THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

W.P.(C) No. 4186/2015

Dr. Subramanian Swamy,
A 77 Nizamuddin East,
New Delhi – 110013

…….Petitioner

-**Versus**-

1) The State of Assam
Represented by the Chief Secretary Government of Assam
C.M. Block 1st Floor,
Assam Secretariat,
Dispur, Assam – 781006

2) Tutur Rahman Patikar (Lawyer)
S/o – Late Arman Ali,
Village – Boleswar, P.O.– Kaliganj Bazar,
District – Karimganj, Assam

…….Respondents

Advocates :

For the Petitioner : Dr. Subramanian Swamy, petitioner in person,
Mr. B.K. Mahajan, Mr. S. Sabharwal and
Mr. R. Chakroborty, Advocates

For the Respondents no. 1 : Mr. K. Goswami, Senior Government Advocate and
Ms. M. Barman, Junior Government Advocate, Government of Assam

For the Respondent no. 2 : Mr. H.R.A. Choudhury, Senior Advocate
Mr. A. Ahmed, Advocate

Date of hearing : 11.11.2021

Date of judgment : 09.12.2021

BEFORE

HON'BLE MR. JUSTICE MANISH CHOUDHURY

JUDGMENT & ORDER

By this writ petition, the petitioner has invoked the extra-ordinary jurisdiction under Article 226 of the Constitution of India of this Court seeking setting aside and quashing of the criminal proceeding instituted against him by a complaint case, C.R. Case no. 188/2015, initially instituted before the Court of learned Additional Chief Judicial Magistrate [Sadar], Karimganj, Assam and after being transferred from the said Court, presently pending before the Court of learned Sub-Divisional Judicial Magistrate, Karimganj, Assam. The petitioner has also sought setting aside and quashing of various orders passed in the said criminal proceeding including an order dated 18.03.2015 and an order dated 01.06.2015. By the order dated 18.03.2015, the learned Court of Additional Chief Judicial Magistrate, Karimganj upon receipt of the complaint, took cognizance of the offences under Sections 153/153A/295A/298 of the Indian Penal Code ['IPC' and/or 'the Penal Code'] and issued process [summons] against the petitioner for his appearance as the sole accused person before the Court on 06.05.2015. By the subsequent order dated 01.06.2015, the learned Counsel of Additional Chief Judicial Magistrate, Karimganj issued non-bailable warrant of arrest [NBWA] against the petitioner.

2. It is apposite to state that the respondent no. 2 herein as the complainant had filed a complaint in writing before the Court of learned Chief Judicial Magistrate, Karimganj on 17.03.2015 and the said complaint has been registered and numbered as C.R. Case no. 188/2015. After such registration, the learned Chief Judicial

Magistrate, Karimganj made over the case to the Court of learned Additional Chief Judicial Magistrate, Karimganj for disposal. Upon receipt of the case record of C.R. Case no. 188/2015, the learned Additional Chief Judicial Magistrate, Karimganj passed afore-mentioned order dated 18.03.2015.

3. It transpires that pursuant to institution of the complaint case, C.R. Case no. 188/2015, the petitioner had approached the Hon'ble Supreme Court of India by a writ petition, Writ Petition [Criminal] no. 69/2015 [Dr. Subramanian Swamy vs. Union of India, Ministry of Law and others]. When the said petition came up for hearing on 02.07.2015, the Hon'ble Supreme Court of India while issuing notice, made it clear that the grievances raised with regard to the specific cases registered under different jurisdictions may be agitated by the petitioner, if so advised, by instituting appropriate proceedings before the competent court, including the jurisdictional High Court[s] within a period of 6 [six] weeks. The Hon'ble Supreme Court of India had stayed the execution of non-bailable warrants, as might have been issued against the petitioner, for the said period of 6 [six] weeks. It was also made clear in the order that the Hon'ble Supreme Court of India did not express any opinion on the merits of the specific cases instituted against the petitioner. Pursuant to the said order dated 02.07.2015, the present writ petition was filed on 17.07.2015. This Court by an order dated 24.07.2015 while issuing Rule and calling for the records, had stayed the impugned orders including the order dated 18.03.2015, and the further proceedings in respect of the complaint case, C.R. Case no. 188/2015.

