A.F.R.

Reserved

Case :- APPLICATION U/S 482 No.42 of 2023

Applicant :- Arvind Kejriwal

Opposite Party :- State Of U.P. Thru. Prin. Secy./Addl.Chief Secy. Home And Another

Counsel for Applicant :- Mahmood Alam,Anjani Kumar Mishra,Manmohan Singh,Nadeem Murtaza,Sheeran Mohiuddin Alavi
Counsel for Opposite Party :- G.A.

Hon'ble Rajesh Singh Chauhan,J.

1. Heard Sri H.G.S. Parihar, learned Senior Advocate, assisted by Sri Nadeem Murtaza, Sri Mahmood Alam, Sri Man Mohan Singh, learned counsel for the petitioner and Sri Alok Saran along with Sri Rajesh Kumar Singh, learned Additional Government Advocates for the State.

2. By means of this application, the applicant has made following main prayers:-

> *"Wherefore, it is most respectfully prayed that this Hon'ble may graciously be pleased to:*
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> *i) Quash and set aside the impugned revisional order dated 21.10.2022 passed by the Ld. Court of Sessions Judge, Sultanpur in Criminal Revision No.219 of 2022 (Arvind Kejriwal vs State of UP) arising out of Case Crime No.608/2014 registered at Police Station Musafirkhana, District Amethi, whereby, the criminal revision preferred by the Applicant has been dismissed.*
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> *ii) Quash and set aside the impugned order dated 04.08.2022 passed by the Ld. Court of ACJM Room No.18 (Special Judge MP/MLA), Sultanpur in Criminal Case No. 360/2014 (State vs Arvind Kejriwal) arising out of Case Crime No.608/2014 registered at Police Station Musafirkhana, District Amethi, whereby, application of the Applicant seeking discharged under Section 239 CrPC has been dismissed."*

3. Precisely, the applicant has assailed the judgment and order dated 21.10.2022 passed by the learned Sessions Judge, Sultanpur in criminal revision rejecting the revision filed by the present applicant upholding the order dated 04.08.2022 passed by the learned trial Court i.e. Additional Chief Judicial Magistrate, Court No.18/Special Judge,

MP/MLA/Sultanpur, who has rejected the discharge application of the present applicant.

4. Notably, this is the third petition/application filed under Section 482 Cr.P.C. before this Court.

5. Before adverting to earlier orders being passed in the petitions/ applications filed by the present applicant under Section 482 Cr.P.C. before this Court, it would be apt to discuss the brief facts of the present case. One Prem Chandra, Flying Squad Magistrate, lodged an FIR bearing Case Crime No.608 of 2014, under Section 125 of the Representation of the People Act, 1951 (hereinafter referred to as "the Act, 1951"), Police Station- Kotwali Musafirkhana, District Amethi, alleging inter-alia that the accused-applicant flouted the Model Code of Conduct by making public statement "*Jo Congress ko vote dega, mera manana hoga, desh ke saath gaddari hogi. Bhajpa per katakch karte hue kaha ki jo Bhajpa ko vote dega use Khuda bhi muaf nahin karega, des ke sath gaddari hogi"*. After completion of investigation, the Investigating Officer has submitted the charge sheet against him. Learned trial court has taken cognizance against the accused on 06.09.2014 under Section 125 of the Act, 1951 and summoned him.

6. The present applicant has filed a petition under Section 482 Cr.P.C. bearing U/S 482/378/407 No.3662 of 2015; Arvind Kejriwal Vs. State of U.P. and Ors, seeking prayer for quashing the entire proceedings of Case No.360 of 2014 arisen out of Case Crime No.608 of 2014 (supra). He has also prayed for quashing the charge sheet, which has been filed in the aforesaid case. The aforesaid petition was disposed of finally vide order dated 03.08.2015 giving liberty to the applicant to file appropriate application before the learned court below taking all pleas and ground including the ground for exemption of his personal appearance and such application was directed to be considered strictly in accordance with law. For a period of four weeks, the bailable warrant which was issued against the present applicant was stayed. For the convenience, the order dated 03.08.2015 is being reproduced hereunder:-

"Heard Shri Mahmood Alam, learned counsel appearing on behalf of applicant along with Shri C.L. Gupta, Advocate and Shri Rishad Murtaza, learned Government Advocate on behalf of State.

