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IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 05TH DAY OF MAY, 2020

BEFORE

THE HON'BLE MR.JUSTICE SURAJ GOVINDARAJ

CRIMINAL PETITION NO.101784 OF 2019

Between:

1. Vishwanath @ Vishu Phaniraj Gopi Bhat,
A/a 46 years, Occ: Priest,
R/o.: Near Mahabaleshwar Temple,
Gokarna, Tq.: Kumta, Uttara Kannada.

2. Phaniraj Saka Ram Gopi Bhat,
A/a 81 years, Priest,
R/o.: Smashankali Road, Gokarna,
Tq.: Kumta, Uttara Kannada.

… Petitioners

(By Shri A.P. Hegde, Advocate)

And:

1. The State of Karnataka,
Through Gokarna Police Station,
Rep. by SPP, High Court of Karnataka,
Bench Dharwad.

2. G.K. Hegde S/o.Krishnayya Hegde,
Age 73 years, R/o.: Rathabeedi,
Gokarna, Tq.: Kumta,
Dist.: Uttara Kannada, Pin-581 332.

… Respondents

(By Smt. K.Vidyavathi, AAG

for Smt. Seema Shiva Naik, HCGP;
Shri S.M. Chandrashekar, Senior Counsel
for Shri Prashant F. Goudar
& Shri Akshay Katti, Advocates for R2)

This criminal petition is filed under Section 482 of Cr.P.C. seeking to quash the order dated 28.11.2014 so passed by Addl. Civil Judge and JMFC Court, Kumta in C.C.No.686/2011, dismissing the application for discharge for the offences under Sections 120-B, 153-A, 295-A, 298, 500, 511 read with Section 149 of IPC, Section 67 of I.T. Act, 2000 and additional charges under Sections 292, 419, 469 read with Section 34 of IPC and Sections 4 and 6 of Indecent Representation of Women Prohibition Act, 1986, moved by accused under Section 239 of Cr.P.C. and order dated 04.04.2019 so passed by Prl. District and Sessions Judge, Uttara Kannada, Karwar, dismissing the Criminal Revision Petition No.4/2015 and consequently discharge the petitioners from C.C.No.686/2011 pending on the file of the Addl. Civil Judge and JMFC Court, Kumta.

This petition being heard and reserved for orders on 27.02.2020, this day, the court through video conference made the following:

ORDER

1. The petitioners are before this Court seeking for quashing of the order dated 28.11.2014 passed by the Additional Civil Judge and JMFC Court, Kumta in C.C.No.686/2011, dismissing the

application under Section 239 of Cr.P.C. filed by the petitioners seeking for discharge in the said matter wherein they were initially charged with offences under Sections 120-B, 153-A, 295-A, 298, 500, 511 read with Section 149 of IPC, section 67 of I.T. Act and subsequently charged with offences under Sections 292, 419, 469 read with Section 34 of IPC and Section 4 read with Section 6 of Indecent Representation of Woman Prohibition Act, which on revision has also been dismissed by the District and Sessions Judge, Uttara Kannada by way of his order dated 04.04.2019 in Crl.R.P.No.4/2015.

2. One Mr.Ganapati had filed a complaint, which was registered by Gokarna P.S. Crime No.27/2010, upon investigation the Investigating Officer of Kumata P.S. had presented a charge sheet on 25.07.2011. Thereafter, the

investigation was continued and an additional charge sheet was filed on 28.07.2012 for the aforesaid offences.

3. Accused Nos.1 to 12, who stood trial before JMFC Court had filed an application under Section 239 of Cr.P.C. seeking for discharge in the said proceedings. The application was opposed by the prosecution. The JMFC after hearing both parties by order dated 28.11.2014 dismissed the application filed by the accused.

4. Accused Nos.4 to 7 and 9 to 11 had approached the District and Sessions Judge, who had also dismissed the revision petition on 04.04.2019.

5. The present petition has been filed by accused Nos.4 and 11, the petitioners herein challenging the said order of the District and Sessions Judge.

6. The petitioners claim to be Vedic Scholars, Priests and Upadhivanthas of Shree Mahabaleshwar Temple Gokarna. In the year 2008, the Government of Karnataka handed over management of Shree Mahabaleshwar Temple, Gokarna to Shree Ramachandrapur Mutt of Hosanagar. This was opposed by the petitioners as also some of the general public. Thus, on account of the same, there was a strained relationship between the petitioners and Shri Ramachandrapur Mutt. The Petitioners has brought legal action against Ramachandrapur Mutt challenging the handling over the temple. The petitioners allege that in order to subdue and deter the petitioners and all other Uadhivanthas, a criminal action was designed by Mutt in the month of April 2020 and the administrator of the temple by name G.K. Hegde

had filed a false and created complaint on 01.04.2010 against 12 persons including the petitioners, alleging that they were distributing handbills and Compact Disk (C.D.) to the public in Ratha Beedi of Gokarna, which contained derogatory materials against the Mutt and pontiffs in order to defame the pontiffs and to create a breach of peace and harm to the religious feelings amongst the devotees of Mutt. Based on which, the Gokarna P.S. registered FIR against the accused alleging the commission of offences.

7. The prosecution filed a charge sheet against 12 persons before the JMFC Court, Kumta in C.C.No.686/2011 on 27.05.2011, alleging the commission of offences under Sections 120-B, 153-A, 295-A, 298, 500 and 511 read with Section 149 of IPC and Sections 67 of I.T. Act,

2000. The prosecution once again on 28.07.2012 filed an additional charge sheet against the accused alleging the commission of offences under Sections 292, 419 and 469 read with Section 34 of IPC, Section 4 read with Section 6 of Indecent Representation of Women Prohibition Act, 1986.

8. The accused filed an application for discharge under Section 239 of Cr.P.C. before, JMFC, Court, Kumta, which came to be dismissed by way of his order dated 28.11.2014. The petitioners preferred Criminal Revision Petition under Section 397 of Cr.P.C. before the Principal District and Sessions Court, Uttara Kannada at Karwar, which also came to be dismissed on 04.04.2019. Hence, the petitioners are before this Court seeking for interference there with.

9. Shri A.P. Hegde, learned counsel for the petitioners would contend that the application for discharge under Section 239 of Cr.P.C. filed by the accused more particularly the petitioners herein who are accused Nos.4 and 11 ought to have been allowed by JMFC Court and further that the Principal District and Sessions Court, Uttara Kannada at Karwar ought to have reversed the finding of the JMFC Court by allowing their application. In this regard, he relies upon the following contentions:

9.1. That the offences which have been complained of against the petitioners and other accused require prior sanction of the government before the investigation was taken up against the accused. In the absence of such prior sanction in terms of

Section 190 of Cr.P.C., any investigation proceeded with.

9.2. That the cognizance taken by the JMFC Court is also without any basis. In that, the charge sheet which had been filed before the JMFC Court was without prior sanction. Therefore, the charge sheet could not have been considered and cognizance could not have been taken by the JMFC Court.

9.3. One of the offences complained of against the accused is defamation. By relying on Section 499 of IPC, he would contend that for the offence of defamation, a person aggrieved is to lodge a complaint. The administrator of the temple is not a person aggrieved; he could not have to filed the complaint for defamation of the Mutt

and/or the pontiff of the mutt and as such, the complaint insofar as the offence under Section 500 of IPC could not have been taken cognizance of.

9.4. In terms of Section 153-A of IPC, any an offence can be said to have been committed only if it resulted in promoting enmity between two different groups on grounds of religion, race, place of birth, residence, language etc.,. Section 153-A does not cover within its ambit an alleged offence of promoting enmity within the same religious group or sect.

9.5. The provision of Section 67 of I.T. Act is also not attracted since there is no public dissemination of any matter over the internet or by way of social media like

WhatsApp, Facebook etc., There being no dissemination, no offence can be said to have been committed in terms of Section 67 of I.T. Act.

9.6. The petitioners and other accused were not aware of so-called sanction dated 12.01.2011 and they came to know about the same only after filing of the charge sheet. He further submits that even this sanction has been revoked on 07.10.2015 by the Cabinet, in furtherance thereof, a Government order has been passed on 04.11.2015 requesting Public Prosecutor to withdraw the proceedings in terms of Section 321 of Cr.P.C. He submits that in view of the Government order dated 04.11.2015 directing the Public Prosecutor to withdraw the proceedings under Section

321 of Cr.P.C. it is deemed that sanction dated 12.01.2011 has been withdrawn and there being no sanction, further proceedings in the matter ought not to have continued and as a natural consequence thereof the application for discharge filed by the accused ought to have been allowed by JMFC Court and/or by the District Court.