4. Heard Dr. Subramanian Swamy, petitioner in person, assisted by Mr. B.K. Mahajan, Mr. S. Sabharwal and Mr. R. Chakroborty, learned counsel. Also heard Mr. K. Goswami, learned Additional Senior Government Advocate & Ms. M. Barman, learned Junior Government Advocate for the respondent no. 1, State of Assam and Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. A. Ahmed, learned counsel for the respondent no. 2 – complainant.

5. Dr. Swamy appearing in person, has, apart from others, mainly made four-fold submissions. At the first, he has submitted that the learned Additional Chief Judicial Magistrate, Karimganj ['the trial court'] while issuing process against him as the accused, had completely ignored the provisions of Section 202 of the Code of Criminal Procedure, 1973 ['CrPC' and/or 'the Code']. He being a resident of a place beyond the area in which the learned trial court exercises its jurisdiction, the learned trial court could not have issued the process by the order dated 18.03.2015 without first complying with the procedure contained in Section 202, CrPC as the same is mandatory in nature. Secondly, he has submitted that the learned trial court after taking cognizance of the offences, did not examine the complainant on oath, ignoring the mandate prescribed in Section 200, CrPC. The learned Additional Chief Judicial Magistrate, Karimganj could not have dispensed with the examination of the complainant on oath. As his third limb of submission, Dr. Swamy has submitted that no cognizance of the offence punishable under Section 153A, IPC and Section 295A, IPC can be taken by a Court without previous sanction of the Central Government or of the State Government. In the absence of such sanction, the order dated 18.03.2015 whereby cognizance of the offences under Section 153A, IPC and Section 295A, IPC was taken is ex-facie illegal and unsustainable in law. Fourthly, he has submitted that even if the allegations made in the complaint are accepted in its entirety, they do not disclose commission of any of the offences defined under Section 153 or Section 153A or Section 295A or Section 298 of the Penal Code. He has further submitted that the manner in which non-bailable warrant of arrest [NBWA] was issued by the learned Additional Chief Judicial Magistrate, Karimganj against him is unsustainable in law. It is his further submission that since the initial order of taking cognizance and issuance of process is bad and illegal, all other consequential orders are also liable to be set aside and quashed. In essence, the petitioner has challenged the criminal prosecution launched against him in its entirety.

6. Mr. Goswami, learned Senior Government Advocate for the respondent no. 1 State of Assam has submitted that the writ petition has been instituted pursuant to the order passed by the Hon'ble Supreme Court of India in Writ Petition [Criminal] no. 69/2015 on 02.07.2015. He has submitted that the matter of taking cognizance is subject to the limitations prescribed in the Code. It clearly appears that cognizance was taken by the learned trial court in the instant case without examination of the complainant on oath, as required under Section 200, CrPC. He has submitted that there appears to be no material on record which goes to suggest that there was any prior sanction of the Government.

7. Mr. Choudhury, learned senior counsel appearing for the respondent no. 2 – complainant has submitted that the complainant had filed the complaint being aggrieved by the comments made by the accused before media persons and the same were objectionable and provocative in nature. The learned trial court had taken cognizance after going through the contents of the complaint and the original copies of the four newspapers which the complainant had annexed with the complaint. The accused is in the habit of making such kind of remarks in a motivated manner which had the tendency to incite violence. The comments made by him in respect of which the complaint had been filed, were communally coloured. Even if the bar contained in the Code is taken into consideration, it is not sufficient to quash the entire criminal proceeding initiated by the complaint.

8. I have duly considered the rival submissions made by the petitioner-in-person and the learned counsel for the respondents and have also perused the materials available in the case record of the complaint case, C.R. Case no. 188/2015, requisitioned by an order dated 26.08.2015, in original. Synopses in writing are also submitted on behalf of the petitioner and the respondent no. 2 – complainant. A number of decisions have been cited at the bar by the learned counsel for the parties in support of their respective submissions. I have also gone through the decisions

cited before the Court about which reference would be made in the subsequent part of this order.

