IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

(THROUGH VIRTUAL MODE)

Reserved on: 27.01.2021
Pronounced on:11.02.2021

CRM(M) No.283/2020
CrlM No. 1098 of 2020

Zakir Hussain ...Petitioner(s)

Through: - Mr. M. A. Rathore, Advocate.

Vs.

UT of Ladakh and ors. …Respondent(s)

Through: - Mr. T. M. Shamsi, ASGI.

CORAM:

HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE.

JUDGEMENT

1. The petitioner is a Councillor of the Ladakh Autonomous Hill Development Council, Kargil, (LAHDCK) and claims to be an educationally qualified and law abiding citizen of the country. He, however, is aggrieved of registration of FIR No.34/2020 registered in Police Station Kargil for commission of offences under Sections 124-A, 153-A, 153-B and 505(2), 120-B of the Indian Penal Code pursuant to the communication of respondent No.4 dated 19.06.2020. The petitioner is also aggrieved of the police report submitted by SHO, Police Station, Kargil to the Court of Chief Judicial Magistrate, Kargil, in terms of Section 173 of the Code of Criminal Procedure. The petitioner seeks quashment of FIR and the entire subsequent proceedings taken pursuant thereto including the order dated

17.09.2020 passed by the Chief Judicial Magistrate, Kargil.

2. Before proceeding to consider the grounds of challenge urged by the petitioner to justify invoking the inherent powers of this Court vested by virtue of Section 482 of the Cr.P.C. against registration of FIR and subsequent proceedings taken thereon, it would be appropriate to notice few material facts.

3. On 18.06.2020 the police of Police Station Kargil received an information through reliable sources that an audio clip containing objectionable conversation, demeaning armed forces of the country in the backdrop of clashes between Indian Army and armed forces of China that took place in Galwan Valley of Ladakh region, has gone viral on social media. Taking cognizance of the information received, the police registered the subject FIR and set the investigation into motion. During the course of investigation, it was established that the audio clip of 6.3 minutes duration that had gone viral on social media contained a conversation between the petitioner and one Nissar Ahmad Khan. The conversation was found to be extremely objectionable containing derogatory references to the role of Indian Army in the Galwan misadventure of armed forces of China. The police were of the opinion that the conversation was not only extremely objectionable and contemptuous of the country but was also *prima facie* seditious in nature. The petitioner along with the co-accused Nissar Ahmad Khan was arrested by the police but was let off on bail by this Court vide order dated 24.09.2020 passed in Bail Application No. 67/2020. For this misadventure and indulgence of the

petitioner in demeaning the role of Indian Army in Galwan conflict as also bringing the country to contempt by unsavory and objectionable conversation, the petitioner was also suspended from discharging the functions of Councillor of LAHDC Kargil. The order dated 25.06.2020 passed by Deputy Commissioner, Kargil, suspending the petitioner from discharging his duties as a Councilor, is assailed by the petitioner in WPC No. 1645/2020 and this Court vide its order dated 04.12.2020 has stayed the aforesaid order. The writ petition is subjudice in this Court.

In the meanwhile, the police, after investigation, has submitted final report (challan) in the Court of Chief Judicial Magistrate, Kargil. The learned Magistrate, before whom the challan was presented on 17.09.2020, remanded the petitioner and other accused, namely, Nissar Ahmad Khan, to the judicial custody after providing them copies of the police report through their counsel present physically in the Court. On 21.09.2020 when the police report/challan once again came up for consideration before the Chief Judicial Magistrate, Kargil, the learned Magistrate noted that the charge sheet submitted by the police was incomplete sans requisite sanction as stipulated under Section 196 Cr. P. C. The Magistrate, after noticing the aforesaid defect in the challan, granted opportunity to the APP to file the requisite sanction in terms of Section 196 Cr. P. C. This way the challan presented by police, which, as found by the Chief Judicial Magistrate as incomplete, is lying in the Court of Chief Judicial Magistrate, awaiting requisite sanction in terms of Section 196 Cr. P.

C. Similar position is reflected in the order dated 24.09.2020 subsequently passed by the learned Chief Judicial Magistrate.