10. Shri A P Hegde relies on the following judgments:

10.1. **Ganesh Anand Chela vs. Swami Divyanand reported in 1980 Cri LJ 1036 :**

11. In the Facts and circumstances of the present case, **the complainant has not been able to prove that the above imputations are against him personally or that he is the person aimed at.** It

can, therefore, be held that he is not an aggrieved person within the ambit of Section 199(1) of the Code which reads as follows:

"199. Prosecution for defamation.—(1) No Court shall take cognizance of an offence punishable under Chapter XXI of the Penal Code, 1860 except upon a complaint made by some person aggrieved by the offence:

Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf."

The learned trial Court, in my view, was wrong in holding that the law laid in Dhirendra Nath Sen's case (supra) was not applicable to the facts of the present case. The defamatory allegations, even according to the learned trial Court, are that Swami Purnanand Ji Maharaj, who was a spiritual head of the Ashram, was leading an immoral life. The said Swami Purnanand Ji Maharaj, according to the complainant's own showing, owns property, namely, four Ashrams—one at Delhi and the others at Haridwar and Ahmedabad. It is no where stated that he has renounced the world.

There is no explanation as to why the Guru or the lady with whom he is alleged to have illicit relations, cannot file the complaint. **The maximum that one can say about the complainant is that he has a grievance about his Guru being defamed. But that grievance, which the other members of the Ashram must also be sharing, cannot make him the aggrieved person within the meaning of sub-section (1) of Section 199 of the Code.**

…. Emphasis Supplied

10.2. **Vali Siddappa and Others vs. State of Karnataka reported in ILR 1998 KAR 1796**

8. In the afore-quoted sanction order of the Government **a direction has been given to the Police Inspector to hold a preliminary investigation into the alleged offence against the petitioners, when curiously at the same time it is stated therein, that the requisite sanction for prosecution under Section 191(2) Cr.P.C. was also granted.** So, it is manifest from the operative portion of the afore-quoted order that the concerned authority has failed to apply his mind to the relevant material submitted by the I.O. in deciding whether or not it was a fit case to accord the sanction for prosecution of the accused for the offence under Section 295-A IPC inasmuch as the order states on the

one hand that the said sanction was accorded and on the other it directs the I.O. to investigate the case under Section 196(3) of Cr. P.C. **It is self-contradictory order** for the reason that when there is a direction to the I.O. under Section 196(3) Cr. P.C. to make preliminary investigation into the case against an accused then, **there cannot be any question of simultaneously according sanction by the competent authority to prosecute him for the said offence since that stage before the authority arises only on completion of investigation by the I.O. and on availability of whole of the relevant material collected by him during investigation**. Therefore, the said sanction order dated 24.7.1994 stands vitiated by patent illegality by reason of non-application of mind by the competent authority, and the same is not sustainable in law. As such, the criminal prosecution launched by the I.O. against the accused on the basis of such a void sanction order cannot be held as a legally sustainable criminal prosecution in law. Therefore, the petitions are entitled to succeed and the prosecution against the accused in C.C. 554/94 is liable to be quashed.

…. Emphasis Supplied

10.3. **Sri. A Alam Pasha vs. Sri Ravishankar in Criminal Petition No.3632 of 2018 decided on 29.05.2019 by this Court:**

10. The Supreme Court, while referring to decision in ***'MANHARIBHAI MULJIBHAI KAKADIA Vs. SHAILESHBHAI MOHANBHAI PATEL (2012) 10 SCC 517,*** *has held that the word 'cognizance' occurring in various sections of the Code is a word of wide import. In the aforesaid decision, the Supreme Court has taken note of a three judge Bench decision of the Supreme Court in* ***'STATE OF U.P. Vs. PARAS NATH SINGH' (2009) 6 SCC 372****, and has held that a Court is precluded from entertaining a complaint or taking note of it or exercising jurisdiction, if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty. The Supreme Court has also referred to decision in* ***'STATE OF W.B. Vs. MOHD. KHALID' (1995) 1 SCC 684*** *and has held that before* taking cognizance, the Magistrate has to apply his judicial mind to the facts mentioned in the complaint or to a police report. After placing reliance on the decisions of the Supreme Court in ***PARAS NATH SINGH, supra and 'SUBRAMANIAN SWAMY Vs. MANMOHAN SINGH' (2012) 3 SCC 64,*** in paragraph 16 of the decision in the case of **L. NARAYANA SWAMY** supra, the Supreme Court has held that **an order directing further investigation under Section 156(3) cannot be passed in the absence of a valid sanction.**

…. Emphasis Supplied

10.4. **L. Narayana Swamy vs. State of Karnataka & others in Criminal Appeal No.721 of 2016 decided on 06.09.2016 by Supreme Court of India.**

"13. The expression "cognizance" which appears in Section 197 Cr.P.C. came up for consideration before a three-Judge Bench of this Court in State of U.P. v. Paras Nath Singh [(2009) 6 SCC 372 : (2009) 2 SCC (L&S) 200] and this Court expressed the following view: (SCC p. 375, para 6)

'6. … "10. … And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police officer, or upon his knowledge that such offence has been committed. So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the

expression, **"no court shall take cognizance of such offence except with the previous sanction".** Use of the words "no" and "shall" makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. According to Black's Law Dictionary the word "cognizance" means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance, it means taking notice of. **A court, therefore, is precluded from entertaining a compiaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty."** [Ed.: As observed in State of H.P. v. M.P. Gupta, (2004) 2 SCC 349, 358, para 10 : 2004 SCC (Cri) 539] .'

…. Emphasis Supplied

11. Shri S.M. Chandrashekar, learned Senior counsel instructed by Shri Prashant F.Goudar and Shri Akshay Katti, counsel appearing for respondent No.2 submited as follows:

11.1. Sanction has been granted for prosecution of the petitioners and other accused on 12.05.2011. The said sanction was prior to filing of the charge sheet and taking cognizance by the JMFC in terms of Section 196(1) of Cr.P.C. the only obligation for the Court is not to take cognizance without sanction, there is no requirement under any provisions of Cr.P.C. for sanction to be obtained prior to the investigation being taken up. Hence, the Investigating Officer can investigate any complaint without prior sanction. It is only after the investigation is completed and if there are any offences as regards, which the prosecution is to be initiated then the sanction is required and prosecution initiated by filing a charge

sheet on which basis the Magistrate could take cognizance. Thus, he submits that carrying out of investigation is not barred in the present case. The sanction was granted on 12.05.2011 and charge sheet was filed on 27.05.2011. Therefore, filing of the charge sheet having been sanctioned. There is no violation of Section 196 of Cr.P.C.

11.2. As regards the contention with reference to offence under Section 500 of IPC, that the complainant-administrator could not have filed the complaint. Shri S.M. Chandrashekar, learned Senior Counsel submits that the defamation has occurred for the entire sect and to the members of Sect, who follow the said Mutt. The complainant being the administrator of the

temple and being a prominent member of the Mutt has filed the complaint alleging defamation against the Mutt and pontiff. Defamation being of the mutt and not only of the pontiff, the administrator is an aggrieved party and is thus entitled to file the said complaint, the same cannot be faulted with by the petitioners-accused.

11.3. As regards the contention that for the offence under Section 153-A of IPC, there are two different religious groups required. Shri S.M. Chandrashekar, learned Senior Counsel submits that the provisions of Section 153-A of IPC is vide enough to cover any person promoting enmity or carrying out acts prejudicial to the harmony within the community as also public tranquillity. In this regard, he

submits that the action on the part of the accused are aimed at promoting enmity between the followers of Mutt as also to disturb public tranquillity in the area. Therefore, at this stage, it cannot be said that Section 153-A of IPC is not attracted and the matter requires trial.

11.4. As regards the contention that there is no dissemination of any video or photograph using internet or social media like WhatsApp, Facebook etc., he submits that the video has been recorded on a C.D. which comes within the purview of I.T. Act and the distribution of C.D. would also be covered by Section 67 of I.T. Act.

11.5. As regards the last contention of Shri A.P. Hegde, that the sanction is deemed to have

been revoked by the Government vide order dated 04.11.2015, he would submit that no such revocation is possible. He submits that the said letter does not indicate any revocation. It is only a request to the Public Prosecutor to withdraw the proceedings in terms of Section 321 of Cr.P.C. The Public Prosecutor has not taken any steps in furtherance thereof.