9. In order to appreciate the assailment made on the first two counts, it would, at first, be apposite to advert to the order dated 18.03.2015 whereby taking cognizance of the offence, the learned trial court had issued process [summons] against the petitioner. The said order reads as under :-

> "18.03.2015 : Case record received for favour of disposal from the learned Chief Judicial Magistrate, Karimganj.
>
> Perused the contents of the complaint petition filed by the petitioner – Sri Tutiur Rehman Patikar, who is also an advocate, Karimganj District Bar Association in details.
>
> I have carefully gone through the contents of the statement made in the complaint petition.
>
> I have also perused the news items published in several newspapers, which are in vernacular in Bengali language.
>
> The complainant has furnished the copies of several newspapers with this complaint petition.
>
> Heard learned counsel for the complainant.
>
> The complaint petition is in writing and as such under Section 2[d] of the Code of CrPC, the recording of statement of the complainant under Section 200, CrPC is not necessary.
>
> Upon perusal of the complaint petition and the news item published in several newspapers, there appears sufficient grounds of offence u/s 153/153[A]/295A/298 IPC and as such cognizance is taken and accordingly against the accused Sri Subramanian Swamy.
>
> Issue summons to the accused.
>
> Complainant is directed to take steps.

Steps within 7 [seven] days.

A summons be issued to accused which is directed to be executed by Delhi Police not below the rank of Sub-Inspector of Delhi Police.

Fixing 06.05.2015 for S/R & appearance.

Later on,

As accused happens to be Member of Parliament, as such a copy of summon be issued to the Hon'ble Deputy Speaker of Rajya Sabha with a request to ask accused Sri Subramanian Swamy to personally appear before this court on 06.05.2015.

However, it is made clear that summons should not be issued to accused when Rajya Sabha is in session and same shall be served after completion of Rajya Sabha session is over.

Directed accordingly."

10. The word "*complaint*" has been defined in Section 2[d] of the Code and it means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. The word "*inquiry*", defined in Section 2[g] of the Code, means every inquiry, other than a trial conducted under the Code by a Magistrate or Court. In the Chapter XIV of the Code titled "*Conditions requisite for initiation of proceedings*", Section 190 has provided for cognizance of offences by Magistrates. As per sub-clause [a] of sub-section [1] of Section 190, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in that behalf under sub-section [2] thereof, may take a cognizance of any offence upon receiving a complaint of facts which constitute such offence.

11. As the provisions of Section 200, Section 202, and Section 204 of the Code are also of relevance, the same are quoted herein in *extenso* :

"**Section 200 – Examination of complainant** – A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate :

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

[a] if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

[b] if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 :

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

Section 202 – Postponement of issue of process – [1] Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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 of 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.

Section 204 - Issue of process. - [1] If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -

[a] a summons - case, he shall issue his summons for the attendance of the accused, or

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

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

[3] In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section [1] shall be accompanied by a copy of such complaint.

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

[5] Nothing in this section shall be deemed to affect the provisions of Section 87.

12. The words "*and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction*" have been inserted in Section 202 of the Code by Section 19 of the Code of Criminal Procedure [Amendment] Act, 2005 [Central Act 25 of 2005] w.e.f. 23.06.2006. The note for the amendment reads as under :-

> "False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section [1] of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

13. The above insertion in Section 202 of the Code has been considered in a number of decisions of the Hon'ble Supreme Court of India including in [i] *Udai Shankar Awasthi vs. State of Uttar Pradesh and another,* reported in *[2013] 2 SCC 435;* [ii] *National Bank of Oman vs. Barakara Abdul Aziz and another,* reported in *[2013] 2 SCC 488;* [iii] *Vijay Dhanuka and others vs. Najima Mamtaj and others,* reported in *[2014] 14 SCC 638;* [iv] *Abhijit Pawar vs. Hemant Madhukar Nimbalkar and another,* reported in *[2017] 3 SCC 528;* and [v] *Aroon Poorie vs. Jayakumar Hiremath,* reported in *[2017] 7 SCC 767*. In *Vijay Dhanuka* [supra], it has been held that the use of the expression "*shall*", inserted in Section 202 of the Code w.e.f. 23.06.2006, *prima facie* makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory and considering the background and the purpose for which the amendment has been brought in in Section 202 of the Code, it is mandatory for the Magistrate to hold the inquiry or the investigation, as the case may

be, before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate. In *Abhijit Pawar* [supra], it has been held that the requirement of conducting inquiry or directing investigation before issuing process is not an empty formality. After adverting to the definition of "*inquiry*" given in Section 2[g] of the Code, it has been observed that in the inquiry envisaged under Section 202 of the Code, the witnesses are examined whereas under Section 200 of the Code, examination of the complainant only is necessary with the option of examining the witnesses present, if any. This exercise by the Magistrate, for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused, is the inquiry envisaged under Section 202 of the Code. The amended provision of Section 202 of the Code has, thus, cast an obligation on the Magistrate to conduct inquiry or direct investigation, as the case may be, before issuing the process in view of the purpose specifically mentioned in the note appended to the Bill proposing the said amendment. The other decisions are also in similar manner.