4. It is worthwhile to notice the sequence of events that have led to the registration of the subject FIR. The information was received by the police from reliable sources on 18.06.2020 with regard to commission of offences by the petitioner and one Nissar Ahmad Khan under Sections 124-A, 153-A, 153-B 505(2), 120-B IPC. The matter was taken up by the police with the District Magistrate, Kargil vide communication No. CCB/Complaint/2020-8774-78 dated 18.06.2020 for requisite sanction under Section 196 Cr.P.C. Responding to the request of the police, the District Magistrate vide his communication No. DMK/JC.CrPC dated 19.06.2020 accorded sanction to the District Police Kargil for initiation of investigation and taking cognizance of the commission of offences as aforementioned, pursuant to which the impugned FIR was lodged in Police Station Kargil. The police, after investigation, have produced the final report in terms of Section 173 Cr. P. C before the Court of Chief Judicial Magistrate, Kargil.

5. In the aforesaid factual backdrop, the petitioner assails the registration of FIR, investigation by the police, presentation of challan before the Chief Judicial Magistrate and subsequent proceedings taken by the learned Magistrate on the challan, *inter alia* on the following grounds:-

(i) That the registration of impugned FIR by the police of Police Station Kargil on the directions of District

Magistrate is not sustainable in law, in that, the District Magistrate has no authority to direct the police to register an FIR and conduct investigation into the commission of offences under Sections 124-A, 153-A, 153-B and 505(2), 120-B of the Indian Penal Code. The District Magistrate, in terms of Section 196 Cr.P.C, is required to file a complaint before the concerned Magistrate after requisitioning an enquiry report from the police concerned.

(ii) That police had no authority to either register an FIR or embark on investigation, much less to present the challan /final report before the Judicial Magistrate concerned. As provided under Section 196 Cr. P. C, the Court can take cognizance only on a complaint filed by the District Magistrate and in the instant case no such complaint has been filed by the District Magistrate, Kargil.

(iii) That going by the audio clip, claimed by the police to be conversation between the petitioner and co-accused, Nissar Ahmad Khan, offences under Sections 124-A, 153-A, 153-B and 505(2), 120-B IPC are not made out. Mere derogatory or objectionable words are not sufficient to invoke the provisions of Section 124 or 153-A of the IPC unless the written or spoken words have the tendency or intention of inciting disorder or disturbance of public peace or public violence.

(iv) That the petitioner, being a Councillor in the Ladakh Autonomous Hill Development Council, Kargil, is a public servant in terms of Section 54 of the Ladakh Autonomous Hill Development Council Act,1997, and, therefore, no cognizance against him could be taken by the Court unless there is prior sanction under Section 197 of the Code of Criminal procedure. The trial Court has erroneously accepted the challan and proceeded in the matter when the requisite sanction under Section 196 as also under Section 197 of the Code of Criminal Procedure had not been granted by the competent authority.

6. Mr. Tahir Shamsi, learned counsel representing the respondents vehemently opposes the petition and submits that the conversation between the petitioner and the co-accused, Nissar Ahmad Khan, is not only derogatory and mischievous but is tantamount to 'sedition' defined under Section 124-A of the IPC. He has shared the video clip containing the conversation and its transcript to make good his point that the words spoken by the petitioner have the tendency to bring the government into hatred and contempt and also to cause disaffection, enmity and disloyalty to the government and, therefore, offences under Section 124-A and 153-A of the IPC. He submits that the police has rightly slapped the charges against the petitioner which have been found substantiated during investigation. He counters the argument of the learned counsel for the petitioner that no FIR in the offences could

have been registered by the police and investigation taken thereof. He submits that bare reading of Section 196 would make it abundantly clear that what is prohibited by the Section is taking cognizance of the offences under Sections 124-A, 153-A, 153-B etc. without there being a sanction by the District Magistrate. And it cannot be argued that police would lack authority to register the FIR even if the information received by it discloses commission of cognizable offences like 124-A, 153-A, 153-B and 505(2), 120-B IPC.

7. Having heard the learned counsel for the parties and perused the record, this petition raises following questions of seminal importance:-

(1) (a) What is the true import and scope of Section 124-A, 153-A, 153-B, 505(2) IPC when seen through the prism of Article 19(1) of the Constitution of India?

(b)Whether offences under Sections 124A, 153A, 153B, 505(2) and 120-B IPC are made out in the instant case?

(2) Whether FIR can be registered, investigation undertaken and challan presented for commission of offences under Section 124A, 153A, 153B, 505(2) and 120-B IPC by the police without prior sanction of the competent authority as envisaged in Section 196 of the Code of Criminal Procedure?

(1) (a) What is the true import and scope of Section 124-A, 153-A, 153-B, 505(2) IPC when seen through the prism of Article 19(1) of the Constitution of India?