12. Respondent No.2 relies on the following judgments:

12.1. **Central Bureau of Investigation (CBI) Etc., vs. Mrs. Pramila Virendra Kumar Agarwal & Anr. Etc., in Crl.Appeal Nos.1489-90 of 2019**

13. Further the **issue relating to validity of the sanction for prosecution could have been considered only during trial** since essentially the conclusion reached by the High Court is with regard to the defective sanction since according to the High Court, the procedure of providing opportunity for explanation was not

followed which will result in the sanction being defective. In that regard, the decision in the case of ***Dinesh Kumar* v. *Chairman, Airport Authority of India*,** (2012) 1 SCC 532 relied upon by the learned Additional Solicitor General would be relevant since it is held therein that there is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. **The absence of sanction no doubt can be agitated at the threshold but the invalidity of the sanction is to be raised during the trial.** In the instant facts, admittedly there is a sanction though the accused seek to pick holes in the manner the sanction has been granted and to claim that the same is defective which is a matter to be considered in the trial.

…. Emphasis Supplied

12.2. **Rajender Kumar Jain vs. State Through Special Police Establishment and others reported in (1980) 3 SCC 435**

14. Thus, from the precedents of this Court, we gather:

> *"1*. Under the scheme of the Code, prosecution of an offender for a serious offence is primarily the responsibility of the executive.

2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.

3. **The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else**.

4. The **Government may suggest to the Public Prosecutor** that he may withdraw from the prosecution but none can compel him to do so.

5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammary Hall enterprises.

6. **The Public Prosecutor is an officer of the court and responsible to the court.**

7. **The court performs a supervisory function in granting its consent to the withdrawal.**

> *8*. The court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. **The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.**"

15. We may add it shall be the duty of the Public Prosecutor to inform the court and **it shall be the duty of the court to apprise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution.** The court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its "Minister of Justice". Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the executive by resort to the provisions of Section 361 of the Criminal Procedure Code. **The independence of the judiciary requires that once the case has travelled to the court, the court and its officers alone must have control over the case and decide what is to be done in each case.**

27. Before bidding farewell to these cases it may be appropriate for us to say that

criminal justice is not a plaything and a criminal court is not a playground for politicking. Political fervour should not convert prosecution into persecution, nor political favour reward wrongdoer by withdrawal from prosecution. If political fortunes are allowed to be reflected in the processes of the court very soon the credibility of the rule of law will be lost. So we insist that courts when moved for permission for withdrawal from prosecution must be vigilant and inform themselves fully before granting consent. While it would be obnoxious and objectionable for a Public Prosecutor to allow himself to be ordered about, he should appraise himself from the government and thereafter appraise the court the host of factors relevant to the question of withdrawal from the cases. **But under no circumstances should he allow himself to become anyone's stooge.**

…. Emphasis Supplied

12.3. **Bairam Muralidhar vs. State of Andhra Pradesh reported in (2014) 10 SCC 380:**

18. The central question is whether the Public Prosecutor has really applied his mind to all the relevant materials on record and satisfied himself that the withdrawal from the prosecution would subserve the cause of public interest or not. Be it stated,

it is the obligation of the Public Prosecutor to state what material he has considered. It has to be set out in brief. The court as has been held in *Abdul Karim case,* is required to give an informed consent. **It is obligatory on the part of the court to satisfy itself that from the material it can reasonably be held that the withdrawal of the prosecution would serve the public interest.** It is not within the domain of the court to weigh the material. However, it is necessary on the part of the court to see whether the grant of consent would thwart or stifle the course of law or cause manifest injustice. **A court while giving consent under Section 321 of the Code is required to exercise its judicial discretion, and judicial discretion, as settled in law, is not to be exercised in a mechanical manner. The court cannot give such consent on a mere asking.** It is expected of the court to consider the material on record to see that the application had been filed in good faith and it is in the interest of public interest and justice. Another aspect the court is obliged to see is whether such withdrawal would advance the cause of justice. It requires exercise of careful and concerned discretion because certain crimes are against the State and the society as a collective demands justice to be done. That maintains the law and order situation in the society. **The Public Prosecutor cannot act like the post office on behalf of the State**

Government. He is required to act in good faith, peruse the materials on record and form an independent opinion that the withdrawal of the case would really subserve the public interest at large. An order of the Government on the Public Prosecutor in this regard is not binding. He cannot remain oblivious to his lawful obligations under the Code. He is required to constantly remember his duty to the court as well as his duty to the collective.

19. In the case at hand, as the application filed by the Public Prosecutor would show that he had mechanically stated about the conditions precedent, it cannot be construed that he has really perused the materials and applied his independent mind solely because he has so stated. The application must indicate perusal of the materials by stating what are the materials he has perused, may be in brief, and whether such withdrawal of the prosecution would serve public interest and how he has formed his independent opinion. As we perceive, the learned Public Prosecutor has been totally guided by the order of the Government and really not applied his mind to the facts of the case. The learned trial Judge as well as the High Court has observed that it is a case under the Prevention of Corruption Act. They have taken note of the fact that the State Government had already granted sanction. It is also noticeable that the Anti-

Corruption Bureau has found there was no justification of withdrawal of the prosecution.

…. Emphasis Supplied

12.4. **Abdul Karim and Others vs. State of Karnataka and others reported in (2000)8 SCC 710:**

19. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.

20. It must follow that the application under Section 321 must aver that the Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is

in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application or, in a given case, placed before the court, with its permission, in a sealed envelope. The court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the court to weigh the material. The court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the court accords consent, it must make such order on the application as will indicate to a higher court that it has done all that the law requires it to do before granting consent."

42. The satisfaction for moving an application under Section 321 Cr.P.C. has to be of the Public Prosecutor which in the nature of the case in hand has to be based on the material provided by the State. The nature of the power to be exercised by the Court while deciding application under

Section 321 is delineated by the decision of this Court in *Sheonandan Paswan* v. *State of Bihar.* This decision holds that grant of consent by the court is not a matter of course and when such an application is filed by the Public Prosecutor after taking into consideration the material before him, the court exercises its judicial discretion by considering such material and on such consideration either gives consent or declines consent. It also lays down that the court has to see that the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given.

43. True, the power of the court under Section 321 is supervisory but that does not mean that while exercising that power, the consent has to be granted on mere asking. The court has to examine that all relevant aspects have been taken into consideration by the Public Prosecutor and/or by the Government in exercise of its executive function."

…. Emphasis Supplied

12.5. **Abdul Wahab K. vs. State of Kerala and Others reported in (2018) 18 SCC 448:**

17. In the case at hand, as is evincible, the learned Chief Judicial Magistrate has dwelt upon the merits and expressed an opinion that the case is not likely to end in conviction. It is clearly manifest that the Public Prosecutor had not applied his mind but had only placed the government notification on record. The High Court has unsuited the petitioners on the ground that they are third parties who are unconnected with the case. They had filed revisions and the High Court has been conferred power to entertain the revisions and rectify the errors which are apparent or totally uncalled for. This is the power of superintendence of the High Court. Thus viewed, the petitioners could not have been treated as strangers, for they had brought it to the notice of the High Court and hence, it should have applied its mind with regard to the correctness of the order. It may be said with certitude that the revision petitions filed before the High Court were not frivolous ones. They were of serious nature. It is a case where the Public Prosecutor had acted like a post office and the learned Chief Judicial Magistrate has passed an order not within the parameters of Section 321 Cr.P.C. He should have applied the real test stipulated under Section 321 Cr.P.C. and the decisions of this Court but that has not been done.

18. We are compelled to recapitulate that there are frivolous litigations but that does not mean that there are no innocent

sufferers who eagerly wait for justice to be done. That apart, certain criminal offences destroy the social fabric. Every citizen gets involved in a way to respond to it; and that is why the power is conferred on the Public Prosecutor and the real duty is cast on him/her. **He/she has to act with responsibility. He/she is not to be totally guided by the instructions of the Government but is required to assist the Court; and the Court is duty-bound to see the precedents and pass appropriate orders.**

.... Emphasis Supplied

12.6. **V.L.S. Finance Limited vs. S.P. Gupta and Another reported in (2016) 3 SCC 736:**

37. Regard being had to the language employed in Section 321 Cr.P.C., we may refer to the Constitution Bench decision in *Sheonandan Paswan* v. *State of Bihar* wherein the Court referred to Section 333 of the old Code and after taking note of the language employed under Section 321 of the present Code, came to hold that Section 321 enables the Public Prosecutor, in charge of the case to withdraw from the prosecution of any person at any time before the judgment is pronounced, but the application for withdrawal has to get the consent of the court and if the court gives consent for such withdrawal the accused

will be discharged if no charge has been framed or acquitted if charge has been framed or where no such charge is required to be framed. It clothes the Public Prosecutor to withdraw from the prosecution of any person, accused of an offence, both when no evidence is taken or even if entire evidence has been taken. The outer limit for the exercise of this power is "at any time before the judgment is pronounced". **It has also been observed that the judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.** The Constitution Bench after referring to the authorities in *Bansi Lal* v. *Chandan Lal* , *Balwant Singh* v. *State of Bihar* , *Subhash Chander* v. *State (Chandigarh Admn.)*, *Rajender Kumar Jain* v. *State* and the principles stated in *State of Bihar* v. *Ram Naresh Pandey* came to hold thus: (*Sheonandan Paswan case* [*Sheonandan Paswan* v. *State of Bihar*, SCC pp. 358-59, paras 99-100)

> "99. All the above decisions have followed the reasoning of *Ram Naresh Pandey case* and the

principles settled in that decision were not doubted.