14. Admittedly, the accused herein is a resident beyond the territorial jurisdiction of the learned Additional Chief Judicial Magistrate, Karimganj. When in the context of Section 202 of the Code and the observations made in the afore-mentioned decisions the order dated 18.03.2015 passed by the learned Additional Chief Judicial Magistrate, Karimganj is examined it is found that the learned Magistrate before issuing summons to the accused by the said order dated 18.03.2015, did not hold any inquiry or did not direct any investigation, as envisaged under Section 202 of the Code. Before issuance of the process under Section 204, CrPC, it is obligatory for the Magistrate in a case where the accused is residing at a place beyond the area in which he exercises jurisdiction, to hold the inquiry as envisaged in Section 202, CrPC. In such view of the matter, this Court is of the unhesitant view that due to failure on the part of the learned Magistrate to follow the mandatory procedure as envisaged in Section 202 of the Code the order dated 18.03.2015 issuing summons to the accused had suffered from infirmity and the same is liable to be set aside and quashed.

15. The provisions of Section 200, CrPC has provided for the examination of the complainant. It is obligatory on the part of a Magistrate taking cognizance of an offence upon a complaint, to examine upon oath the complainant and the witnesses present, if any, and to reduce the substance of such examination to writing and the same shall have to be signed by the complainant and the witnesses, and also by the Magistrate. The object of Section 200 of the Code requiring the complainant and the witnesses, if any, to be examined is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons alleged as accused. The main object of examination of the complainant and his witnesses under Section 200 of the Code is to ascertain whether there is any *prima facie* case against the person accused of the offence in the complaint and such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further. The first proviso to Section 200 has made provision to dispense with such examination of the complainant and the witnesses, if any, by the Magistrate in two situations when the complaint is made in writing, *firstly,* if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or *secondly,* when the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 of the Code. The second proviso to Section 200 of the Code has made it clear that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the later Magistrate need not re-examine them. Section 21 of the Penal Code has enumerated the descriptions of the person who can be held as a "*public servant*". A reference in this regard can be made to the decisions in *Dy. Chief Controller of Imports & Exports vs. Roshanlal Agarwal and others,* reported in *[2003] 4 SCC 139;* and in *National Small Industries Corporation Limited vs. State [NCT of Delhi] and others,* reported in *[2009] 1 SCC 406.*

16. In the case in hand, it is found on perusal of the order dated 18.03.2015 as well as the case record of complaint case, C.R. Case no. 188/2015 that the learned Magistrate did not examine the complainant and/or any witness on oath prior to issuance of process against the accused. The complainant himself had declared that he is a practicing advocate and the learned Magistrate had also recorded that the complainant was an advocate associated with the Karimganj District Bar Association. The complainant does not come within the definition of public servant, as provided in Section 21, IPC. The complainant is, thus, by no means, a public servant. When the complainant is not a public servant the examination of such a complainant on oath cannot be dispensed with without reducing the substance of such examination to writing under the provisions of Section 200 of the Code. The mandatory provision requiring the complainant in the instant case who is not a public servant or who was not examined by any other Magistrate at any prior point of time in relation to the complaint, could not have been dispensed with by the learned Magistrate before issuing the process against the accused. On this ground also, the impugned order dated 18.03.2015 has suffered from infirmity and is liable to be set aside and quashed.

17. The words "*a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any,*", appearing in Section 200 of the Code, manifest that the act of taking cognizance of an offence on complaint by the Magistrate is anterior in point of time to the examination of the complainant and the witnesses present, if any. The expression "*cognizance*" has not been defined in the Code but the ways in which such cognizance can be taken are delineated in Clauses [a], [b] and [c] of sub-section [1] of Section 190 of the Code. The phrase "*taking cognizance of*" means cognizance of an offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. The act of taking cognizance happens at a point when a

Magistrate first takes judicial notice of an offence. This is the position as per Section 190 of the Code whether the Magistrate take cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190[1][a] of the Code, he must have not only to apply his mind to the contents of the complaint presented before him but must have done so for the purpose of proceeding under Section 200 of the Code and the provisions following that section [Ref : *Nirmaljit Singh Hoon vs. The State of West Bengal and another, [1973] 3 SCC 753* and *Mona Panwar vs. High Court of Judicature of Allahabad, [2011] 3 SCC 496]*.