(b)Whether offences under Sections 124A, 153A, 153B, 505(2) and 120-B IPC are made out in the instant case?

8. It is strenuously argued by Mr. M. A. Rathore, learned counsel for the petitioner, that the conversation between the petitioner and co-accused-Nissar Ahmed Khan of Alochi Bagh, Srinagar contained in

the audio clip, which was allegedly made viral by the co-accused Nissar Ahmed Khan on the social media, does not disclose the commission of offences with which the petitioner has been charged by the police. He submits that the entire conversation contained in the audio clip attributed to the petitioner, by no stretch of reasoning, would be tantamount to 'sedition' as defined under Section 124A IPC nor the same will make out an offence under Section 153A, 153B and 505(2) read with Section 120-B IPC. He argues that the conversation, taken as it is, on its face value, would be protected under Article 19(2) of the Constitution of India, which guarantees every citizen right to free speech and expression.

9. *Per contra*, Mr. Tahir Majid Shamsi, learned ASGI, who has shared the audio clip with this Court, would argue that conversation between the petitioner and the co-accused-Nissar Ahmed Khan, contained in the audio clip, is highly objectionable and critical of the role played by the brave hearts of Indian Army during recent Galwan Valley conflict with their counter parts of Republic of China. He submits that the conversation, which went viral on the social media, had the tendency of propagating disaffection, enmity between groups and spreading rumours against the country's armed forces. He, therefore, urges that the conversation in the audio clip, if considered in its entirety and in the context of happenings in the Galwan Valley, does make out offences with which the petitioner and co-accused Nissar Ahmad Khan have been charged.

10. With a view to better appreciating the rival contentions, it would be necessary to set out the provisions of Section 124A, 153-A, 153-B, 505(2) and 120-B IPC. Section 124A IPC reads thus:-

> "**[124A. Sedition.**—Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.
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> *Explanation 1*.-- The expression "disaffection" includes disloyalty and all feelings of enmity.
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> *Explanation 2*.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.
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> *Explanation 3*.--Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

Section 153A of the Indian Penal Code:-

> **"153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.**-- (1) Whoever--
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> (a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or

[(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,]

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Offence committed in place of worship, etc.— (2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Section 153B of the Indian Penal Code

153B. Imputations, assertions prejudicial to national integration.-- (1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,--

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason

of their being members of any religious, racial, language or regional group or caste or community, be denied, or deprived of their rights as citizens of India, or

(c) makes or publishes and assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine."

Section 505(2) reads as under:-

505. Statements conducing to public mischief.--[2][(1)] Whoever makes, publishes or circulates any statement, rumour or report,

……

(2) **Statements creating or promoting enmity, hatred or ill-will between classes**. Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

……..."

Section 120-B IPC reads thus:-

"**120-B. Punishment of criminal conspiracy.**--(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death,

> [imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
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> (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

11. Section 124A IPC defines 'sedition' and provides punishment for its commission. From a bare reading of Section 124A, it clearly transpires that the term 'sedition' means the conduct or speech, which brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India. Explanation No.1 appended to the Section defines 'disaffection' to include disloyalty and all feelings of enmity.

12. The offence of sedition is not of recent origin. Section 124A, as it exists now in the Indian Penal Code, was originally Section 113 of Macaulay's Draft Penal Code of 1937-39 but the Section was omitted from the Indian Penal Code as it was enacted in 1860. However, Section 124A came to be included in the Statute book i.e. Indian Penal Code by Act No. XXVII of 1870. Constitutionality of Section 124A along with Section 505 of the Indian Penal Code came up for consideration before Hon'ble the Supreme Court in case of **Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955**. The *vires* of Section 124A and Section 505 of the IPC were challenged on the ground that the same had the effect of abridging or taking away the

fundamental right to free speech and expression guaranteed by Article 19(1)(a) of the Constitution. The Supreme Court after tracing out the history of Section 124A and having regard to the right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution, came to the conclusion that Section 124A, if construed in literal sense in which the Judicial Committee of the Privy Council had construed it in the case of ***King-Emperor vs Sadashiv Narayan Bhalerao***, would be rendered *ultra vires* the provisions of Article 19(1)(a) of the Constitution of India and, therefore, would be unconstitutional. The Supreme Court, therefore, applied the doctrine of "*reading into*" and held that it is only when the words, written or spoken, etc., which have the pernicious tendency or intention of creating public disorder or disturbance of law and order, that the law steps in to prevent such activities in the interest of public order. The Supreme Court, thus, concluded that Section 124A, so construed, shall strike the correct balance between individual fundamental right and the interest of public order. That being so, the provisions of impugned Section 124A as well as 505 (2) would fall within reasonable restrictions on the fundamental right of speech and expression and, therefore, would render the provision constitutional.