By means of of the instant petition under Section 482 Cr.P.C., the applicant has prayed for quashing of the entire criminal proceedings of Case No. 360 of 2014 arising out of Case Crime No. 608 of 2014, under Sections 125 of the Representation of the People Act, 1951 relating to the Police Station, Musafir Khana, District Amethi which is pending in the Court of Judicial Magistrate, Musafir Khana, District Amethi. The applicant has further prayed for quashing of the chargesheet filed in the aforesaid Case Crime No. 608 of 2014.

The learned counsel for the applicant, after some arguments, submits that the applicant had sought exemption from personal appearance by moving an application before the Court concerned on 20.07.2015 but the same was dismissed. He further submits that Section 317 Cr.P.C. empowers the Court to pass appropriate order for exemption. The learned counsel for the applicant further submits that the applicant intends to file an application for discharge but in the mean time, the bailable warrant issued against the applicant may be kept in abeyance.

The learned Government Advocate has submitted that although one application moved on behalf of the applicant for exemption from personal appearance has been rejected on technical ground but it is still open for the applicant to move fresh application for exemption from personal appearance on proper grounds and he has no objection in this regard. In case, the Court below considers the application for exemption from personal appearance proper, fresh order may be passed in accordance with law. So far as application for discharge is concerned, the said application has not yet been moved and therefore, no direction for expeditious disposal thereof can be passed at this stage.

In view of the above, the present application is disposed of with the observation that the grounds taken by the applicant in the instant application under Section 482 Cr.P.C. may be taken at appropriate stage before the Court below and it will be open for the learned Court below to pass appropriate order. It is further observed that if the applicant applies for exemption from personal appearance, the same shall also be considered by the Court below in accordance with law.

The bailable warrant issued against the applicant shall remain in abeyance for a period of four weeks from today.

The petition stands finally disposed of.

Copy of this order may be provided to the learned counsel for the applicant within 24 hours on payment of usual charges."

7. Perusal of the aforesaid order dated 03.08.2015 reveals that the learned counsel for the applicant had argued that the applicant had sought exemption from personal appearance by moving an application before the court concerned on 20.07.2015 but the same was dismissed. Learned counsel further argued in such petition that the applicant intends to file an application for discharge, therefore, the bailable warrant being issued against the applicant may be kept in abeyance.

8. After rejection of the application of the present applicant by the learned trial court on 20.07.2015 whereby he had sought exemption from personal appearance, another application was filed by the applicant in compliance of the order dated 03.08.2015 passed by this Court and the learned court below rejected such application vide order dated 12.08.2015. Therefore, the present applicant has filed second petition under Section 482 Cr.P.C. bearing U/S 482/378/407 No.4136 of 2015; Arvind Kejriwal Vs. The State of U.P. and Ors., with the same prayer which has been made in the first petition filed under Section 482 Cr.P.C. with another prayer that the order dated 12.08.2015 whereby the exemption application of the present applicant had been rejected may be quashed.

9. In the second petition, considering the prayers of the present applicant and noticing the fact that the present applicant has not appeared before the learned court below and has not filed any personal bond with or without sureties and has filed two applications for exemption under Section 205 Cr.P.C., which have been rejected by orders dated 20.07.2015 and 12.08.2015 framed the question for adjudication to the effect that "Whether after taking cognizance and issuance of the process, may be summons or warrant, the exemption

application under Section 205 or 317 Cr.P.C.is maintainable without personal appearance and without furnishing bail bonds? The aforesaid petition was disposed of finally vide order dated 27.08.2015, which reads as under:-

> *"Heard learned counsel for the petitioner, Shri Rishad Murtza, learned Government Advocate and perused the record.*
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> *This petition has been filed with the following prayers:-*
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> *(i) to quash the order dated 12.08.2015 in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" in pursuance of the Charge Sheet No.122 of 2014 dated 09.07.2014 in Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi.*
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> *(ii) to stay the entire criminal proceedings in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" in pursuance of the Charge Sheet No.122 of 2014 dated 09.07.2014 in Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi, during pendency of the present case.*
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> *(iii) to order to concerned Hon'ble Court for deciding the pending application of the applicant filed under the proviso of Section 239 Cr.P.C. in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" bearing Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi.*
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> *Learned counsel for the petitioner has submitted that the petitioner is the Chief Minister of Delhi against whom a case under Section 125 of Representation of People Act has been registered. The application for discharge under Section 239 Cr.P.C. has been moved which has not yet been decided and the application for personal exemption filed under Section 205 Cr.P.C. has wrongly been rejected. It has also been submitted that the petitioner is ready to file the undertakings before the Court that whenever his personal appearance is required, he shall appear personally.*
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> *Learned counsel for the petitioner has relied upon the provisions of Section 88 Cr.P.C., which reads as under:-*
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> *"88. Power to take bond for appearance. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person*

to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial".

