

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
AT JAMMU**

Reserved on 03.12.2021
Pronounced on 11.02.2022

CRMC No. 9900001/2017
(O&M)

Ghulam Mohd Mir

.....Appellant/Petitioner(s)

Through :- Mr. Shakir Haqani, Advocate vice
Mr. Altaf Haqani

v/s

Tej Krishen Ganjoo and others

.....Respondent(s)

Through :- Mr. C. M. Koul, Sr. Advocate with
Mr. A. R. Bhat, Advocate

Coram: HON'BLE MR. JUSTICERAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioner through the medium of this petition has challenged the order dated 17.03.2017 passed by the court of 1st Additional Sessions Judge, Jammu by virtue of which the order dated 08.12.2015 passed by the Court of learned City Judge Jammu has been set aside and further the learned City Judge, Jammu has been directed to implead the petitioner as an accused in the complaint, titled "Tej Krishan Ganjoo Vs. Shri Piyari Krishen Raina & Anr" filed under section 500 RPC.
2. The petitioner has impugned the order dated 17.03.2017, primarily on the two following grounds:
 - (a) That no such power of impleadment of the accused is vested in the courts below and there is absolutely no enabling provision available

to that effect in the criminal procedure code, as such, order impugned is not sustainable.

(b) That neither in the complaint nor in the statements of the witnesses recorded under section 200 Cr.P.C., any allegation has been levelled against the petitioner and as such, the petitioner could not have been arrayed as an accused.

3. Mr. Shakir Haqani, learned counsel appearing for the petitioner vehemently argued that there is no provision in the code of criminal procedure that provides for impleadment of an accused after the cognizance has been taken and process has been issued. He further submitted that there is no allegation against the petitioner either in the complaint or in the statement of the witnesses recorded in support of the complaint that necessitates the impleadment of the petitioner as an accused in the complaint.

4. On the other hand, Mr. C.M Koul, learned senior counsel appearing for the respondent Nos. 1 & 2 vehemently argued that the order passed by the learned 1st Additional Sessions Judge, Jammu does not suffer from any legal infirmity and the said order has been passed by the court after placing reliance upon the number of judgments of the Apex Court. Mr. Koul placed reliance upon the judgment of Hon'ble Apex Court in case of "**Mohd. Abdullah Khan Vs. Prakash K**" reported in 2018 (1) SCC615.

5. Heard and perused the record.

6. The facts necessary for the disposal of the present petition are that the complaint was filed by the Respondent Nos. 1 and 2 initially against the Respondent No. 3 and editor of Daily Aftab, Srinagar, with regard to the publication of statement/write up by the Respondent No. 3 in the Daily News Paper "Aftab" in its edition dated 30.05.2009. Initially the petitioner was not arrayed as an accused in the said complaint and later on, the respondent Nos. 1 and 2/complainants, filed an application before the Court of learned City Judge Jammu for impleading the petitioner as an accused for publishing a slanderous/defamatory right in the columns of the daily news paper Daily Aftab, Srinagar dated 30.05.2009 with a view to defame and denigrate the complainants in the estimation of the community, relatives friends and acquaintances, on the ground that the petitioner is the necessary party to be arrayed as accused in view of the fact that the defamatory write-up has been published in the columns of the Daily Aftab and the petitioner is the printer and publisher of the same. It requires to be noted that the Editor of the newspaper was also arrayed as an accused but as he died during the pendency of the complaint, so he was deleted from the array of the accused. The petitioner appeared before the Court of learned City Judge Jammu and filed a detailed response that the application was not maintainable as the cognizance has already been taken by the court and that the petitioner had no intention to defame the complainants, he had published the advertisement by taking a requisite fees for the same and further that he in his daily newspaper has categorically published disclaimer with regard to the liability for publication of paid

advertisement. The learned City judge Jammu vide order dated 08.12.2015 dismissed the said application. The complainants/respondent Nos. 1 and 2 assailed the said order by way of revision and the Court of learned 1st Additional Sessions Judge, Jammu vide order dated 17.03.2017 set aside the said order passed by the learned City Judge, Jammu and directed the learned Magistrate to implead the petitioner as an accused and proceed ahead in accordance with law.