100. It is in the light of these decisions that the case on hand has to be considered. I find that the application for withdrawal by the Public Prosecutor has been made in good faith after careful consideration of the materials placed before him and the order of consent given by the Magistrate was also after due consideration of various details, as indicated above. It would be improper for this Court, keeping in view the scheme of Section 321, to embark upon a detailed enquiry into the facts and evidence of the case or to direct retrial for that would be destructive of the object and intent of the section."

38. In this context, a reference to a three-Judge Bench decision in *V.S. Achuthanandan* v. *R. Balakrishna Pillai* is pertinent. In the said case, the Court after referring to the principles stated by the Constitution Bench in *Sheonandan Paswan* while upholding the view of the learned Special Judge in rejecting the application filed by the Assistant Public Prosecutor under Section 321 Cr.P.C. adverted to the question as it arose therein whether it was legally permissible for the High Court and it was justified in setting aside the order of the learned Special

Judge declining to give consent for withdrawal of prosecution of the accused. The Court did not agree with the view of the High Court by holding that the High Court's order did not at all deal with the only ground on which the application was made by the Special Public Prosecutor and which was found non-existent by the learned Special Judge in his order that was challenged before the High Court in revision. The High Court embarked upon a roving inquiry in an extraneous field totally ignoring the fact that if the ground urged for withdrawal of the prosecution was non-existent and there was prima facie material, if believed, to support the prosecution then the motive for launching the prosecution by itself may be of no avail. The Court also opined that the High Court missed the true import of the scope of the matter, for it went into grounds which were not even urged by the Special Public Prosecutor in his application made under Section 321 Cr.P.C., or otherwise before the Special Judge. **Exception was taken to the fact that the High Court delved into administrative files of the State which did not form part of the record of the case and accepted anything which was suggested on behalf of the State Government overlooking the fact that for the purpose of Section 321 Cr.P.C.,** it is the opinion of the Public Prosecutor alone which is material and the ground on which he seeks permission of the court for

withdrawal of the prosecution alone has to be examined.

39. In *Rahul Agarwal* v. *Rakesh Jain*, the Court while dealing with the application under Section 321 Cr.P.C., referred to certain decisions wherein the earlier decision of the Constitution Bench in *Sheonandan Paswan* was appreciated, and thereafter ruled thus: (*Rahul Agarwal case* SCC pp. 381-82, para 10)

> "*10.* From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The

> discretion under Section 321 of the Code of Criminal Procedure is to be carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only when valid reasons are made out for the same."

53. At this juncture, the authority decided regard being had to the fact situation that the Assistant Public Prosecutor should withdraw the application and not press the same. After such a decision had been taken, as the application would show, the Assistant Public Prosecutor has reappreciated the facts, applied his mind to the totality of facts and filed the application for not pressing the application preferred earlier under Section 321 Cr.P.C. The filing of application not to press the application cannot be compared with any kind of review of an order passed by the court.

Question of review can arise when an order has been passed by a court. Section 362 Cr.P.C. bars the court from altering or reviewing when it has signed the judgment or final order disposing of a case except to correct a clerical or arithmetical error. The said provision cannot remotely be attracted. The filing of the application for seeking withdrawal from prosecution and application not to press the application earlier filed are both within the domain of the Public Prosecutor. He has to be satisfied. He has to definitely act independently and as has been held by the Constitution Bench in *Sheonandan Paswan*, for he is not a post office.

54. In the present case, as the facts would graphically show, the Public Prosecutor had not moved the application under Section 321 Cr.P.C. but only filed. He could have orally prayed before the court that he did not intend to press the application. We are inclined to think that the court could not have compelled him to assist it for obtaining consent. The court has a role when the Public Prosecutor moves the application seeking the consent for withdrawing from the prosecution. At that stage, the court is required to see whether there has been independent application of mind by the Public Prosecutor and whether other ingredients are satisfied to grant the consent. Prior to the application being

taken up or being moved by the Public Prosecutor, the court has no role. If the Public Prosecutor intends to withdraw or not press the application, he is entitled to do so. The court cannot say that the Public Prosecutor has no legal authority to file the application for not pressing the earlier application. ***It needs no special emphasis to state that the accused persons cannot be allowed to contest such an application. We fail to fathom, how the accused persons can contest the application and also file documents and take recourse to Section 91 Cr.P.C. The kind of liberty granted to the accused persons is absolutely not in consonance with the Code of Criminal Procedure. If anyone is aggrieved in such a situation, it is the victim, for the case instituted against the accused persons on his FIR is sought to be withdrawn. The accused persons have no role and, therefore, the High Court could not have quashed the orders permitting the prosecution to withdraw the application and granting such liberty to the accused persons.*** The principle stating that the Public Prosecutor should apply his mind and take an independent decision about filing an application under Section 321 Cr.P.C. cannot be faulted but stretching the said principle to say that he has to convince the court that he has filed an application for not pressing the earlier application would not be appropriate. We are disposed to

think so as the learned Magistrate had not dealt with the earlier application. Therefore, the impugned order dated 30-7-2015 passed by the High Court is set aside. As the impugned order is set aside, consequentially the order passed by the learned Magistrate on 22-9-2015 has to pave the path of extinction and we so direct. The learned Magistrate is directed to proceed with the cases in accordance with law. We may hasten to add that we have not expressed any opinion on the merits of the case. All our observations and the findings are to be restricted for the purpose of adjudication of the controversy raised.

…. Emphasis Supplied

12.7. **State of Karnataka and another vs. K. Rajashekara and another in 2009 SCC OnLine Kar 227:**

19. The object of Section 196(1) of the Code of Criminal Procedure is to prevent unauthorised persons from intruding in matters of State by instituting prosecution and to secure that such prosecutions, for reasons of policy, shall only be instituted under the authority of Government. Further, the offences are of a serious and exceptional nature and deal with matters relating to public peace and tranquility with which the State Government is concerned. Therefore, provision has been made for obtaining prior sanction of the Government before cognizance is taken of any such offence. It is possible that in a given case

> the very filing of a prosecution, after tempers have cooled down, may generate fresh heat which could well be avoided by the Government by refusing to accord sanction. **There is hence an underlying policy which is evident on a reading of the offences enumerated in Section 196(1) in respect of which prior sanction is a must before cognizance of such offence can be taken.** Further, under sub-section (3) of Section 196, it is laid down that before sanction is accorded, the State Government may order a preliminary investigation by a police officer. This is apparently to decide on the course to be adopted by the State Government in respect of any particular incident and is therefore a crucial step, which cannot be by-passed. Therefore, in my view having regard to the nature of offences alleged, prior sanction of the State Government was a must before the Magistrate could even direct an investigation by the jurisdictional police. It is this feature which would distinguish the present case as an exception to the general rule.
>
> …. Emphasis Supplied

13. Smt.K.Vidyavati, learned Additional Advocate General submits that at the time of filing of charge sheet, there was sanction. The

investigation carried out is proper and correct and such investigation cannot be found fault with. She further submits that so called withdrawal of Government Order dated 04.11.2015 has not been acted upon. The Public Prosecutor has chosen not to file an application for withdrawal in terms of Section 321 of Cr.P.C. Therefore, the petitioners cannot seek to derive any benefit there from.

14. Heard Shri A.P. Hegde, learned counsel for the petitioners, Smt.K.Vidyavati, learned Additional Advocate General for Smt. Seema Shiva Naik, HCGP and Shri S.M. Chandrashekar, Senior Counsel instructed by Shri Prashant F.Goudar and Shri Akshay Katti, learned advocates for respondent No.2. Perused the records.