The main question for consideration is that whether after taking cognizance and issuance of the process, may be summons or warrant, the exemption application under Section 205 or 317 Cr.P.C.is maintainable without personal appearance and without furnishing bail bonds?

In the present case, it is admitted that till now the petitioner has not appeared before the court below and has also not filed any personal bond with or without sureties. The application for exemption under Section 205 Cr.P.C. was moved, which has been rejected by order dated 12.08.2015. The similar application was also moved previously, which was also rejected on 20.07.2015.

Learned counsel for the petitioner has relied upon the judgment of this Court rendered in Santosh Chauhan & others vs. State of U.P. & another reported in [(2011) (4) ALJ 121], in which, this Court has considered the scope of Section 205 Cr.P.C. but nowhere it has been held that without submitting the personal bond or sureties, the exemption under Section 205 Cr.P.C. can be granted.

Learned counsel for the petitioner has further relied upon the case Roitong Singpho vs. Sajjan Kumar Agarwal reported in AIR 2009 (NOC) 129 (GAU), in which, the Hon'ble Gauhati High Court has held that the Court has to take into account the magnitude of sufferings, which a particular accused person may have to bear with, in order to make himself present in the Court and the discretion must be exercised judiciously. The Gauhati High Court as well as Allahabad High Court have relied upon the case M/s. Bhasker Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd and others reported in AIR 2001 (SC) 3625.

In the case of M/s. Bhasker Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd and others reported in AIR 2001 (SC) 3625, the Hon'ble Apex Court has considered the scope of Sections 205 (2), 251 and 317 Cr.P.C. and has held in paras-12, 13, 14, 15, 16, 17 and 19 as under:-

"12. We cannot part with this matter without advertising to the plea made by the second accused before the trial court for exempting him from personal appearance. He highlighted two factors while seeking such exemption. First is that the offence under Section 138 of the Negotiable Instruments Act is relatively not a serious offence as could be seen from the fact that the legislature made it only a summons case. Second is, the insistence on the physical presence of the accused in the case would cause substantial hardships and sufferings to him as he is a resident of Haryana. To undertake a long journey to reach Bhopal for making his physical presence in the court involves, apart from great hardships, much expenses also, contended the counsel. He submitted that the advantages the court gets on account of the presence of the

accused are far less than the tribulations the accused has to suffer to make such presence in certain situations and hence the court should consider whether such advantages can be achieved by other measures. Therefore, he relied on Section 317 of the Code. It reads thus:

"317 provision for inquiries and trial being held in the absence of accused in certain cases.- (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be re corded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up for tried separately."

13. Sub-section (1) envisages two exigencies when the court can proceed with the trial proceeding in a criminal case after dispensing with the personal attendance of an accused. We are not concerned with one of those exigencies i.e. when the accused persistently disturbs the proceedings. Here we need consider only the other exigency. If a court is satisfied that in the interest or justice the personal attendance of an accused before it need not be insisted on, then the court has the power to dispense with the attendance of that accused. In this context a reference to Section 273 of the Code is useful. It says that "except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader." If a court feels that insisting on the personal attendance of an accused in a particular case would be too harsh on account of a variety of reasons, can't the court afford relief to such an accused in the matter of facing the prosecution proceedings?

14. The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the absence of the accused such evidence can be taken but then his counsel must be presence in the court, provided he has been granted exemption from attending the court. The concern of the criminal court should primarily be the administration of criminal justice. For that purpose the proceedings of the court in the case should register progress. Presence of the accused in the court is not for marking his attendance just for the sake of seeking him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be

achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the court in that particular case.

15. These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of the banks it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of summons case. When a magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.

16. Section 251 is the commencing provision in Chapter XX of the Code which deals with trial of summons cases by magistrates. It enjoins on the court to ask the accused whether he pleads guilty when the "accused appears or is brought before the magistrate". The appearance envisaged therein can either be by personal attendance of the accused or through his advocate. This can be understood from Section 205(1) of the Code which says that "whenever a magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader."

17. Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

19. The position, therefore, bogs down to this: It is within the powers of a magistrate and in his judicial discretion to dispense with the personal appearance of an accused either

throughout or at any particular stage of such proceedings in a summons case, if the magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations to him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the magistrate can consider all aspects and pass appropriate orders thereon before proceeding further."