13. The discussion made by Hon'ble the Supreme Court in paragraph Nos. 25 to 29 of the judgment is noteworthy and is reproduced hereunder:-

> "25. It has not been contended before us that if a speech or a writing excites people to violence or have the tendency to create public disorder, it would not come within the

definition of 'sedition'. What has been contended is that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But, in our opinion, such words written or spoken would be outside the scope of the section. In this connection, it is pertinent to observe that the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the sine quo non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder. The Court, has, therefore, the duty cast upon it of drawing a clear line of demarcation between the ambit of a citizen's fundamental right guaranteed under Art. 19(1)(a) of the Constitution and the power of the legislature to impose reasonable restrictions on that guaranteed right in the interest of, inter alia, security of the State and public order. We have, therefore, to determine how far the ss. 124A and 505 of the Indian Penal Code could be said to be within the justifiable limits of legislation. If it is held, in consonance with the views expressed by the Federal Court in the case of Niharendu Dutt majumdar v. The King Emperor(1) that the gist of the offence of 'sedition' is incitement to violence or the tendency or the intention to create public disorder by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State in other words bringing the law into line with the law of sedition in England, as was the intention of the legislators when they introduced s. 124A into the Indian Penal Code in 1870 as aforesaid, the law will be within the permissible limits laid down in cl. (2) of Art. 19 of the Constitution, if on the other hand we give a literal meaning to the words of the section, divorced from all the antecedent background in which the law of sedition has grown, as laid down in the several decisions of the Judicial Committee of the Privy Council, it will be true to say that the section is not only within but also very much beyond the limits laid down in cl. (2) aforesaid.

26. In view of the conflicting decisions of the Federal Court and of the Privy Council, referred to above, we have to determine whether and how far the provisions of ss. 124A and 505 of the Indian Penal Code have to be struck down as unconstitutional. If we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression. There can be no doubt that apart from the provisions of (2) of Art. 19, ss. 124A and 505 are clearly violative of Art. 19(1)(a) of the Constitution. But then we have to see how far the saving clause, namely, cl.(2) of Art. 19 protects the sections aforesaid. Now, as already pointed out, in terms of the amended cl. (2), quoted above, the expression "in the interest of...public order" are words of great amplitude and are much more comprehensive than the expression "for the maintenance of", as observed by this Court in the case of Virendra v. The State of Punjab 1958 SCR 308 at p.317: (S) AIR 1957 SC 895 at p.899). Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Art. 19(1)(a) read with cl. (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress (vide (1)). The Bengal Immunity Company Limited v. The State of Bihar 1955-2SCR 603: (S) AIR 1955 SC 661 and

(2) R.M.D. Chamarbaugwalla v. The Union of India, 1957 SCR 930: (S) AIR 1957 SC 628). Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence.

27. We may also consider the legal position, as it should emerge, assuming that the main s. 124A is capable of being construed in the literal sense in which the Judicial Committee of the Privy Council has construed it in the cases referred to above. On that assumption, it is not open to this Court to construe the section is such a way as to avoid the alleged unconstitutionality by limiting the application of the section in the way in which the Federal Court intended to apply it ? In our opinion, there are decisions of this Court which amply justify our taking that view of the legal position. This Court, in the case of R.M.D. Chamarbaugwalla v. The Union of India has examined in detail the several decisions of this Court, as also of the Courts in America and Australia. After examining those decisions, this Court came to the conclusion that if the impugned provisions of a law come within the constitutional powers of the legislature by adopting one view of the words of the impugned section or Act, the Court will take that view of the matter and limit its application accordingly, in preference to the view which would make it unconstitutional on another view of the interpretation of the words in question. In that case, the Court had to choose between a definition of the expression 'Prize Competitions" as limited to those competitions which were of a gambling character and those which were not. The Court chose the former interpretation which made the rest of the provisions of the Act, Prize Competitions Act (XLII of 1955), with particular reference to ss. 4 and 5 of the Act and Rules 11 and 12 framed thereunder, valid. The Court held that the penalty attached only to those competitions which involved the element of gambling and those competitions in which success depended to a substantial degree on skill were held to be out of the purview of the Act. The ratio decidendi in that case, in our opinion, applied to the case in hand in so far as we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace.