15. The questions that would arise for consideration in this petition are as under:

i. ***Whether prior sanction is required under Section 196 of Cr.P.C.*** **for carrying out an investigation of an offence against the State and/or for criminal conspiracy to commit such offence?**

ii. **Whether prior sanction is required before filing of charge sheet before the Magistrate as regards an offence against the State and/or for criminal conspiracy to commit such offence*?***

iii. ***Whether once charge sheet has been filed, can the sanction granted be withdrawn by the State Government?***

iv. ***Whether once the charge sheet has been filed after sanction, the State Government can direct the public prosecutor to withdraw the complaint?***

v. ***If there is a valid sanction issued can the petitioners try to take advantage of the so-called direction by the State Government to the Public Prosecutor to withdraw the complaint vide government order dated 04.11.2015 to***

seek for discharge from the proceedings?

vi. Whether a complaint for defamation can only be filed by a person defamed or can it also be filed by an institution or a representative of the institution so alleged to be defamed?

vii. Whether Section 153-A of IPC can be invoked only if it resulted in promoting enmity between two separate religions or could it be invoked if it promotes enmity within the same religious group or sect or in general disturb public tranquility?

viii. Whether dissemination of **material which is *"lascivious or appeals to the prurient interest" by way of Compact Disks would attract Section 67 of Information Technology Act?***

ix. What Order

<u>Point No. (i)</u>: ***Whether prior sanction is required under Section 196 of Cr.P.C.*** **for carrying out an investigation of an offence against the State and/or for criminal conspiracy to commit such offence?**

16. Sri.A.P.Hegde, learned counsel appearing for the petitioner has contended that even before the investigation is carried out, sanction under Section 196 of Cr.P.C. is required. He contends that the State has to give sanction for the investigation and no investigation can be carried out without sanction. He contends that, in the present case, since the investigation is carried out without a sanction, the investigation cannot be looked into and no further proceedings be initiated thereon.

17. Per contra, Smt.Vidyavathi, learned AAG, and Sri.S.M.Chandrashekar, learned Senior Counsel have contended that at the stage of the investigation, there is no requirement for any sanction and therefore, the investigation cannot be faulted with on account of not obtaining of sanction.

18. Section 196 of the Cr. P. C. reads as under:

Section 196: Prosecution for offences against the State and for criminal conspiracy to commit such offence.

(1)No Court shall take cognizance of--

(a) any offence punishable under Chapter VI or under section 153A,[1][section 295A or sub-section (1) of section 505] of the Indian Penal Code (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in section 108A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.

[2][(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 [3] [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 [4] [under sub-section (1) or sub-section (1A)] and the District Magistrate may, before according sanction under sub-section (1A) and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of section 155.

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1. Subs. by Act 63 of 1980, s. 3, for "section 153B, section 295A or section 505" (w.e.f. 23-9-1980).
2. Ins. by s. 3, *ibid*. (w.e.f. 23-9-1980).
3. Subs. by Act 45 of 1978, s. 16, for "a cognizable offence" (w.e.f. 18-12-1978).
4. Subs. by Act 63 of 1980, s. 3, for "under sub-section" (1) (w.e.f. 23-9-1980).

19. Section 196, therefoe imposes an embargo which is mandatory in nature, the conditions for taking cognizance of an offence have to be necessarily followed before taking such

cognizance. Counsel for the petitioner has relied upon the decision in ***Vali Siddappa***'s case stated supra to contend that even for preliminary investigation sanction is required. That was a case where the order indicated both a direction for preliminary investigation as also sanction for prosecution. Hence, this Court has held that there cannot be simultaneous direction according sanction for prosecution as also for investigation since the question of sanction would arise only on completion of the investigation by the Investigating Officer and on availability of relevant material collected during the investigation. This decision relied upon by Mr Hegde, in fact, is contrary to his submissions.

20. This Court in ***Vali Siddappa***'s case has categorically held that the question of sanction would arise only after all the materials are

placed before the Sanctioning Authority. As a corollary, it is clear that at the investigation stage, there is no sanction which is required and the question of according of sanction would arise only after the investigation is completed.

21. This Court in the case of ***State of Karnataka vs. K.Rajashekar and another*** supra has held that the prior sanction of the Government is required before cognizance is taken of any such offence. Section 196 would apply only to a court and not to the police or any investigating agency. Thus, it is clear from the above discussion that no sanction is required for the purpose of carrying out investigation. This is also logically correct in the sense that the sanction contemplated under Section 196 Cr.P.C. is for "prosecution for offences against the State and for criminal conspiracy to commit such offence".

22. Prosecution for an offence does not commence at the stage of investigation. At the investigation stage, the Investigating Officer is only to ascertain the facts of the matter and to prepare investigation report. Thereafter, the Investigating Officer has an option either to file a 'B' summary report to state that no offence is committed or to file a charge sheet. If the Investigating Officer is to file a 'B' summary, there would be no prosecution. It is only if a charge sheet is to be filed, then, after filing of the charge sheet, the prosecution would commence. Therefore, at the stage of investigation, it would not be clear as to whether the complaint received would require prosecution or not. It is only if the matter were to proceed towards prosecution, Section 196 of Cr.P.C.

would get attracted which contemplates prior sanction by the State for such prosecution.

23. Infact, Section 196(1A) speaks of 'no court could take cognizance of certain offences except with the previous sanction of the Central Government or of the State Government or of the District Magistrate as the case may. That is to say that prior to cognizance being taken, there is no sanction which is required, more so since Section 196(1A) applies only to courts and courts taking cognizance. An investigating officer conducting an investigation on a complaint being received will not come within the purview of Section 196(1A). Accordingly, I answer Point No.1 by holding that no prior sanction is required under Section 196 of Cr.P.C. for carrying out the investigation of an offence by the investigating officer, without the intervention of the court.

<u>Point No. (ii)</u>: Whether prior sanction is required before filing of charge sheet before the Magistrate as regards an offence against the State and/or for criminal conspiracy to commit such offence*?*

24. The word 'cognizance' is derived from Middle English word ‘conisance’, which in turn is derived from Old French ‘conoisance’ which in turn is based on Latin word cognoscere which essentially means ‘get to know’. The common understanding of the word is “taking notice”, legally it can be said to be "taking judicial notice by a competent jurisdictional court of law” .

25. The Hon'ble Apex Court in ***R.R.Chari v. State of U.P. AIR 1951 SC 207***, observed that "taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of offence".

26. Though the word cognizance assumes a very important position in the discharge of functions of the court the same is not statutorily defined.

27. As discussed above no sanction is required prior to or during the course of the investigation, in terms of Section 196(1A) and (2) prior sanction is required at the time of taking cognizance, i.e., at the time when the court takes notice of the alleged offence committed. This gives rise to the interesting question as to whether sanction is required for purposes of filing a charge sheet of which the court takes cognizance of subsequently. Cognizance of an offence can only happen after the filing of a charge sheet, needless to say without the filing of a charge sheet; there can be no cognizance taken by the court. Such a cognizance could be taken immediately after the charge sheet is filed or on

a subsequent date, when the charge sheet filed in the office of the court is placed before the court. Thus, this would mean that sanction has to be obtained prior to the cognizance being taken.

28. Section 196 however, speaks of prosecution for offences against the State and for criminal conspiracy to commit such offence. Neither Cr.P.C nor the IPC defines the word "prosecution" so is "commencement of prosecution" not defined. I'm of the considered view that a prosecution commences with the filing of the charge sheet in so far as the state is concerned. It is therefore required that before a charge sheet is filed and prosecution commences, prior sanction of the concerned authority being State Government, Central Government or the District Magistrate be

obtained. Trial Court can only take cognizance of an offence if the charge sheet is accompanied by the sanction. Thus, without the sanction order being available before the Court, no cognizance could be taken.

29. However, Section 196 speaks of sanction for prosecution and imposes an embargo on the court taking cognizance. Prior sanction is required for the purpose of prosecution, the sanction of the prosecution being in the discretion of the concerned authority, even if the investigation report makes out an offence, the concerned authority may decide not to prosecute the matter. Thus, the decision in regard to prosecuting or not is at the sole discretion of the concerned authority. Since the offences are against the State, Investigating Officer has to submit the investigation report to the concerned

authority to enable the concerned authority to take a decision on whether to prosecute the matter or not. While doing so, the concerned authority would decide whether to sanction such prosecution or not.

30. If such a sanction is granted, only then, a formal charge sheet would have to be prepared and filed before the jurisdictional Magistrate. The Hon'ble Apex Court has held that prior sanction of the Government is required before taking cognizance of an offence. The cognizance being taken subsequent to the charge sheet being filed, the charge sheet being the basis for such cognizance, the charge sheet has to be accompanied by such sanction. Thus, I answer Point No.(ii) by holding that at the time of filing of the charge sheet, it is required that the sanction order be filed with the same.