I have gone through the judgment and considered the law laid down by the Hon'ble Apex Court in the aforesaid case. The aforesaid case relates to the proceedings under Section 138 N.I. Act, which is a summon case, while in the present case, the charge-sheet has been filed against the petitioner for the offence punishable under Section 125 of Representation of People Act, 1951 and the offence punishable under Section 125 of Representation of People Act is punishable with a term of three years or with fine or with both. Therefore in view of the provisions of Section 2 (x) of Cr.P.C., it is a warrant case because the term of imprisonment is exceeding two years. It is not disputed that the provisions of Code of Criminal Procedure are applicable regarding the offence punishable under the Representation of People Act, 1951.

As far as the provisions of Section 88 Cr.P.C. are concerned, as quoted above, such provisions can be availed only in case the person for whose appearance or arrest the summon or warrant has been issued to present in such Court. Section 88 Cr.P.C. also does not speak to exempt the accused without executing the bond with or without sureties for his appearance in the Court. In view of the provisions of Section 90 Cr.P.C., this provisions is also applicable only to every summon and every warrant of arrest issued under this Code. Admittedly, the petitioner has not yet appeared personally before the Court. Therefore, he cannot get the benefit of Section 88 Cr.P.C.

Article 14 of the Constitution of India provides equality before the law and equal protection of laws. When the Constitution has not distinguished between the powerful and powerless persons, then certainly the courts also cannot grant any special concession to any powerful person like in this case where the petitioner is the Chief Minister of N.C.T. Delhi. Law is equal for all and equal protection has to be granted to all. There is no such provision in the Code of Criminal Procedure which provides that the trial of warrant

case can proceed even in the absence of the accused or without his appearing personally and submitting the bail bonds. It is not disputed that on the subsequent dates of hearing, the personal appearance of the accused may be exempted if sufficient cause is shown provided the accused is represented by a pleader. But at the same time, the Code of Criminal Procedure empowers the Trial Court to direct the personal attendance of such accused.

In the present case, the First Information Report was lodged against the petitioner regarding the offence punishable under Section 125 of Representation of People Act and after the investigation, the charge-sheet has been filed against him for the offence punishable under Section 125 of Representation of People Act. Section 125 of Representation of People Act, 1951 reads as under:-

"125, Promoting enmity between classes in connection with election. Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."

The present case relates to the alleged speech of the petitioner on 02.05.2014 in connection with an election which allegedly attempts to promote feelings of enmity or hatred between different classes of the citizens of India. The politicians are required to observe more caution in their speeches as they have to rule the country and they should promote the spirit of common brotherhood, fraternity and harmony amongst all the people of India transcending religious, linguistic and regional or sectional diversities. The politicians as a citizen of India have also to abide by fundamental duties as provided in Article 51-A of the Constitution of India, apart from the restrictions and guidelines imposed by Representation of People Act, 1951, because they are not above the Constitution.

But what we are experiencing now a days is that some of the politicians have no control over their fire-brand speeches with a view to attract or misguide the voters in their favour. Such tendency should be discontinued because the public of India has now become much more aware about the real truth. The politicians must use the Parliamentary Language. However, these observations shall not affect the merits of the present case.

The procedure for trial of warrant case by the Magistrate is contained in Chapter-XIX of the Code. Section 238 Cr.P.C. Specifically provides that when in any warrant case instituted on a police report, the accused appears or brought before the Magistrate, on the commencement of trial, the provisions of Section 207 Cr.P.C. shall be complied. The language of the aforesaid provision of Section 238 Cr.P.C. also envisaged that either the accused should appear or he

should be brought before the Magistrate. This provision also does not classify that on the commencement of warrant trial, the accused has liberty to appear through counsel. Because it is a warrant trial, therefore, the accused has to appear in the Court and the accused cannot claim exemption under Section 205 Cr.P.C. till he has furnished bonds with or without sureties as per the direction of the Trial Court.

The question whether after taking cognizance and issuance of the process, may be summon or warrant, the exemption application under Section 205 or under Section 317 Cr.P.C. is maintainable without personal appearance and without furnishing bail bonds is, therefore, decided accordingly that in case of an accused is warrant trial, the provisions of Section 205 or Section 317 Cr.P.C. will not apply unless the accused has been granted bail and he has furnished bail bonds.

This petition has been filed under Section 482 Cr.P.C.. The scope of 482 Cr.P.C. has been considered by Hon'ble the Apex Court in various judgments.