28. We do not think it necessary to discuss or to refer in detail to the authorities cited and discussed in the reported case R.M.D. Chamarbaugwalla v. The Union of India (1) at pages 940 to 952. We may add that the provisions of the impugned sections, impose restrictions on the fundamental freedom of speech and expression, but those restrictions cannot but be said to be in the interest of public order and within the ambit of permissible legislative interference with that fundamental right.

> 29. It is only necessary to add a few observations with respect to the constitutionality of s. 505 of the Indian Penal Code. With reference to each of the three clauses of the section, it will be found that the gravamen of the offence is making, publishing or circulating any statement, rumour or report (a) with intent to cause or which is likely to cause any member of the Army, Navy or Air Force to mutiny or otherwise disregard or fail in his duty as such; or (b) to cause fear or alarm to the public or a section of the public which may induce the commission of an offence against the State or against public tranquility; or (c) to incite or which is likely to incite one class or community of persons to commit an offence against any other class or community. It is manifest that each one of the constituent elements of the offence under s. 505 has reference to, and a direct effect on, the security of the State or public order. Hence, these provisions would not exceed the bounds of reasonable restrictions on the right of freedom of speech and expression. It is clear, therefore, that cl. (2) of Art. 19 clearly save the section from the vice of unconstitutionality."

14. In the judgment (supra), which is a Constitution Bench judgment, the constitutional position of Section 124A and 505 IPC has been clearly stated. Section 124A or Section 505, if construed, literally by subjecting it to textual interpretation, would definitely render the provisions violative of Article 19(1)(a) of the Constitution. There is a presumption of constitutionality of a statute and in case its *vires* is challenged, it shall always be the endeavour of the Court to save its constitutionality through interpretive process. It is well settled that in interpreting an enactment, the Court should have regard not merely to the literal meaning of the words used but must take into consideration history of the legislation, its purpose and the mischief it seeks to suppress.

15. It is in the backdrop of aforesaid settled legal position, Hon'ble the Supreme Court construed the provisions of Section 124A and 505 of IPC to limit their application to acts involving intention or tendency

to create disorder, or disturbance of law and order or incitement to violence and, thus, saved the provisions from coming into conflict with Article 19(1)(a) of the Constitution.

16. On similar grounds Hon'ble the Supreme Court in case of **Balwant Singh and another v. State of Punjab, (1995) 3 SCC 214**, in paragraph Nos. 8 & 9 held thus:-

> "8. Section 124A IPC reads thus:
>
> "124A. Sedition - whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fate may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.
>
> Explanation 1 - The expression "disaffection" includes disloyalty and all feelings of enmity.
>
> Explanation 2 - Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by Lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.
>
> Explanation 3 - Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence tinder this Section."
>
> A plain reading of the above Section would show that its application would be attracted only when the accused brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India, by words either written or spoken or visible signs or representations etc.

Keeping in view the prosecution evidence that the slogans as noticed above were raised a couple of times only by the appellant and that neither the slogans evoked a response from any other person of the Sikh community or reaction from people of other communities, we find it difficult to hold that upon the raising of such casual slogans, a couple of times without any other act whatsoever the charge of sedition can be founded. It is not the prosecution case that the appellants were either leading a procession or were otherwise raising the slogans with the intention to incite people to create disorder or that the slogans in fact created any law and order problem. It does not appear to us that the police should have attached much significance to the casual slogans raised by two appellants, a couple of times and read to much into them. The prosecution has admitted that no disturbance, whatsoever, was caused by the raising of the slogans by the appellants and that inspite of the fact that the appellants raised the slogans a couple of times, the people, in general, were un-affected and carried on with their normal activities. The casual raising of the Slogans, once or twice by two individuals alone cannot be said to be aimed at exciting or attempt to excite hatred or disaffection towards the Government as established by law in India, Section 124A IPC, would in the facts and circumstances of the case have no application whatsoever and would not be attracted to the facts and circumstances of the case.