Point no. (iii): ***Whether once charge sheet has been filed, can sanction be withdrawn by the State Government***

31. Once the prosecution is sanctioned and in furtherance thereof, a charge sheet is filed before the jurisdictional Magistrate, the matter goes out of the hand of the Government/executive including the Investigating Officer. Once a charge sheet is filed, it comes within the purview and jurisdiction of the court in which the charge sheet is filed. It is now left to the court/judiciary to take the matter forward, of course with the assistance of the concerned prosecutors, witnesses including the Investigating Officer who have to lead evidence.

32. Once the charge sheet is filed before the Court, it is the Court which would decide as to what is to happen to the matter, in what manner, at

what time and in this regard, the court would be governed by both the procedural law and substantial law applicable thereto.

33. The normal process to be followed by the Magistrate on the filing of the charge sheet is to take cognizance of the matter, issue summons, hold a trial and thereafter, pass a judgment. There is no further sanction or action which is to be taken by the executive. Once the charge sheet is filed, it is the Court alone which would decide on the matter. There is no provision under the Code of Criminal Procedure which permits the withdrawal of the sanction granted. More so, since the sanction being limited to the filing of the charge sheet and initiation of the prosecution, such an order of sanction would have spent itself, there is no possibility of withdrawing the sanction. Furthermore, once the

concerned authority has issued the order of sanction, it becomes *functus officio* and would not have any further right or domain over the matter. The concerned authority, therefore, cannot have any right to withdraw the order of sanction.

34. Hence, I answer Point No.(iii) that once the charge sheet is filed, sanction granted by the concerned authority cannot be withdrawn.

<u>Point No. (iv)</u>: ***Whether once the charge sheet has been filed after sanction, the State Government can direct the public prosecutor to withdraw the complaint?***

35. Once cognizance is taken the matter has to reach its logical conclusion. The said logical conclusion would be in three modes:

35.1. Withdrawal of the matter by the Public Prosecutor in terms of Section 321 of Cr.P.C.

35.2. Compounding of the offence if permissible;

35.3. Final judgment of acquittal or conviction;

36. There would be no problem in respect of (ii) and (iii) are concerned. In the present matter having held hereinabove that once the sanction granted, the said sanction cannot be withdrawn. It is contended that the Government order dated 04.11.2015, amounts to a direction to the public prosecutor to withdraw the complaint in terms of Section 321 of Cr.P.C and that the public prosecutor had no option but to withdraw the complaint.

37. Sections 321 of the Cr. P. C is hereunder reproduced for easy reference:

> **Section 321. Withdrawal from prosecution.** The Public Prosecutor or Assistant Public Prosecutor in charge of a case **may, with the consent of the Court,** at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in

respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences: Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or
(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or
(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or
(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case hag hot been appointed by the Central Government, he shall not, unless he hag been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.

… Emphasis Supplied

38. The Apex Court in ***RAJENDRA KUMAR JAIN VS. STATE THROUGH SPECIAL POLICE ESTABLISHMENT AND OTHERS*** has dealt with the above contention in detail and relevant paras have been extracted hereinabove.

39. The role of the Public Prosecutor and his satisfaction before filing of an application under Section 321 has also been dealt with by Hon'ble Apex Court in ***Abdul Karim and others vs. State of Karnataka and others as also in VLS Finance Limited vs. S.P.Gupta and another supra.*** The Hon'ble Apex Court in ***Abdul Karim's case supra*** has categorically stated that the Public Prosecutor cannot act as a post office and present an application for withdrawal of a matter merely because concerned authority has instructed/directed/ requested/suggested that such an application be

filed. If the Public Prosecutor were to do so, he would be abdicating his duties. Hence, looking from any angle, the direction/instructions/ suggestions/requests made by the State Government in its order dated 04.11.2015 is not binding on the Public Prosecutor. Thus, such an order would not have an effect of withdrawal of prosecution.

40. The Hon'ble Apex Court has categorically held that:

40.1. the withdrawal of any matter would have to be made by a Public Prosecutor after complete satisfaction of the Public Prosecutor. One of the grounds being that the continued prosecution of the matter may not result in conviction of the accused.

40.2. The decision in this regard can only be made by the Public Prosecutor and no direction can be issued by the concerned authority for withdrawal of the matter. At the most, a request could be made by the concerned authority to the Public Prosecutor to move an application of withdrawal.

40.3. It is the Public Prosecutor who will have to consider the said request and/or suggestion in the light of the available facts and documents and decide to move the Court seeking permission of the Court to withdraw.

40.4. Merely because the Public Prosecutor has filed an application seeking for withdrawal

of the matter, the Court in criminal matters cannot permit such a withdrawal.

40.5. The jurisdictional Court would have to consider whether such a withdrawal is permissible, whether such withdrawal is in accordance with law and whether grounds made out by the Public Prosecutor in the application filed by him as also the submission made would support such a withdrawal. Thus, the final adjudicator in the matter is the jurisdictional Court.

40.6. Even if the concerned authority were to direct/suggest/request the Public Prosecutor to withdraw the matter, even if the Public Prosecutor were aggreeable to such direction/suggestion/request and moved an application before the

jurisdictional Court. It is the Court which would decide whether to permit the withdrawal or not.

41. Hence, Applying the above dicta to the present case, I'am of the considered opinion that the concerned authority cannot direct the public prosecutor to withdraw a complaint, it could only request him/her to do so. It is up to the public prosecutor after considering the material on record to move the court for withdrawal or not. Even if so moved it is for the court to decide on such an application and either allow or reject the same.

42. The Government order dated 04.11.2015 will not *ipso facto* result in the withdrawal or dismissal of the complaint filed.

43. Suffice it to reiterate what is stated by the Hon'ble Apex Court that criminal justice system is not a plaything and a criminal court is not a playground for politicking. Courts when moved for permission for withdrawal from prosecution must be vigilant and inform themselves fully before granting consent for such withdrawal.

44. Hence, I answer Point No. (iv) by holding that once the charge sheet has been filed after sanction, the State Government can not direct the public prosecutor to withdraw the complaint, it can only request him to withdraw the prosecution, which request is not binding on the public Prosecutor, the public prosecutor has to independently come to a decision on the basis of available records and move the court seeking the court's consent to withdraw the prosecution. It is upto the court to accept or reject such a request.

Point No. v :- ***If there is a valid sanction issued can the petitioners try to take advantage of the so-called direction by the State Government to the Public Prosecutor to withdraw the complaint vide government order dated 04.11.2015 to seek for discharge from the proceedings?***

45. The Hon'ble Apex Court in ***VLS Finance Limited's*** case stated supra at Para 54 has categorically held that where the Public Prosecutor had filed an application for withdrawal and subsequently had filed an application to withdraw the said application. For withdrawal, the accused persons cannot be allowed to contest such an application. If anyone is aggrieved by an application for withdrawal, it is only the defacto complainant on whose behalf the case is instituted against the accused. Thus, it is clear that the accused can neither support

an application under Section 321 nor claim any benefit of an application filed under Section 321 of Cr.P.C.

46. It is impermissible for an accused to even rely upon so-called instructions/directions/ suggestions/requests for withdrawal and claim for discharge in the proceedings. The laws applicable for discharge do not contemplate the above ground. If an application for discharge is filed, the same would have to satisfy the requirement under Section 239 Cr.P.C. as also various decisions rendered by this Court and Hon'ble Apex Court from time to time.

47. In the present case, no such application is filed. It is only the instructions/directions/suggestions/ requests which have been issued to the Public Prosecutor to file the same, which would be a

precursor to the filing of an application under Section 321 of Cr.P.C. The Public Prosecutor himself not having followed the said instructions/directions/ suggestions/requests, not having filed an application under Section 321 of Cr.P.C. for withdrawal, the accused cannot on the basis of so-called instructions/directions /suggestions/requests seek for discharge from the proceedings. I answer **Point No (v)** by holding that once a valid sanction is issued the accused cannot take advantage of the so-called direction by the State Government to the Public Prosecutor to withdraw the complaint and thereby seek for discharge from the proceedings.

Point No. (vi): Whether a complaint for defamation can only be filed by a person defamed or can it also be filed by an institution or a representative of the institution so alleged to be defamed?