7. The first contention raised by the petitioner is that there is no provision in the code for impleadment of any accused, once the cognizance has been taken and process has been issued by the Magistrate. It needs to be noted that as per the mandate of section 190 of the Code of Criminal Procedure, the Magistrate takes the cognizance of an offence upon receiving the complaint of facts, which constitute such offence, upon the Police report of such facts, upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed. So far as instant case is concerned, the learned Magistrate has taken the cognizance after the complaint was filed by the respondents Nos. 1 and 2 and the cognizance has been taken of the offence and not of the offenders. If from the averments made in the complaint, the learned Magistrate comes to the conclusion that besides accused named in the complaint, there is/are other accused(s) as well, then the Magistrate is well within the jurisdiction to issue the process and summon them for facing the trial. Hon'ble Apex Court while dealing with the scope of section 190 Cr.P.C in **“Raghubans Dubey Vs. State of Bihar”** reported in **1967Cr.L.J 1081**

has held that the cognizance taken by a Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, a Magistrate can find out, who the real offenders were and if he comes to the conclusion that apart from the persons sent by the police, some other persons were also involved, it is his duty to proceed against those persons. Summoning of additional accused is a part of the proceeding initiated while taking cognizance of an offence.

8. Similarly, in **M/S SWIL Ltd. Vs. State of Delhi & Anr.**, reported in **2001(6) SCC 670**, Apex Court has held that there is no bar under section 190 Cr.P.C. that once the process is issued against some accused, on the next date the Magistrate cannot issue process to some other person against whom there is some material on record but his name is not included as accused in the chargesheet. Thus, this Court is of the considered that there is no force in the contention raised by the petitioner, as such, the same is rejected.

9. The other contention raised by the petitioner is that there were no allegations against the petitioner either in the complaint or in the statements of the witnesses of the complainant, that could result in impleadment of the petitioner as an accused. A perusal of the complaint filed by the complainants/respondent Nos. 1 and 2 reveals that in whole of the complaint the allegations have been levelled by the complainants against the respondent No. 3 regarding his defamatory write-up in Daily Aftab of edition dated 30.05.2009. So far as Editor of Daily Aftab, Srinagar is concerned, the only allegations referred to him is in paa-10 of the complaint and the same is reproduced as under:

“That it is submitted that the entire write-up is based on false, incorrect and misleading statements aimed at denigrating and degrading the complainants as stated herein above. It is submitted that the editor of the newspaper should have exercised due care, caution and attention in publishing the said malicious write-up. It is submitted that accordingly, the respondent No. 2 has also contributed glaringly in defaming the complainants as well as the present secretary of the managing committee of the DAV Institute/DAV higher secondary School, Srinagar Kashmir and thus incur liability in terms of section 500 RPC as this daily Aftab is circulated at Jammu also.”

10. On the basis of this specific allegation, the Editor of the newspaper was arrayed as an accused No. 2 in the complaint and subsequently deleted because of his demise. I have gone through the whole of the complaint as well as the statements of the witnesses recorded in support of the complaint and I have not been able to find any allegation regarding complicity of the petitioner in the commission of alleged offence.

11. In “**Mohd. Abdullah Khan Vs. Prakash K**” reported in **2018(1) SCC615**, the judgment relied upon by the learned senior counsel on behalf of the respondent Nos. 1 & 2, the Hon’ble Apex Court while considering the issue of vicarious liability in context of offences relating to defamation has observed as under:

“**26.** Where defamatory matter is printed (in a newspaper or a book, etc.) and sold or offered for sale, whether the owner thereof can be heard to say that he cannot be made vicariously liable for the defamatory material carried by his newspaper, etc. requires a critical examination.

27. Each case requires a careful scrutiny of the various questions indicated above. Neither prosecutions nor the power under Section 482 CrPC can be either conducted or exercised casually as was done in the case on hand.”