9. In so far as the offence under Section 153A IPC is concerned, it provides for punishment for promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever or brings about disharmony or feeling of hatred or ill-will between different religious, racial, language or regional groups or castes or communities. In our opinion only where the written or spoken words have the tendency or intention of creating public disorder or disturbance of law and order or effect public tranquility, that the law needs to step in to prevent such an activity. The facts and circumstances of this case unmistakably show that there was no disturbance or

> semblance of disturbance of law and order or of public order or peace and tranquility in the area from where the appellants were apprehended while raising slogans on account of the activities of the appellants. The intention to cause disorder or incite people to violence is the sine qua non of the offence under Section 153 A IPC and the prosecution has to prove the existence of mens rea in order to succeed. In this case, the prosecution has not been able to establish any mens rea on the part of the appellants, as envisaged by the provisions of Section 153A IPC, by their raising causally the three slogans a couple of times. The offence under Section 153A IPC is, therefore, not made out."

17. It is, thus, evident that for construing the provisions of Section 153A also, the Supreme Court followed the principle of interpretation, which provides that if two constructions of a statute are possible, one that promotes the constitutional objective ought to be preferred over the other that does not do so.

18. Section 153A IPC was construed and interpreted to cover the words spoken or written, which promote enmity between different groups or on the ground of religion, race, place of birth, residents etc provided such words written or spoken have the tendency or intention of creating disorder or disturbance of public peace by resort to violence.

19. Section 153B, if construed, literally going by the bare text it has used, may be *ultra vires* the Constitution and violate the fundamental right of freedom to speech and expression guaranteed by Article 19(1)(a) of the Constitution but the same when read into to mean that the provision of Section would apply only, if the words written or

spoken have the tendency or intention of creating disorder or disturbance or incitement to offence would fall within the purview of reasonable restriction on the right to freedom of speech and expression in terms of Clause (1)(a) of Article 19 of the Constitution of India.

20. In the backdrop of legal position adumbrated above, the conversation between the petitioner and one Nissar Ahmed Khan contained in the audio clip, based on which an FIR has been registered by the Police of Police Station, Kargil, would not constitute any of the offences alleged against the petitioner. It is not the case of the respondents that the conversation, which went viral on the social media, had the tendency or intention of creating any public disorder or incitement to an offence.

21. Undoubtedly, in the conversation the petitioner has demeaned the Indian Forces and eulogized the armed forces of China in the context of recent Galwan valley conflict between the two nations. It is equally true that the conversation contained in the audio clip, which was circulated on the social media by the co-accused Nissar Ahmed Khan, does bring into contempt the Government established by law in India, but unless the conversation has the tendency or intention of creating public disorder or disturbance of public peace by incitement to an offence, the same would not be sedition to attract the applicability of Section 124A or for that matter Section 153A or 153B IPC. There is even no material to demonstrate any criminal conspiracy between the petitioner and Nissar Ahmed Khan to commit sedition or

other offences or prior concert or meeting of minds to commit the offences with which both have been charged by the police.

22. The conversation contained in the audio clip, if examined in its entirety, does not make out a case of sedition or the offences under Section 153A, 153B, 505 read with Section 120-B IPC and would be saved by the fundamental guarantee to free speech and expression assured to the citizens of this Country by Article 19(1)(a) of the Constitution of India.

23. To conclude, it may be stated that for an act to be called seditious in terms of Section 124A of the Indian Penal Code, it should have following contents:-

i) Any word, which can be either written or spoken or signs which include placard/poster (visible representation).

ii) Must bring or attempt to bring hatred/contempt/ disaffection against the Indian State.

iii) Must result in eminent violence or public disorder.

24. Viewed, thus, the conversation contained in the audio clip, though unsavory and detestable, would not amount either to 'sedition' as defined in Section 124A IPC or could be construed to fall under Section 153A, 153B, 505(2) and 120B IPC. This Court, therefore, is in agreement with the learned counsel for the petitioner that the offences, with which the petitioner has been charged, are not made out

and the registration of the FIR and the consequent investigation undertaken by the police, which has culminated into presentation of challan before the Chief Judicial Magistrate, is sheer abuse of the process of law and therefore, all proceedings deserve to be quashed.

(2) Whether FIR can be registered, investigation undertaken and challan presented for commission of offences under Section 124A, 153A, 153B, 505(2) and 120-B IPC by the police without prior sanction of the competent authority as envisaged in Section 196 of the Code of Criminal Procedure?