18. The result of the above discussion is that even if the order dated 18.03.2015 is set aside and quashed in view of violations of the provisions of Section 200 and Section 202 of the Code, the same would not result in effacing out the complaint which is in writing. To that extent, the learned senior counsel for the respondent no. 2 – complainant is right in his submission on that point by relying upon the observations made in the case of *Narmada Prasad Sonkar alias Ramu vs. Sardar Avtar Singh Chabara and others*, reported in *[2006] 9 SCC 601*. In *Narmada Prasad Sonkar* [supra], it has been observed that if the Magistrate does not follow the procedure and fails to apply his mind as required by law, the order issuing process can be quashed but the Magistrate should be directed to re-consider the matter and pass fresh order in accordance with law as setting aside of the order issuing process does not result in quashment of the complaint itself. The same is the view expressed in *National Bank of Oman* [supra] and *Abhijit Pawar* [supra].

19. But the petitioner has also rested his assailment on two other counts which, according to him, should result in quashment of the entire criminal proceeding against him. In order to appreciate the challenges made on the other two counts, it is requisite to look into the contents of the complaint. The contents of the complaint

which was in vernacular, are, is essence, as follows : the accused was a former minister in the Central Government and is a top and influential leader of the *Bharatiya Janata Party.* He is a believer in Hindu religion and is religiously intolerant and fundamentalist. On 14.03.2015, he came to the State Capital of Assam, Guwahati to participate in a function organized on the subject of 'Entrepreneurship in the North East' under the aegis of Kaziranga University. In a press-meet held thereafter, he made some extremely derogatory remarks against the Muslim religion and the mosque, its holy place of worship, which were published in different media across the world and the country including Assam. He had intentionally made unconstitutional and provocative remarks to the effect that mosque is not a place of worship for Muslim people in order to hurt the people of that faith. That apart, he had remarked that if mosques were demolished the same could not be a ground to object. At the same time, he had also remarked that a temple is a place of worship. By making such remarks, he had attempted to hurt the feelings of the people of Muslim religion. Such provocative remarks had disturbed the peaceful religious scenario in the State of Assam. As the country is secular, the Constitution of India has recognized all the religions. The accused had, thus, also hurt the feelings of the people who follow Christianity. The act of the accused was not only reprehensible but also was a serious offence. The provocative remarks of the accused had given rise to serious apprehension in the minds of the people from Muslim faith residing in the State.

20. In the face of the said complaint it is to be seen as to whether the ingredients of any of the offences defined under Section 153 or Section 153A or Section 295A or Section 298 of the Penal Code are made out and as to whether there is any bar on the part of the Magistrate in taking cognizance of those offences.

21. The High Court exercising its extra-ordinary jurisdiction under Article 226 of the Constitution of India or its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 has to examine if from the first information report [FIR] or

the complaint, as the case may be, the ingredients of the offence complained are *prima facie* made out or not, whenever any relief in the form of quashing of an FIR or a complaint is sought. The scope and ambit of the jurisdiction of the High Court under Article 226 of the Constitution of India or under Section 482 of the Code to quash criminal proceeding have been discussed in many a decision of the Hon'ble Supreme Court of India as well as of this Court.

22. In *R.P. Kapur vs. The State of Punjab,* reported in *AIR 1960 SC 866,* the Hon'ble Supreme Court of India discussed the scope of the inherent power of the High Court for the purpose of quashing a criminal proceeding in the following words :-

> "6. ..... Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a

matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under Section 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point."

23. In the oft-quoted and oft-relied decision in *State of Haryana vs. Bhajan Lal*, reported in *1992 Supp [1] SCC 335,* the Hon'ble Supreme Court of India had the occasion, in paragraph no. 102 thereof, to categorize the cases by way of illustration wherein the powers under Article 226 of the Constitution of India or the inherent powers under Section 482 of the Code can be exercised either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. It is apt to extract the said paragraph no. 102 hereinbelow for ready reference :-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