The power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice. Time and again, Apex Court and various High Courts, including ours one, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preampt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. I need not go into various aspects in detail but it would be suffice to refer a few recent authorities dealing all these matters in detail, namely, State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335, Popular Muthiah Vs. State represented by Inspector of Police (2006) 7 SCC 296, Hamida vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474, Dr. Monica Kumar and Anr. vs. State of U.P. and Ors. (2008) 8 SCC 781, M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr. (2009) 9 SCC 682, State of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.

In Lee Kun Hee and others Vs. State of U.P. and others JT 2012 (2) SC 237, it was reiterated that Court in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or otherwise of the allegations and appreciate evidence, if any, available on record. Interference would be justified only when a clear case of such interference is made out. Frequent and uncalled interference even at the preliminary stage by High Court may result in causing obstruction in the progress of inquiry in a criminal case which may not be in public interest. It, however, may not be doubted, if on the face of it, either from the first information report or complaint, it is evident that allegation are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding, in such cases refusal to exercise jurisdiction may equally result in injustice, more particularly, in cases, where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint.

However, in this matter, after investigation, Police has found a prima facie case against accused and submitted charge-sheet in the Court below. After investigation the police has found a prima facie case of commission of a cognizable offence by accused which should have tried in a Court of Law. At this stage there is no occasion to look into the question, whether the charge ultimately can be substantiated or not since that would be a subject matter of trial. No substantial ground has been made out which may justify interference by this Court under Section 482 Cr.P.C.

In view of the above, I do not find any error of law or perversity in the order dated 12.08.2015, by which, the application for exemption has been rejected.

As far as the prayer to stay the entire criminal proceedings is concerned, I also do not find any sufficient ground to stay the aforesaid criminal proceedings because in view of the provisions of Chapter-XIX of Code of Criminal Procedure, the accused has a right to move the application for discharge under Section 239 Cr.P.C. and if that application is rejected then certainly the Magistrate is empowered to frame the charge as provided under Section 240 Cr.P.C. Therefore, the prayer no. (ii) is also misconceived.

As far as prayer (iii) is concerned, there is already specific provision of Section 239 Cr.P.C. to decide the application for discharge and for that the orders of this Court are not required. But certainly, before deciding the application under Section 239 Cr.P.C., the appearance of the accused in the Court for filing of the bond with or without sureties is necessary. Therefore, this prayer is also misconceived.

In the last, learned counsel for the petitioner has

prayed that the accused is ready to appear personally in the Court and file the bail bonds, therefore, some protection may be granted to him.

Considering the request of learned counsel for the petitioner, it is provided that if the petitioner, Arvind Kejriwal, surrenders before the court below within four weeks from today and moves an application for bail, the same shall be considered and disposed of expeditiously in accordance with law and in terms of law laid down in the case of Smt. Amrawati and another vs. State of U.P., 2005; Cr.L.J.755, which has been affirmed by Hon'ble the Apex Court in Lal Kamlendra Pratap Singh vs. State of Uttar Pradesh and Ors. reported in (2009) 4 SCC 437. Till then, no coercive action shall be taken against the petitioner.

The petition stands disposed of accordingly."

10. While disposing of the aforesaid petition, this Court has observed that after investigation police has found a prima facie case against the accused and submitted charge sheet in the court below. After investigation, the police has found a prima facie case for commission of cognizable offence by the accused, which should have been tried in a court of law. The Court further observed that at this stage, there is no occasion to look into the question whether the charge ultimately can be sustained or not since that would be subject matter of the trial court. In view of the above, this Court has held that no substantial ground has been made out which may justify interference by this Court under Section 482 Cr.P.C. and there is no error of law or perversity in the order dated 12.08.2015 by which the application for exemption has been rejected. Accordingly, prayer no.1 of that petition has been rejected.

11. So as to decide the second prayer of that petition, this Court has held that since the accused has right to move an application for discharge under Section 239 Cr.P.C. and if that application is rejected, then certainly the Magistrate is empowered to frame the charge as provided under Section 340 Cr.P.C., so the prayer no.(ii) is misconceived.

12. Deciding prayer no.(iii) of the said petition, this Court has held that there is already specific provision of Section 239 Cr.P.C. to

decide the application for discharge and for that, the orders of this Court are not required but certainly, before deciding the application under Section 239 Cr.P.C., appearance of the accused in the court for filing bond with or without sureties is necessary, therefore, that prayer is also misconceived.