25. It is contended by the learned counsel for the petitioner that in terms of Section 196 Cr. P. C., no Court can take cognizance of any offence punishable under Chapter-VI or under Section 153A, 153B or Section 505(2) IPC including the offence of criminal conspiracy to commit such offences except with previous sanction of the Central Government or of the State Government or of the District Magistrate. He contends that in the instant case, the charged offence i.e. Section 124A is an offence punishable under Chapter VI of the IPC and, therefore, all the offences with which the petitioner is charged have reference to Section 196 IPC and, therefore, the police was not competent to register an FIR and investigate the matter. He argues that not only the police has registered the FIR and investigated the matter in this case without prior sanction of the competent authority but has submitted Final Police Report in terms of Section 173 Cr.P.C. before the Chief Judicial Magistrate, Kargil. He further argues that unfortunate part is that even CJM has taken the cognizance of the police report without insisting for compliance of Section 196 Cr.P.C.

26. With a view to better appreciate the rival contentions, it would be appropriate to set out the provisions of Section 196 of the Code of Criminal Procedure:-

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

years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings: Provided that where the criminal conspiracy is one to which the provisions of section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction [2] under sub- section (1) or sub- section (1A) and the District Magistrate may, before according sanction under sub- section (1A) and the State Government or the District Magistrate may, before giving consent under sub- section (2), order a preliminary investigation by a police officer not being below the 1 Subs. Act. 45 of 978, s. 16, for" a cognizable offence" (w. e. f. 18- 12- 1978) 2 subs. and ins by act 63 of 1980 s. 3 (w. e. f. 23- 9- 1980) rank of Inspector, in which case such police officer shall have the powers referred to in sub- section (3) of section 155"

27. From a perusal of Sub-Section (1) of Section 196, it transpires that the offences punishable under Section 124A and Section 153A of the IPC cannot be taken cognizance of by the Court except with previous sanction of the Central Government or of the State Government. Similarly, as provided in Sub-Section (1A) of Section 196, the Court cannot take cognizance of offence punishable under Section 153B or 505(2) of IPC except with previous sanction of the Central Government or of the State Government or of the District Magistrate.

28. It is, thus, evident that the bar created by the provisions of Section 196 Cr. P. C. is against taking of cognizance by the Court and there is, thus, no bar against registration of FIR or investigation by the police, if information received by the police discloses commission of cognizable offence. In the instant case all the offences, with which the petitioner has been charged, are cognizable. Cognizable is an offence where the police may arrest without warrant [Section 2(c) of Cr. P. C.]

29. Section 154 of the Code of Criminal Procedure mandates that every information relating to commission of cognizable offence, if given orally to an officer incharge of the Police Station, shall be reduced in writing and be read over to the informant. Copy of such information recorded under Section 154 shall be given to the informant free of cost.

30. From a reading of Section 154 Cr. P. C. with Section 2(c) of the Cr. P. C., it is evident that police is under an obligation to register an FIR, if it receives information oral or in writing with regard to the commission of cognizable offence(s)(See **Lalita Kumari** vs. **Govt. of UP, (2014) 2 SCC 1**). The provisions of Section 154 Cr. P. C. are not controlled by Section 196 of the Code. As stated above, Section 196 Cr. P. C. comes into operation only at the time when the Court is to take cognizance of the offence and proceed in the matter in a particular way prescribed under law.

31. What is meaning of expression "taking of cognizance" and the true import of Section 196 Cr. P. C. has been elaborately discussed by the Supreme Court in the case of State of **Karnataka and another v.**

Pastor P. Raju (2006) 6 SCC 728. After discussing plethora of case law, the Supreme Court in paragraph No.13 has concluded thus:-

> "It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the Court decides to proceed against the offenders against whom a prima facie case is made out."

32. With regard to the power of police to register FIR in the face of provisions of Section 196 Cr. P. C, Hon'ble the Supreme Court in paragraph No.8 has held thus:-

> "A plain reading of this provision will show that no Court can take cognizance of an offence punishable under Section 153-B or sub- section (2) or sub-section (3) of Section 505 of Indian Penal Code or a criminal conspiracy to commit such offence except with the previous sanction of the Central Government or of the State Government or of the District Magistrate. The opening words of the Section are "No Court shall take cognizance" and consequently the bar created by the provision is against taking of cognizance by the Court. There is no bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of

> investigation, as contemplated by Section 173 Cr. P. C. If a criminal case is registered, investigation of the offence is done and the police submits a report as a result of such investigation before a Magistrate without the previous sanction of the Central Government or of the State Government or of the District Magistrate, there will be no violation of Section 196(1-A) Cr. P. C. and no illegality of any kind would be committed."