[1] Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

[2] Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code,

[3] Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused,

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

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

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

[7] Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

24. The provisions of Section 153 and Section 298 of the Penal Code read as follows :

Section 153. Wantonly giving provocation with intent to cause riot – if rioting be committed – if not committed.– Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Section 298. Uttering, words, etc., with deliberate intent to wound the religious feelings of any person.— Whoever, with the deliberate

intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

25. From a reading of Section 153 of the Penal Code it is noticed that the person accused of the offence, has to do the act either malignantly or wantonly. Giving such provocation to any person has to be with the intention or with the knowledge that it is likely to cause the offence of rioting to be committed. If the offence of rioting is committed in consequence of such provocation the punishment is with imprisonment of either description for a term which may extend to one year, or with fine, or with both. If the offence of rioting is not committed in consequence of the provocation, then the imprisonment will be of either description for a term which may extend to six months, of with fine, or with both. But the most important ingredient of the offence is that the act must be "*illegal*". The word "*illegal*", as per Section 43 of the Penal Code, is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action. Turning back to the fact situation in the case in hand, it is seen that the allegation against the accused is to the effect that he made some comments purportedly in a meet with the press on 14.03.2015 at Guwahati and those comments were widely published in various newspapers across the State or the Country. The respondent no. 2 – complainant was not present in the press-meet and he could come to know about the comments made by the accused, from the newspapers reports. The submission of the petitioner in this regard is that there were distortions of facts in the reports published in the newspapers. It is his submission that his comments were in reference to a Constitution Bench judgment of the Hon'ble Supreme Court of India in *Dr. M. Ismail Faruqui and others vs. Union of India and others,* reported in *[1994] 6 SCC 360.* In paragraph no. 80 therein the words were : "It has been contended that a mosque enjoys a particular position in Muslim Law and

once a mosque is established and prayers are offered in such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that property." The complaint did not allege occurrence of any riot or likelihood of happening of a riot. As per the Oxford Dictionary, 3rd Edition, malignant means evil in nature or effect, malevolent and wanton means deliberate and unprovoked. For the moment, this Court is not going into the aspects as to whether those alleged comments purportedly made by the accused were malignant or wanton in nature. But the person who is accused of the said offence, has to give to provocation to any person with the intention or knowledge that the same will cause the offence of rioting to be committed. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting [Section 146, IPC]. Section 153 cannot be made applicable unless the accused has done it by doing anything which is illegal. As per the complaint, the accused had allegedly made the comments when he met the media persons after a function and such meeting with media persons and making some comments cannot be said to be an illegal act, the most essential ingredient for the offence under Section 153, IPC.

26. From a reading of Section 298 of the Penal Code, it is evident that the essential ingredients of the offence would be : [i] the accused has to utter any word or to make any sound or to make any gesture or to place any object; [ii] such utterance of word or making of sound must be in the hearing of the person aggrieved, or such gesture or placement of object must be in the sight of the person aggrieved; and [iii] such

utterance or making of sound or making of gesture or placement of object has to be with the deliberate intention of wounding the religious feelings of the person aggrieved. On a bare perusal of the complaint it is found that the alleged comments attributed to the accused person were not in the hearing of the complainant. The complainant had only taken the help of newspaper reports to allege that the accused person had made the alleged comments before the media persons, that too, without entering himself into the witness box to depose in order to support his such accusations. As such, one of the essential ingredients of the offence under Section 298 of the Penal Code is evidently found absent in the case for the learned Magistrate to take cognizance of the said offence. As no offence under Section 298 of the Penal Code is made out, the criminal proceeding against the accused in so far as the said offence is concerned, is liable to be set aside and quashed.

27. Section 153A of the Penal Code has defined the offence of promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony whereas Section 295A of the Penal Code has provided for punishment for deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs. As per the First Schedule to the Code, the offence under Section 153A, IPC is triable by a Court of any Magistrate and the offence under Section 295A, IPC is triable by a Magistrate of the First Class. But in respect of the power of the Court in taking cognizance in respect of the said two offences, that is, Section 153A and Section 295A of the Penal Code, a rider has been incorporated in sub-section [1] of Section 196 of the Code, which reads as under :-

> *"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 295A 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."

28. An absolute bar has been incorporated in sub-section [1] of Section 196 of the Code for the Magistrate in taking cognizance *inter alia* of the offences under Section 153A and Section 295A of the Penal Code without the previous sanction of the Central Government or of the State Government. The sanction of the concerned Government is a condition precedent for a Magistrate to take cognizance of the said two offences. In the absence of prior sanction, it is immaterial as to whether the allegations made in the complaint have *prima facie* made out a case under Section 153A and/or Section 295A of the Penal Code against the accused. As such sanction is a condition precedent to launch the prosecution before the Court of Magistrate for the offence under Section 153A and/or Section 295A of the Penal Code the Magistrate in the absence of such sanction does not get the jurisdiction to take cognizance upon the complaint even if the allegations in the complaint have made out a *prima facie* case for the said two offences. Section 465 of the Code speaks *inter alia* about any error or irregularity in any sanction for the prosecution and its curability if such error or irregularity in the sanction for the prosecution has not occasioned a failure of justice. The case in hand is not a case of any error or irregularity in any sanction for the prosecution but it is a case of no sanction for prosecution. In view of the absolute bar engrafted in sub-section [1] of Section 196 of the Code prohibiting a Magistrate in taking cognizance of the offences under Section 153A and Section 295A of the Penal Code, the case in hand falls under the kind of cases enumerated in sub-paragraph [6]