13. Thereafter, learned counsel for the petitioner has given undertaking that the present applicant is ready to appear personally in the court and file the bail bonds, therefore, some protection may be given to him. Considering that request, this Court granted four weeks' time to the present applicant to surrender before the learned court below and file application for bail and the same was directed to be considered and disposed of strictly in accordance with law in terms of the law laid down in the case of **Smt. Amrawati and another vs. State of U.P., 2005; Cr.L.J.755**, which has been affirmed by Hon'ble the Apex Court in **Lal Kamlendra Pratap Singh vs. State of Uttar Pradesh and Ors., (2009) 4 SCC 437**.

14. The aforesaid order dated 27.08.2015 has been assailed before the Apex Court by filing Petition for Special Leave to Appeal (Crl.) No.7989 of 2015; Arvind Kejriwal Vs. State of U.P. & Ors., and the Hon'ble Apex Court passed the order dated 22.09.2015, which reads as under:-

> *"Taken on board.*
>
> *Issue notice.*
>
> *The attendance of the petitioner before the trial court is dispensed with until further orders."*

15. By means of aforesaid order, the Hon'ble Apex Court issued notices and directed that attendance of the petitioner before the trial court is dispensed with until further orders. The petitioner has challenged the order dated 04.08.2022 whereby the discharge application of the present applicant has been rejected by the learned trial court before the revisional court and the revisional court dismissed the revision vide order dated 21.10.2022 upholding the

order dated 04.08.2022 passed by the learned trial court. Both the aforesaid orders have been assailed in this application on the ground that the applicant has not made any appeal for vote on the ground of religion etc. and he has not promoted enmity between the classes of the people, therefore, he may not be held liable for the offence under Section 125 of the Act, 1951. In support of his aforesaid argument, learned counsel for the applicant has placed reliance upon the judgment of the Apex Court in re; ***Ramakant Mayekar v. Celine D'Silva (Smt.)*****, (1996) 1 SCC 399,** citing para 27, which reads as under:-

> *"**27.** What is forbidden by law is an appeal by a candidate for votes on the ground of 'his' religion or promotion etc. of hatred or enmity between groups of people, and not the mere mention of religion. There can be no doubt that mention made of any religion in the context of secularism or for criticising the anti-secular stance of any political party or candidate cannot amount to a corrupt practice under sub-section (3) or (3-A) of Section 123. In other words, it is a question of fact in each case and not a proposition of law as understood and enunciated by the High Court."*

16. However, learned counsel for the applicant has informed the Court that the present applicant being a law abiding citizen appeared before the learned court of Magistrate on 25.10.2021 and has been granted bail. Recital to this effect has been given in item no.13 of the dates and events.

17. In para-9 of the discharge application of the present applicant (Annexure No.8), it has been stated that whatever statement was made by the applicant during his speech, that was merely based upon his personal opinion and such statement is protected under Article 19 of the Constitution of India i.e. "Freedom of Speech and Expressions". In para-8 of the discharge application, he has stted that his statement may not be considered as an offence under Section 125 of the Act, 1951.

18. As per learned counsel for the applicant, learned trial court as well as learned revisional court below has committed manifest error of

law and fact both while rejecting the discharge application and the revision of the present applicant. Therefore, the aforesaid orders may be set aside and quashed.

19. Per contra, Sri Alok Saran, learned AGA, has opposed this application filed under Section 482 Cr.P.C. by submitting that this is the third petition/application under Section 482 Cr.P.C. in the same matter. He has also stated that as per the observation of this Court in the second petition filed under Section 482 Cr.P.C., the police has found prima facie case against the accused and submitted charge sheet in the court below after completion of the investigation and the trial court has taken cognizance of the offence, therefore, that charge could be proved or disproved before the learned trial court and at this stage, no interference would be required invoking inherent powers of the High Court under Section 482 Cr.P.C., therefore, the trial of the present case should be conducted and concluded strictly in accordance with law.

20. Sri Saran has further submitted that the Hon'ble Apex Court has not stayed the trial pending against the present applicant; only his presence before the learned trial court has been dispensed with, therefore, the trial of the present case may not be stalled or stayed, rather directions may be issued to conduct and conclude the trial with expedition, strictly in accordance with law. He has further submitted that the statement so given by the applicant is apparently violative of Section 125 of the Act, 1951 inasmuch as his sentence that whosoever would cast vote in favour of Congress, would be branded as Gaddar and whosoever would cast vote in favour of Bhartiya Janta Party shall not be pardoned by Khuda. As per Sri Saran, the applicant could have used the word 'Bhagwan' but he deliberately and intentionally used the word 'Khuda' for those voters, who cast their votes to the Bhartiya Janta Party. During investigation, sufficient material has been collected by the Investigating Officer in support of the allegation, therefore, the intention of the present applicant to use the word 'Khuda' for those voters, who cast their votes to Bhartiya Janta Party

