as his clients intend to approach the higher forum.

The request is accepted. The proceedings of the Criminal Case No.9868 of 2013 pending in the Court of the learned Metropolitan Magistrate, Court No.16, Ahmedabad, shall remain stayed upto 13th July 2015.

(J.B.PARDIWALA, J.)

MOIN