of paragraph no. 102 of *Bhajan Lal* [supra]. In the above fact situation, the criminal prosecution lodged against the accused under Section 153A and Section 295A of the Penal Code is liable to be set aside and be quashed. In this connection, the petitioner has also relied in the decision of Hon'ble Supreme Court of India in *Manoj Rai and others vs. State of M.P.,* reported in *[1999] 1 SCC 728.* In *Manoj Rai* [supra], there was no sanction accorded under Section 196[1], CrPC to prosecute the appellants for the offence under Section 295A, IPC and in absence of such sanction, the impugned proceeding was quashed.

29. There is another fundamental aspect with regard o the supporting materials to the complaint. The complaint was not supported by any sworn affidavit of the respondent no. 2 – complainant. As has been noticed above, there was no examination of the complainant or any other witness on oath. What was available before the learned Magistrate was only the copies of some newspapers where the incident was reported.

29.1 With regard to newspapers reports, in *Samant N. Balkrishna and another vs. George Fernandez and others,* reported in *1969 [3] SCC 238,* the Hon'ble Supreme Court of India in paragraph no. 47 had made the following observations :-

> "47. ..... A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well-known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible. ....."

29.2 The Hon'ble Supreme Court of India in *Laxmi Raj Shetty and another vs. State of Tamil Nadu,* reported in *[1988] 3 SCC 319,* had observed as under :-

> "25. ..... We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78[2] of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proved of the facts reported therein.
>
> 26. It is now well settled that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. ....."

29.3 In the case of *Kushum Lata vs. Union of India,* reported in *[2006] 6 SCC 180,* which was in respect of a public interest litigation, the observations were as under :-

> "17. ..... As observed by this Court in several cases, newspaper reports do not constitute evidence. A petition based on unconfirmed news reports, without verifying their authenticity should not normally be entertained. As noted above, such petitions do not provide any basis for verifying the correctness of statements made and information given in the petition. It would be desirable for the courts to filter out the frivolous petitions and dismiss them with costs as aforestated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the courts."

30. In the light of the above decisions regarding evidentiary value of newspaper reports, rather its nil evidentiary value when the complaint is looked at it is found that the learned Magistrate could not have taken judicial notice of the facts stated in those

newspaper reports without any other supporting materials. In the said fact situation, it is apparent that there was no legal evidence before the learned trial court when it took cognizance on the complaint. The case, thus, comes in the third category of cases, as has been listed in *R.P. Kapur* [supra] where there is no legal evidence adduced in support of the case, meaning thereby, continuance of the criminal proceeding would amount to abuse of the process of the Court.

31. In view of the discussion made above and for the reasons mentioned therein, the impugned order dated 18.03.2015 passed by the learned Magistrate is quashed. In view of the quashment of the initial order dated 18.03.2015 whereby the process was issued, all other consequential orders including the subsequent order dated 01.06.2015 whereby non-bailable warrant of arrest was issued against the petitioner, are also quashed. As the complaint does not make out any offence either under Section 153, IPC or under Section 298, IPC the criminal proceeding to that extent is also quashed. As the criminal prosecution against the petitioner for the offences under Section 153A and Section 295A of the Penal Code has been launched without any sanction under Section 196[1] of the Code, such criminal prosecution is held to be illegal. The continuance of the criminal proceeding including the complaint instituted in connection with the complaint case, C.R. Case no. 188/2015, presently pending in the Court of learned Sub-Divisional Judicial Magistrate [Sadar], Karimganj, would amount to abuse of the process of the Court. Thus, the same are set aside and quashed. As a result, this writ petition succeeds. The interim order dated 24.07.2015 stands merged with this order. No cost. The office to send back the case record of complaint case, C.R. Case no. 188/2015 forthwith.

JUDGE

Comparing Assistant