and also as to why the voters of Congress would be branded as ‘Gaddar of the country’ may be determined during the course of the trial. Sri Saran has stated that both the learned court below i.e. learned trial court as well as revisional court has considered the arguments of the present applicant thoroughly and carefully and returned their findings strictly in accordance with law, therefore, there is no infirmity or illegality in those order, so the present petition may be dismissed and the applicant may be directed to participate in the trial proceedings so that the trial may be conducted and concluded with expedition. Since he has already been protected by the Hon’ble Apex Court, therefore, he has got no reasonable apprehension of his arrest in any manner whatsoever.

21. Heard learned counsel for the parties and perused the material available on record.

22. Article 19 of the Constitution of India gives all citizens the rights regarding freedom of speech and expression but subject to reasonable restrictions for preserving inter-alia public order, decency or morality. This is trite that the extent of protection of speech would depend on whether, such speech would constitute a propagation of ideas or would have any social value. If the answer to the said question is in affirmative, such speech would be protected under Article 19 (1) (a); if the answer is in native, such speech would not be protected under Article 19 (1) (a). Further, reasonable restrictions are meant for preserving inter-alia public order, decency or morality. Prima facie, it is not decent for a person, who is the Chief Minister of one State, to utter any sentence or word which has any hidden meaning. As per the contents of his speech, the voters of the Congress would be termed as ‘Gaddar of the country’ whereas the voters of the Bhartiya Janta Party would not be pardoned by ‘Khuda’. It is true that Khuda, Bhagwan or God are one and the same but using the word ‘Khuda’ by one Hindu leader only for those voters, who cast their votes to the Bhartiya Janta Party not to the Congress can only be clarified by the applicant during the course of the trial about his intent

to use such word. I am unable to comprehend as to how such speech would constitute a propagation of ideas or would have any social value. Since credible evidences to that effect are said to have been collected during investigation and charge sheet has been filed, therefore, veracity of charge may not be examined or tested by this Court by invoking its inherent power under Section 482 Cr.P.C.

23. For the convenience, Section 125 of the Act, 1951 is being reproduced herein below:-

> *"**125. Promoting enmity between classes in connection with election**. Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."*

24. From the perusal of Section 125 of the Act, 1951, it appears that if the feelings of enmity or hatred between different classes of citizens of India is promoted, that shall be treated as an offence under such section and punishable under Section 125 of the Act, 1951. The statement so given by the applicant is not so plain and simple inasmuch as for one set of voters, he is uttering the term 'Gaddar of the country' and for the other set of voters, he is saying that 'Khuda shall not pardon them'. Prima facie, it appears that he is threatening the later voters in the name of Khuda knowing fully well that if he uses the term 'Khuda', some set of voters belonging to different religion might have severely been influenced.

25. So far as the submission of learned counsel for the applicant is that the speech of the applicant is based on his personal opinion, therefore, no offence under Section 125 of the Act, 1951 may be constituted as it lacks mens-rea, so he will have to clarify his opinion before the trial court as to what is his source of knowledge that if any one who believes in 'Khuda' casts votes to Bhartiya Janta Party, those would not be pardoned by 'Khuda' and as to why this thing would not

be applicable for the voters, who cast vote to Congress. In certain cases, the Courts have considered the 'knowledge' as an essential element of offence, not the 'mens rea'. Therefore, if during course of investigation some credible evidences/materials have been collected, charge sheet has been filed, cognizance has been taken, discharge application has been rejected by the learned trial court by speaking and reasoned order and that order has been upheld by the revisional court, that too by speaking and reasoned order, then the applicant must participate in the trial proceedings.

26. Notably, the Hon'ble Apex Court has not stayed the proceedings pending against the present applicant before the trial court and only his presence has been dispensed with keeping the appeal pending, therefore, the trial/proceedings of the present case may not be stayed or quashed.

27. The power of this Court enshrined under Section 482 Cr.P.C. is an inherent power to secure the ends of justice or to prevent any abuse of the process of any Court. This is an extra-ordinary power of the High Court like Article 226 of the Constitution of India but at the same time, this Court must be much careful and cautious before invoking this power to ensure that if this power is not invoked, the litigant would suffer irreparable loss and injury and it would be manifest injustice and abuse of the process of the law. Therefore, the Apex Court has observed in catena of cases that this power should be invoked very sparingly and cautiously.