12. So, the judgment relied upon by the respondent Nos. 1 & 2 is not applicable in the instant case as the petitioner was not arrayed as an accused at the very first instance. In the instant case, as already observed by this Court there is no allegation against the petitioner either

in the complaint or in the statements recorded in support and as such, in absence of such allegations, even the petitioner could not have been proceeded against had he been arrayed as an accused initially. The ratio of the judgment of the Apex Court in **M/s. SWIL Ltd. Vs. State of Delhi & Anr.**, is that the Magistrate can issue process to some other person against whom there is some material on record. Thus, there must be material on record against the person and then only the process can be issued against him. There is no doubt that Managing Editor, Resident Editor, Chief Editor and even the owner/publisher can be prosecuted but that there must be sufficient material on record to put them to trial. In the complaint filed by the respondent Nos. 1 and 2 there is specific averment against Editor only that he has also contributed glaringly in defaming the complainants. This is the only allegation so far as any official of the daily news paper is concerned. Further, from the perusal of the write-up, it is evident that the same cannot be considered as a news item but write-up by the person, who has specifically mentioned his name in the said write-up.

13. **In K.M. Mathew v. State of Kerala, (1992) 1 SCC 217** Hon'ble Apex court has held as under:

“10. It is important to state that for a Magistrate to take cognizance of the offence as against the Chief Editor, there must be positive averments in the complaint of knowledge of the objectionable character of the matter. The complaint in the instant case does not contain any such allegation. In the absence of such allegation, the Magistrate was justified in directing that the complaint so far as it relates to the Chief Editor could not be proceeded with. To ask the Chief Editor to undergo the trial of the case merely on the ground of the issue of process would be oppressive. No person should be tried without a prima facie case. The view taken by the High Court is untenable. The appeal is accordingly allowed. The order of the High Court is set aside.”

14. Further in **Subramanian Swamy v. Union of India**, reported in (2016)

7 SCC 221, the Apex Court has observed as under:

“207. Another aspect required to be addressed pertains to issue of summons. Section 199 CrPC envisages filing of a complaint in court. In case of criminal defamation neither can any FIR be filed nor can any direction be issued under Section 156(3) CrPC. The offence has its own gravity and hence, the responsibility of the Magistrate is more. In a way, it is immense at the time of issue of process. Issue of process, as has been held in *Rajindra Nath Mahato v. T. Ganguly* [*Rajindra Nath Mahato v. T. Ganguly*, (1972) 1 SCC 450 : 1972 SCC (Cri) 206] , is a matter of judicial determination and before issuing a process, the Magistrate has to examine the complainant. In *Punjab National Bank v. Surendra Prasad Sinha* [*Punjab National Bank v. Surendra Prasad Sinha*, 1993 Supp (1) SCC 499 : 1993 SCC (Cri) 149] it has been held that judicial process should not be an instrument of oppression or needless harassment. The Court, though in a different context, has observed that there lies responsibility and duty on the Magistracy to find whether the accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded, then only process would be issued. **At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. In *Pepsi Foods Ltd. v. Special Judicial Magistrate* [*Pepsi Foods Ltd. v. Special Judicial Magistrate*, (1998) 5 SCC 749 : 1998 SCC (Cri) 1400] , a two-Judge Bench has held that summoning of an accused in a criminal case is a serious matter and criminal law cannot be set into motion as a matter of course.**

208. We have referred to these authorities to highlight that in matters of criminal defamation the heavy burden is on the Magistracy to scrutinise the complaint from all aspects. The Magistrate has also to keep in view the language employed in Section 202 CrPC which stipulates about the residence of the accused at a place beyond the area in which the Magistrate exercises his jurisdiction. He must be satisfied that ingredients of Section 499 CrPC are satisfied. Application of mind in the case of complaint is imperative.”

15. The learned 1st Additional Sessions Judge has failed to consider this vital aspect of the case as to whether there was any material on record for arraying the petitioner as an accused or not and without considering the same has passed the order impugned. This Court has already observed that there was no material against the petitioner that

necessitating his impleadment as an accused, as such, the order impugned is not sustainable in the eyes of law.

16. Under the circumstances and in view of the discussion (supra), this petition succeeds and the order dated 17.03.2017 passed by the learned 1st Additional Sessions Judge, Jammu is set aside, along with all consequential orders passed by the learned trial Court. The record, if summoned in original, be returned back forthwith.
17. Disposed of.

(RAJNESH OSWAL)
JUDGE

JAMMU
11.02.2022
Rakesh