48. Shri A P Hegde contended that one of the offences complained of against the accused is defamation. By relying on Section 499 of IPC, he would contend that for the offence of defamation, a person aggrieved is to lodge a complaint. The administrator of the temple is not a person aggrieved; he could not have filed the complaint for defamation of the Mutt and/or the pontiff of the mutt, such a complaint could only have been filed by the pontiff, which not being so filed, the complaint insofar as the offence under Section 500 of IPC could not have been taken cognizance of. In this regard he relied upon the decision of the Hon'ble Delhi High Court in ***Ganesh Anand Chela vs. Swami Divyanand reported in 1980 Cri LJ 1036,*** wherein it was held that when the complainant has not been able to prove that the imputations

are against him personally or that he is the person aimed at, no complaint was maintainable. The Hon'ble Delhi High court further went on to hold that

> "The maximum that one can say about the complainant is that he has a grievance about his Guru being defamed. But that grievance, which the other members of the Ashram must also be sharing, cannot make him the aggrieved person within the meaning of sub-section (1) of Section 199 of the Code."

49. Shri Hegde learned counsel for the petitioners would therefore contend that the said judgement applies on all fours to the present matter and therefore the complaint in so far as defamation is concerned was not maintainable.

50. Per contra Shri S.M. Chandrashekar, learned Senior Counsel submitted that the defamation has occurred for the entire sect and to the members of Sect, who follow the said Mutt. The

complainant being the administrator of the temple and being a prominent member of the Mutt, has filed the complaint alleging defamation against the Mutt and pontiff. Defamation being of the mutt and not only of the pontiff but the administrator also is an aggrieved party and is thus entitled to file the said complaint, the same cannot be faulted with by the petitioners-accused.

51. The relevant provisions of the IPC for consideration of the above proposition being Section 199 of Cr. P.C and Sections 499 and 500 of IPC are reproduced below:

> **Section 199. Prosecution for defamation.** (1) No Court shall take cognizance of an offence punishable under Chapter XXI of the Penal Code, 1860 except upon a complaint **made by some person aggrieved by the offence**:
>
> Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and

manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf."

Section. 499. Defamation. Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1. It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2. It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3. An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4. No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in loathsome state, or in a state generally considered as disgraceful.

Section.500. Punishment for defamation.- Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

... Emphasis supplied

52. *The Apex Court in* ***John Thomas v. Dr. K. Jagdeesan (2001) 6 SCC 30*** while referring to Explanation 2 to Section 499 of the IPC held as under:

"Explanation 2.- It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such."

In view of the said Explanation, it cannot be disputed that a publication containing defamatory imputations as against a company would escape from the purview of the offence of defamation. If the defamation pertains to an association of persons or a body corporate, who could be the complainant? This can be answered by reference to Section 199 of the Code. The first sub-section of that section alone is relevant, in this context. It reads thus:

"199. Prosecution for defamation.- (1) No court shall take cognizance of an offence under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence."

> The collocation of the words "by some persons aggrieved" definitely indicates that the complainant need not necessarily be the defamed person himself. Whether the complainant has reason to feel hurt on account of the publication is a matter to be determined by the court depending upon the facts of each case. If a company is described as engaging itself in nefarious activities its impact would certainly fall on every Director of the company and hence he can legitimately feel the pinch of it. Similarly, if a firm is described in a publication as carrying on offensive trade, every working partner of the firm can reasonably be expected to feel aggrieved by it. If K.J. Hospital is a private limited company, it is too farfetched to rule out any one of its Directors, feeling aggrieved on account of pejoratives hurled at the company. Hence the appellant cannot justifiably contend that the Director of the K.J. Hospital would not fall within the wide purview of "some person aggrieved" as envisaged in Section 199(1) of the Code.

53. *The decision of the Apex court in* ***John Thomas*** would be applicable to the present case.

54. The complaint has been filed by the administrator of the temple as regards which the alleged defamatory statements have been filed. The administrator is therefore vested with the duty as also obligation to run the temple in a

proper manner, which would also include taking action against any defamatory allegations made against the temple, the mutt or the pontiff, such allegation impacting upon the proper running of the temple. The administrator would, therefore, qualify to be an aggrieved person in terms of Section 199 of the Cr P.C. as also Explanation II to Section 499.

55. Whether there is infact an offence of defamation or not would have to be decided during the course of trial after evidence is lead as to how the statements made are defamatory or not.

56. In view of the above discussion I answer point No. vi above by holding that a complaint for defamation can not only be filed by a person defamed but can also be filed by an institution or

a representative of the institution so alleged to be defamed.

Point No. (vii): Whether Section 153-A of IPC can be invoked only if it resulted in promoting enmity between two separate religions or could it be invoked if it promotes enmity within the same religious group or sect or in general disturb public tranquility?

57. Shri A P Hegde learned counsel for the Petitioners submitted that in terms of Section 153-A of IPC, an offence could be said to have been committed only if it resulted in promoting enmity between two different groups on the grounds of religion, race, place of birth, residence, language etc.,. Section 153-A does not cover within its ambit an alleged offence of promoting enmity within the same religious group or sect. He submitted that for Section 153-A to be attracted there have two be two different religious groups involved.

58. Per Contra Shri S.M. Chandrashekar, learned Senior Counsel submits that the provisions of Section 153-A of IPC is vide enough to cover any person promoting enmity or carrying out acts prejudicial to the harmony within the community as also public tranquillity. In this regard, he submits that the action on the part of the accused are aimed at promoting enmity between the followers of Mutt as also to disturb public tranquility in the area. Therefore, at this stage, it cannot be said that Section 153-A of IPC is not attracted and the matter requires trial.

59. Section 153-A of IPC is reproduced hereunder for easy reference:

> **[1][153A. Promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.**-- (1) Whoever--

(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, [2][or]

[2][(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.

(2) Offence committed in place of worship, etc.--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.]

---

1. Subs. by Act 35 of 1969, s. 2, for section 153A.
2. Ins. by Act 31 of 1972, s. 2.

60. Freedom of speech and expression as protected under Article 19 of the constitution is one of the paramount rights; it is only by of speech and expression is one's thoughts made known, this, however, is subject to the limitation placed in the said Article itself. This right has been the subject matter of many a litigation more particularly during elections, broadly under the concept of hate speech. The legislative ambit of hate speech is covered under the IPC in terms of Section 124A, Section 153A, Section 153B,

Section 295A, Section 298 and Section 505(1) and (2).

61. Section 153 A deals with vilification or attacks upon the religion, race, place of birth, residence, language, etc., of any particular group or class or religion, which would include the proponents thereof. The said provision makes the promotion of disharmony, enmity or feelings of hatred or ill-will between different religious, racial, language or regional groups or castes or communities punishable.

62. In Abhiram Singh vs C.D. Commachen (2017) 2 SCC 629, the Apex Court observed as under

"28. Interestingly, simultaneous with the introduction of the Bill to amend the Act, a Bill to amend Section 153A of the Indian Penal Code (the IPC) was moved by Shri Lal Bahadur Shastri. The Statement of Objects and Reasons for introducing the amendment notes that it was, inter

alia, to check fissiparous, communal and separatist tendencies whether based on grounds of religion, caste, language or community or any other ground. The Statement of Objects and Reasons reads as follows:

STATEMENT OF OBJECTS AND REASONS In order effectively to check fissiparous communal and separatist tendencies whether based on grounds of religion, caste, language or community or any other ground, it is proposed to amend section 153A of the Indian Penal Code so as to make it a specific offence for any one to promote or attempt to promote feelings of enmity or hatred between different religious, racial or language groups or castes or communities. The Bill also seeks to make it an offence for any one to do any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which is likely to disturb public tranquillity. Section 295A of the Indian Penal Code is being slightly widened and the punishment for the offence under that section and under section 505 of the Code is being increased from two to three years.

NEW DELHI; LAL BAHADUR
The 5th August, 1961.