33. It is, thus, well settled and beyond any pale of doubt that the provisions of Section 154 Cr.P.C. are not controlled by the provisions of Section 196 and both operate at different points of time and at different stages of a criminal case. It is, thus, axiomatic that if the police receives an information, oral or in writing, with regard to the commission of a cognizable offence, even if it is an offence referable to Section 196 Cr.P.C., it is under an obligation to reduce that information in writing and register a formal FIR. Once it is conceded that the police has the power to register an FIR even with regard to cognizable offences referable to Section 196 Cr.P.C., the power to investigate the offence has to be necessarily conceded in favour of the police. The police can even go to the extent of presenting challan/final report before the Court but the Court shall not take cognizance thereof unless there is previous sanction by the Central Government or State Government of District Magistrate, as the case may be.

34. In the instant case, indisputably, previous sanction of the Central Government or State Government is not obtained for launching prosecution against the petitioner. The police have

registered the FIR and investigated the matter on the asking of the District Magistrate and have, on investigation, submitted the final report before the Court of Chief Judicial Magistrate, Kargil.

35. From the interlocutory orders passed by the Chief Judicial Magistrate, Kargil from time to time, it clearly transpires that the learned CJM has not taken cognizance of the challan and has held the same incomplete without previous sanction of the competent authority. Ordinarily, the way in which the CJM has proceeded in the matter cannot be found fault with, yet ideally learned CJM should have returned the challan to the police for its presentation after seeking previous sanction of the competent authority.

36. I am not in agreement with the learned counsel for the petitioner that the proceedings in the instant case before the Court could have been launched only by the District Magistrate that too by filing a formal complaint. The plain reading of Section 196 Cr.P.C. does not suggest any such course of action. As already held herein above, the offences charged against the petitioner are not made out and, therefore, registration of FIR, investigation and its culmination into presentation of challan is only abuse of the process of law. However, with a view to set the record straight and to clarify the legal position for the benefit of learned Magistrates, I have ventured to discuss the provisions of Section 196 of the Code of Criminal Procedure and their impact on Section 154 Cr.P.C.

37. Since the issue was debated before me vehemently by the learned counsel appearing for the parties, as such, I have ventured to sum up the legal position.

(3). Conclusion:-

i) That for making out an offence under Section 124A, 153A, 153B and 505(2) IPC, it is necessary to demonstrate that the words written or spoken or signs or visible representation have the tendency or intention of creating public disorder or disturbance of public peace by incitement to offence. (Kedar Nath Singh v. State of Bihar);

ii) That the provisions of Section 196 Cr.P.C. do not, in any manner, control Section 154 of the Code of Criminal Procedure, in that, the police is competent to register an FIR, if information received by it discloses commission of cognizable offence, even if it is referable to Section 196 Cr. P. C;

iii) The police, who are competent to register FIR under Section 154 Cr. P. C., are equally competent to investigate the same and present the final report before the Court.

iv) Section 196 Cr. P. C. would come in operation at the stage of taking of cognizance by the Court and the Court will refuse to take cognizance of the offence(s) referable

to Section 196 Cr. P. C., if there is no previous sanction by the Central Government or State Government or District Magistrate, as the case may be.

v) That in case, challan with regard to the offence(s) having reference to Section 196 Cr. P. C. is presented before the Judicial Magistrate without obtaining prior sanction from the competent authority, the Court shall not take its cognizance but return the same to be presented only after seeking previous or prior sanction of the competent authority.

vi) That the Court shall be deemed to have taken cognizance only if it applies its mind to the Final Police Report submitted before it in terms of Section 173 Cr. P. C. with a view to proceed further in the manner provided in law.

vii) That the Magistrate, who finds the police report not in consonance with Section 196 Cr. P. C. shall not retain the challan and proceed in the matter rather it would return the same to the prosecution.

38. In view of the above, I find substance in the petition that the offences charged against the petitioner are not made out and, therefore, the registration of FIR, which has culminated into filing of the Final Police Report without previous sanction from the competent authority before the Chief Judicial Magistrate, Kargil is sheer abuse of the process of law. This Court, therefore, finds it a fit case to invoke

its inherent powers vested by Section 482 Cr. P. C and quash all the criminal proceedings pending against the petitioner including the impugned FIR with regard to the audio clip, which allegedly contains conversation between the petitioner and one Nissar Ahmed Khan. Ordered accordingly.

(Sanjeev Kumar)
Judge

SRINAGAR
11.02.2021
Anil Raina, Addl. Registrar/Secy

Whether the order is speaking: Yes/No.
Whether the order is reportable: Yes/No.