28. The High Court of Uttarakhand at Nainital has considered almost the similar and identical case in re; **Rajendra Singh Bhandari Vs. State of Uttarakhand and Another**, **2020 SCC OnLine Utt 551**, and considering the relevant dictums of the Apex Court, that petition was dismissed. Relevant paragraphs no.10 to 18 of the said judgment are required to be reproduced hereunder:-

> *"**10.** The scope of Section 482 of the Code has been considered by the Hon'ble Supreme Court in various judgments.*

11.*In* ***Madhu Limaya v. State of Maharashtra,(1977) 4 SCC 551 : AIR 1978 SC 47****, the Hon'ble Apex Court has held that the following principles would govern the exercise of inherent jurisdiction of the High Court -*

> *(1) Power is not to be resorted to, if there is specific provision in Code for redress of grievances of aggrieved party.*
>
> *(2) It should be exercised sparingly to prevent abuse of process of any Court or otherwise to secure ends of justice.*
>
> *(3) It should not be exercised against the express bar of the law engrafted in any other provision of the Code.*

12. *In* ***Pepsi Food Limited v. Special Judicial Magistrate, (1998) 36 ACC 20****, the Hon'ble Supreme Court has observed that the power conferred on the High Court under Article 226 and 227 of the Constitution of India, and under Section 482 of the Code have no limits, but more the power more due care and caution is to be exercised in invoking these powers.*

13. *In* ***Lee Kun Hee v. State of U.P., JT (2012) 2 SC 237****, the Hon'ble Supreme Court held that the Court in exercise of its jurisdiction under Section 482 of the Code cannot go into the truth or otherwise of the allegations and appreciate evidence, if any, available on record.*

14. *In* ***State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335****, the Hon'ble Supreme Court of India considered in detail the provisions of Section 482 of the Code. The Hon'ble Supreme Court summarized the legal position by laying the following guidelines to be followed by High Courts in exercise of their inherent jurisdiction:*

> *"(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 concerned Act (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 concerned Act, 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.

15. *In the instant case, cognizance has been taken in the offence punishable under Section 125 of the Act, 1951. Section 125 of the Act, 1951 reads as under:—*

"Section 125. ***Promoting enmity between classes in connection with election****.—Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."*

16. *It is the fundamental duty of every citizen to promote harmony and the spirit of common brotherhood and fraternity amongst all the people of India transcending religious, linguistic and regional or sectional diversities. For fair and peaceful election, during the election campaign, party or candidate should not indulge in any activity which may create mutual hatred or cause tension between different classes of the citizens of India on ground of religion, race, caste, community or language.*

17. *In the present case, the learned Chief Judicial Magistrate took the cognizance after considering the evidences available on the record. It is well settled that at the time of considering of the case for cognizance and summoning, merits of the case cannot be tested and it is wholly impermissible for this Court to enter into the factual*

> *arena to adjudge the correctness of the allegations. This Court would not also examine the genuineness of the allegations since this Court does not function as a Court of Appeal or Revision, while exercising its jurisdiction under Section 482 of the Code. In this matter it cannot be said that there are no allegations against the applicant. Apart this, learned counsel for the applicant could not able to show at this stage that allegations 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 applicant.*
>
> ***18.*** *The use of expression "promotes or attempts to promote" in Section 125 of the Act, 1951 shows that there has to be mens rea on the part of the accused to commit the offence of promoting disharmony amongst different religions under Section 125, whereas, the case of the applicant is that this matter is launched by the political opponents. These allegations are required to be tested only at the time of trial. This Court cannot hold a parallel trial in an application under Section 482 of the Code."*

29. In view of the trite law as settled by the Apex Court (supra), facts and circumstances as considered above, the present case does not fall in any category set out in the judgment of **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335**. Further, I find no infirmity, illegality or perversity in the impugned orders dated 21.10.2022 passed by the revisional court and in the order dated 04.08.2022 passed by the learned trial court as both the impugned orders are well considered, reasoned and speaking orders. Accordingly, the prayers made in this application are refused.

30. Since the case has to be tried, so I make it clear that the observations made in the preceding paras of this order are only for the disposal of this application, filed under Section 482 Cr.P.C. These observations will not influence the trial court while deciding the case.

31. In the aforesaid terms, the application, filed under Section 482 Cr.P.C., is **dismissed**.

32. No order as to costs.

33. Before parting with, I appreciate the hard work and research done by my Law Intern Mr. Mudit Singh for finding out the case laws applicable in the present issue.

[Rajesh Singh Chauhan,J.]

Order Date :- 16.01.2023
RBS/-