29. The Bill to amend the IPC was passed by Parliament and Section 153A of the IPC was substituted by the following:

"153A. Whoever—

(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,

language, caste or community or any other ground whatsoever, feelings of enmity or hatred between different religious, racial or language groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which disturbs or is likely to disturb the public tranquillity, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Piloting the Bill

30. While piloting the Bill relating to the amendment to sub-section (3) of Section 123 of the Act the Law Minister Shri A.K. Sen adverted to the amendment to the IPC and indeed viewed the amendment to the Act as consequential and an attempt to grapple "with a very difficult disease." It is worth quoting what Shri A.K. Sen had to say for this limited purpose:

"Now, I come to the main question with regard to clauses 23 and 24, that is, the new provision in clause 23 seeking to prohibit the appeal to communal or linguistic sentiments, and also clause 24 which penalizes the creation of enmity between different classes. Those hon. Members who feel that we should have kept the word 'systematic' have really failed to appreciate the very purpose of this amendment. There would have been no necessity of this amendment if the old section with the word 'systematic' had served its purpose. It is well known that the old section was as good as dead. There could have been no possibility of preventing an appeal to communal, religious or other sectarian interests, with the word 'systematic' in the section, because it is impossible to prove that a person or a

candidate or his agent was doing it systematically; and one or two cases would not be regarded as systematic. We feel, and I think it has been the sense of this House without any exception, that even a stray appeal to success at the polls on the ground of one's religion or narrow communal affiliation or linguistic affiliation would be viewed with disfavor by us here and by the law. Therefore, I think that when we are grappling with a very difficult disease, we should be quite frank with our remedy and not tinker with the problem, and we should show our disfavor openly and publicly even of stray cases of attempts to influence the electorate by appealing to their sectarian interests or passions. I think that this amendment follows as a consequence of the amendment which we have already made in the Indian Penal Code. Some hon. Members have said that it is unnecessary. In my submission, it follows automatically that we extend it to the sphere of elections and say categorically that whoever in connection with an election creates enmity between different classes of citizens shall be punishable. The other thing is a general thing. If our whole purpose is to penalize all attempts at influencing elections by creating enmity between different classes and communities then we must say that in connection with the election, no person shall excepting at the peril of violating our penal law, shall attempt to influence the electorate by creating such enmity or hatred between communities. I think that these two provisions, if followed faithfully, would go a long way in eradicating or at least in checking the evil which has raised its ugly head in so many forms all over the country in recent years." [Emphasis supplied].

31. The significance of this speech by the Law Minister is that Parliament was invited to unequivocally launch a two-pronged attack on communal, separatist and fissiparous tendencies that

seemed to be on the rise in the country. An amendment to the IPC had already been made and now it was necessary to pass the amendment to the Act. A sort of 'package deal' was presented to Parliament making any appeal to communal, fissiparous and separatist tendencies an electoral offence leading to voiding an election and a possible disqualification of the candidate from contesting an election or voting in an election for a period. An aggravated form of any such tendency could invite action under the criminal law of the land.

32. Although we are concerned with Section 123(3) of the Act as enacted in 1961[15] and in view of the limited reference made, to the interpretation of his religion, race, caste, community or language in the context in which the expression is used, we cannot completely ignore the contemporaneous introduction of sub-section (3A) in Section 123 of the Act nor the introduction of Section 153A of the IPC."

63. **In Sri Baragur Ramachandrappa & Ors vs State Of Karnataka (2007) 5 SCC 11** the Apex court upheld the forfeiture a book by the state under Section 95 of the Cr.P.C on the ground that the said book contained objectionable matter and that such matter was maliciously intended to promote feelings of enmity and hatred between different classes of

the citizens of India which was punishable section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860). In that case the book published cast aspersions on Basaveshwara, Akkanagamma and Channabasaveshwara who belonged to Veerashaivism, a religious sect of the Basava Philosophy. Needless to say that in that case, two different religions were not involved.

64. Interpreting sections 153A and 505(2) of IPC in ***Bilal Ahmed Kaloo v. State of AP, AIR 1997 SC 3483*** the Apex Court held that

> "The common feature in both sections being promotion of feeling of enmity, hatred or ill-will "between different" religious or racial or language or regional groups or castes and communities it is necessary that atleast two such groups or communities should be involved. Merely inciting the feeling of one community or group without any

reference to any other community or group cannot attract either of the two sections."

65. In ***Babu Rao Patel v. State of Delhi AIR 1980 SC 763.*** the Apex Court held that section 153A(1) IPC is not confined to the promotion of feelings of enmity etc. on the grounds of religion only, but takes into account promotion of such feelings on other grounds as well, such as race, place of birth, residence, language, caste or community.

66. Thus as can been seen from the above dicta it is not necessary that there are to be two distinct religious groups for invocation of Section 153A of the IPC. As long as the spoken or written word would have the effect of creating a breach of public tranquillity among the general public, an offence under Section 153B can be said to have been committed. It does not necessarily have to

incite one religion against the other or one sect of the same religion against another sect. If the spoken or printed word were to have an effect of inciting persons of the same religion or same sect or same community or same fraternity, would be sufficient to invoke section 153B of the IPC. Of course, whether in fact such an offence has been committed or not is the subject matter of trial. The trial court would arrive at a conclusion in regard thereto as per the applicable law.

67. In view of the above discussion and finding I answer Point No. vii by holding that an offence under Section 153-A of IPC, can be said to have been committed if the spoken or printed word were to promote or incite enmity between members of the same religious group or sect or result in disturbing public tranquillity.

Point No. (viii): Whether dissemination of "material which is lascivious or appeals to the prurient interest" by way of Compact Disks would attract Section 67 of the Information Technology Act?

68. Shri Hegde has contended that Section 67 of I.T. Act is not attracted since there is no public dissemination of any matter over the internet or by way of social media like WhatsApp, Facebook etc., There being no dissemination, no offence can be said to have been committed in terms of Section 67 of I.T. Act

69. Shri S M Chandrashekhar Learned Senior counsel had submitted that the video has contained on a C.D has been distributed, The C.D would come within the purview of I.T. Act and the distribution of C.D. would also be covered by Section 67 of I.T. Act.

70. Before I advert to the above contentions, let us examine the relevant provisions. Section 67 of the IT Act read as under

> **Section 67: Punishment for publishing or transmitting obscene material in electronic form.**
>
> Whoever **publishes or transmits or causes to be published or transmitted** in the **electronic form**, **any material** which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.
>
> … Emphasis Supplied

71. Electronic form is ddefined in terms Section 2 (1) (r) of the IT Act as under:

> (r) "electronic form" with reference to information, means any information generated, sent, received or stored in **media, magnetic, optical,** computer

memory, micro film, computer generated micro fiche or similar device;

… Emphasis Supplied

72. In the present matter, this court is only concerned with whether publication or transmittal by way of a C.D would attract Section 67 of the IT Act, this court is for now not concerned with nor is it giving a finding on whether an offence is made out. That is for the trial court to decide after trial, which would include the marking of the C.D, examining the contents, cross-examination of the relevant witnesses etc.,

73. What Section 67 requires is the publication or transmittal in Electronic Form, an examination of Section 2(1) (r) would indicate that any information generated, sent, received or stored in media, magnetic, optical etc.,

74. The entry in Wikipedia relating of Compact Disk reads as under:

> A **Compact Disc**, also called a **CD** are small plastic discs which store and retrieve computer data or **music using light**. Compact Discs replaced floppy disks because they were faster and could hold more information. The CDs made floppy disks become obsolete. CDs were invented by both Philips and Sony at the same time, but not together. Sony and Philips did work together to create a standard format and the technology to read CDs in 1982. CDs can hold up to 700 MB worth of data, which is about 80 minutes of music. Mini CDs were also made for special small programs like drivers. CDs that have computer information on them are called CD-ROMs, or Compact Disc - Read Only Memory. The diameter of a normal CD is 120 mm. The middle hole in a CD is about 1.5 cm).

75. The entry relating to Compact Disk in Encyclopedia Britannica reads thus:

> **Compact disc (CD)**, a molded plastic disc containing digital data that is **scanned by a laser beam** for the reproduction of recorded sound and other information. Since its commercial introduction in 1982, the audio CD has almost completely replaced the phonograph disc (or record) for high-fidelity recorded music. Coinvented by Philips Electronics NV and Sony Corporation in 1980, the compact disc has expanded beyond audio recordings into other storage-and-distribution uses,

notably for computers (CD-ROM) and entertainment systems (DVD).

76. The above write up would indicate that the data on a C.D is created or scanned using a laser beam, that is it is optical in nature. Thus, a C.D would come within the definition of Electronic Form under Section 2(1) (r) of the IT Act. A C.D being an electronic form the publication by way of a C.D would come within the purview of Section 67 of the IT Act. The distribution of such a CD would amount to publication and/or transmission. Thus I'am unable to accept the submission of Shri Hegde. Hence I answer *Point No. (viii) holding that dissemination of "material which is lascivious or appeals to the prurient interest" by way of Compact Disks would attract Section 67 of the Information Technology Act.*

77. In the result, I pass the following

ORDER

77.1. The Criminal Petition is dismissed.

77.2. The trial court is directed to dispose of the matter as expeditiously as possible, preferably within a period of one year of the receipt of the certified copy of this order and/or from the date the trial court is permitted to take up evidence matters whichever is later.

77.3. Parties to bear their own costs.

In view of dismissal of the petition, I.A.1/2019 does not survive for consideration.

SD/-
JUDGE

Vnp*/Prs*